

# Federal Register

Tuesday  
February 2, 1999

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- WHY:** To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

### WASHINGTON, DC

**WHEN:** February 23, 1999 at 9:00 am.  
**WHERE:** Office of the Federal Register  
Conference Room  
800 North Capitol Street, NW.  
Washington, DC  
(3 blocks north of Union Station Metro)

**RESERVATIONS:** 202-523-4538



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Federal Register

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

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## DEPARTMENT OF AGRICULTURE

### Agricultural Marketing Service

#### 7 CFR Part 1065

[DA-98-10]

#### Milk in the Nebraska-Western Iowa Marketing Area; Suspension of Certain Provisions of the Order

**AGENCY:** Agricultural Marketing Service, USDA.

**ACTION:** Suspension of rule.

**SUMMARY:** This document suspends 11 counties from the marketing area definition of the Nebraska-Western Iowa Federal milk marketing order (Order 65) beginning on February 1, 1999, and extending for an indefinite period until the implementation of a final rule consolidating Federal milk orders, as required by the 1996 Farm Bill, or an action to subsequently terminate the suspension. The action was requested by Gillette Dairy (Gillette) of Rapid City, South Dakota, which contends the suspension is necessary to maintain its milk supply and to remain competitive in selling fluid milk products in the marketing area.

**EFFECTIVE DATE:** February 1, 1999.

**FOR FURTHER INFORMATION CONTACT:** Clifford M. Carman, Marketing Specialist, USDA/AMS/Dairy Programs, Order Formulation Branch, Room 2971, South Building, P.O. Box 96456, Washington, DC 20090-6456; telephone: (202) 720-9368; e-mail address: clifford\_m\_carman@usda.gov.

**SUPPLEMENTARY INFORMATION:** Prior document in this proceeding:

Notice of Proposed Suspension: Issued September 23, 1998; published October 9, 1998 (63 FR 54383).

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

This final rule has been reviewed under Executive Order 12988, Civil

Justice Reform. This rule is not intended to have a retroactive effect. This rule will not preempt any state or local laws, regulations, or policies, unless they present an irreconcilable conflict with this rule.

The Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C. 601-674), provides that administrative proceedings must be exhausted before parties may file suit in court. Under section 608c(15)(A) of the Act, any handler subject to an order may request modification or exemption from such order by filing with the Secretary a petition stating that the order, any provision of the order, or any obligation imposed in connection with the order is not in accordance with the law. A handler is afforded the opportunity for a hearing on the petition. After a hearing, the Secretary would rule on the petition. The Act provides that the district court of the United States in any district in which the handler is an inhabitant, or has its principal place of business, has jurisdiction in equity to review the Secretary's ruling on the petition, provided a bill in equity is filed not later than 20 days after the date of the entry of the ruling.

#### Small Business Consideration

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Agricultural Marketing Service has considered the economic impact of this action on small entities and has certified that this rule will not have a significant economic impact on a substantial number of small entities. For the purpose of the Regulatory Flexibility Act, a dairy farm is considered a "small business" if it has an annual gross revenue of less than \$500,000, and a dairy products manufacturer is a "small business" if it has fewer than 500 employees. For the purposes of determining which dairy farms are "small businesses," the \$500,000 per year criterion was used to establish a production guideline of 326,000 pounds per month. Although this guideline does not factor in additional monies that may be received by dairy producers, it should be an inclusive standard for most "small" dairy farmers. For purposes of determining a handler's size, if the plant is part of a larger company operating multiple plants that collectively exceed the 500-employee limit, the plant will be considered a

large business even if the local plant has fewer than 500 employees.

For the month of April 1998, which is the most recent representative month with data including Gillette Dairy, 1,649 dairy farmers were producers under Order 65. Of these producers, 1,573 producers (i.e., 95 percent) were considered small businesses having monthly milk production under 326,000 pounds. A further breakdown of the monthly milk production of the producers on the order during April 1998 was as follows: 1,001 produced less than 100,000 pounds of milk; 445 produced between 100,000 and 200,000; 127 produced between 200,000 and 326,000; and 76 produced over 326,000 pounds. During the same month, 8 handlers were pooled under the order. One was considered a small business.

Pursuant to authority contained in the Agricultural Marketing Agreement Act of 1937, as amended, (7 U.S.C. 601-674), this suspension will remove 11 counties in the western panhandle of Nebraska from the marketing area definition of Order 65. The Nebraska counties are Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux.

Gillette, the proponent of this suspension, estimates that its sales in the counties represent 65 to 70 percent of total fluid milk sales in the 11 counties. Gillette explains that a loss of sales in an unregulated marketing area has resulted in its regulation under Order 65 without any appreciable increase in sales in the Order's marketing area. The handler contends the suspension is necessary to maintain its milk supply and to remain competitive in selling fluid milk products in the marketing area.

The July 1996 population estimate and the December 1992 fluid milk per capita consumption data show that the 11 Nebraska counties represent a small amount of the population and fluid milk consumption in the State of Nebraska and in the entire Order 65 marketing area. The 11 counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area.

There are three handlers other than Gillette that possibly have sales into the 11 Nebraska counties. The handlers are

Meadow Gold of Lincoln, Nebraska; Roberts Dairy in Omaha, Nebraska; and Meadow Gold in Greeley, Colorado. Roberts Dairy hauls milk for Nebraska Dairy, Inc., which is a distribution facility that is owned by the same principal company that owns Gillette. However, the dairy appears to be a separate entity from Gillette. Market information indicates that if these three handlers have sales into the 11 counties the volume is relatively small.

The suspension should not have a significant economic impact on handlers because of the relatively small number of sales by handlers other than Gillette in this 11-county area. In addition, the population in the 11-county area constitutes a small percentage of the population and fluid milk consumption in the State of Nebraska. This milk has not been historically associated with Order 65. Therefore, the removal of the 11 counties from the marketing area definition of Order 65 should not have a significant adverse impact on other order producers and other handlers.

A review of the current reporting requirements was completed pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35), and it was determined that this suspension will have little impact on reporting, recordkeeping, or other compliance requirements because these would remain almost identical to the current system. No new forms will need to be proposed.

No other burdens are expected to fall upon the dairy industry as a result of overlapping Federal rules. This regulation does not duplicate, overlap or conflict with any existing Federal rules.

#### Statement of Consideration

This suspension is issued pursuant to the provisions of the Agricultural Marketing Agreement Act and of the order regulating the handling of milk in the Nebraska-Western Iowa marketing area. The action suspends 11 counties in the western panhandle of Nebraska from the marketing area definition of Order 65. The Nebraska counties are Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux.

The July 1996 population estimate, which represents the most recent population statistics, shows that the total population for the Order 65 marketing area is 2,000,529 (i.e., 412,167 for Iowa counties and 1,588,362 for Nebraska counties). The population estimate for the entire State of Nebraska is 1,652,093, while the population for the 11 Nebraska counties is 91,194. In addition, the *December 1992 Federal*

*Milk Order Statistics Report* (Per Capita Sales of Fluid Milk Products in Federal Order Markets) indicates that the Nebraska fluid milk per capita consumption is about 20 pounds per person per month. It is estimated that the fluid milk consumption per month within the 11 Nebraska counties is 1,823,880 (20 lbs. \* 91,194).

The July 1996 population estimate and the December 1992 fluid milk per capita consumption data show that the 11 Nebraska counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area.

Gillette Dairy, the proponent of this suspension, was a fully regulated handler under the Black Hills, South Dakota, Federal milk marketing order prior to its termination (effective October 1, 1996) at the request of the Black Hills Milk Producers. After termination of the Black Hills order, Gillette for some time was a partially regulated handler under 3 Federal milk marketing orders: Eastern South Dakota (Order 76), Eastern Colorado (Order 137), and Order 65. From January 1998 through May 1998, Gillette was a fully regulated handler under Order 65 because its fluid milk sales in the marketing area represented more than 15 percent of its receipts. In recent months (i.e., June through November 1998), Gillette has been a partially regulated plant under Order 65 due to an increase in total milk receipts. During this period, Gillette has reduced its distribution in the 11-county area in an effort to avoid reducing the amount it pays its supplier, the Black Hills Milk Producers.

As a partially regulated handler, Gillette pays to the producers supplying its plant at least the full class-use value of its milk each month. Thus, Gillette has no further obligation to the producer-settlement fund of the orders under which it was a partially regulated handler. However, as a fully regulated handler, Gillette is required to pay the difference between its class-use value and the marketwide class-use value to the Order 65 producer-settlement fund. This payment, Gillette contends, increases its cost for milk and reduces the amount it can pay its producers.

Gillette was pooled under Order 65 during the months of January through May 1998. For the period of February through May 1998, Order 65 price data shows that the average uniform price to producers was \$13.34 per hundredweight. If Gillette had not been a regulated handler under Order 65 during this period, the average uniform

price to producers would have been about \$13.31 per hundredweight. Thus, the regulation of Gillette for the February through May 1998 period resulted in an increase in the average uniform price of 3 to 4 cents per hundredweight.

According to Gillette, marketing conditions in Order 65 have changed significantly since the order was promulgated. Gillette estimates that its sales in the 11 counties represent 65 to 70 percent of total fluid milk sales in the counties. Gillette explains that a loss of sales in an unregulated marketing area has resulted in its regulation under Order 65 because such sales represented at least 15 percent of its receipts, but without any appreciable increase in sales in the Order's marketing area. Furthermore, the handler states that since its milk supply comes from the Black Hills Milk Producers there is no balancing of milk supply for the plant from Order 65 or any other Federal milk marketing order.

Black Hills Milk Producers also requested that the counties be removed from the Order 65 marketing area definition. The cooperative representing the producers explained that it is dependent on Gillette's survival. It states that the regulation of Gillette under Order 65 has caused its producers hardship by costing them as much as \$1.00 per hundredweight during some months. According to the cooperative, this cost results from an agreement that it has with Gillette in which it refunds to Gillette an amount equal to half of the handler's obligation to the producer-settlement fund when Gillette is fully regulated. Although the producers pay this amount to Gillette, Order 65 price data for the February through May 1998 period indicates that their monthly pay prices were above the Order 65 uniform price.

Notice was published in the **Federal Register** on October 9, 1998 (63 FR 54383) concerning the proposed suspension of part of the marketing area definition of Order 65. Interested persons were afforded an opportunity to file written data, views, and arguments thereon. Six comments were received in support of the proposed suspension; two were received in opposition to it.

Gillette and Black Hills Milk Producers reiterated their support for the proposed suspension. Gillette anticipates that in the months ahead, as milk prices decline and milk production increases seasonally, the price spread between the Class I price and the blend price will increase. The handler states the impact will cause it to pay more into the producer-settlement fund while reducing its payment to Black Hills Milk

Producers. The cooperative states that the sharing of the cost of regulation with Gillette in addition to the low milk prices and high feed costs has caused several dairymen to discontinue dairying.

Associated Milk Producers, Inc. (North Central Region), in its comment letter, stated that because population, consumption, and milk supply in the 11 counties is fairly evenly balanced the proposed action would have a marginal effect on Order 65 blend prices. In addition, the other supporters who filed comments (i.e., the South Dakota Department of Agriculture, 5 United States Senators, and the Rapid City Area Chamber of Commerce) state that the action would eliminate the payments by Gillette into the producer-settlement fund (i.e., \$500,000 during the first 6 months of 1998 or \$83,000 per month) when regulated under Order 65. Thus, they claim that this cost directly affects the producers supplying the dairy and has been a contributing factor to producers discontinuing their dairy farm operations.

Dairy Farmers of America (DFA) and Meadow Gold Dairies expressed opposition to the proposed action and contend that it would create an inequitable marketing situation between handlers and producers. DFA is a cooperative that represents about 39 percent of the producers on Order 65 and 927 producers in other affected markets. DFA argues that the proposal would lower the returns of DFA member producers supplying the handlers affected by this action. The cooperative also contends that the proposal would lower the blend prices to these DFA producers in Order 65.

According to DFA, the proposal would provide Gillette with a financial advantage over competing handlers because Gillette competes with handlers over a broad geographic area (in counties in Nebraska, Colorado, and Wyoming). DFA asserts that the action would prohibit the sharing of revenues from the sale of milk by Gillette to DFA members and the Federal Order 65 producers. In addition, the cooperative claims that the action would assist Gillette in expanding its business further into Order 65 and the Eastern Colorado order (Order 137). The proposed action, it concludes, would adversely impact cooperatives' ability to negotiate over-order premiums in the future due to the perceived inequity in the marketplace.

Two additional letters were submitted after the comment period ended. Sinton Dairy filed a comment in opposition to the proposed action and Gillette submitted another letter in response to

the issues addressed by DFA. Both comment letters were dated and received after the comment expiration date and cannot be given due consideration.

After careful consideration of the comments submitted, it is concluded that there is sufficient basis to grant the request for suspension of the 11 counties from the Order 65 marketing area for an indefinite period of time until the implementation of Federal order reform. Statistics clearly show that the majority (i.e., 65 to 70 percent) of the fluid milk sales into the 11-county area is by Gillette. Moreover, the 11 counties represent about 6 percent of the population and fluid milk consumption in the State of Nebraska and about 5 percent of the population and fluid milk consumption in the Order 65 marketing area. In addition, this milk has not been historically associated with the Order 65. Therefore, the removal of the 11 counties from the marketing area definition of Order 65 should not have an adverse impact on other order producers and other handlers. However, if the counties were to remain as part of the Order 65 marketing area definition, the effect could be severely disruptive for the Black Hills Milk Producers.

At this time, the Federal order reform process is expected to be completed by October 1, 1999. In the proposed federal order reform rule that was issued on January 21, 1998 (63 FR 4802), the proposed Central order marketing area, which included most of the existing Order 65 marketing area, did not include the 11 counties suspended in this action. However, this recommendation, together with all of the provisions in the proposed rule, is currently under consideration.

After consideration of all relevant material, including the proposal in the notice, the comments received, and other available information, it is hereby found and determined that for the period of February 1, 1999, and extending for an indefinite period until the implementation of a final rule consolidating Federal milk orders as required by the 1996 Farm Bill, or a subsequent action to terminate the suspension, the following provisions of the order do not tend to effectuate the declared policy of the Act:

In § 1065.2(a), the words "Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux."

It is hereby found and determined that 30 days' notice of the effective date hereof is impractical, unnecessary, and contrary to the public interest in that:

(a) The suspension is necessary to reflect current marketing conditions and to assure orderly marketing conditions in the marketing area;

(b) This suspension does not require of persons affected substantial or extensive preparation prior to the effective date; and

(c) Notice of the proposed suspension was given interested parties and they were afforded opportunity to file written data, views or arguments concerning this suspension. Several comments supporting the suspension, and one comment opposing it, were received.

Therefore, good cause exists for making this suspension effective less than 30 days from the date of publication in the **Federal Register**.

#### List of Subjects in 7 CFR Part 1065

Milk marketing orders.

For the reasons set forth in the preamble, 7 CFR Part 1065 is amended as follows:

#### PART 1065—MILK IN THE NEBRASKA-WESTERN IOWA MARKETING AREA

1. The authority citation for 7 CFR Part 1065 continues to read as follows:

**Authority:** 7 U.S.C. 601-674.

#### § 1065.2 [Suspended in part]

2. In § 1065.2(a), the words "Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, Sioux" are suspended.

Dated: January 26, 1999.

**Enrique E. Figueroa,**  
Administrator, Agricultural Marketing Service.

[FR Doc. 99-2430 Filed 2-1-99; 8:45 am]

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#### DEPARTMENT OF TRANSPORTATION

##### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 98-NM-50-AD; Amendment 39-11018; AD 99-03-04]

RIN 2120-AA64

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

**AGENCY:** Federal Aviation Administration, DOT.

**ACTION:** Final rule.

**SUMMARY:** This amendment adopts a new airworthiness directive (AD), applicable to all Boeing Model 737-100, -200, -300, -400, and -500 series airplanes, that requires installation of

components to provide shielding and separation of the fuel system wiring (that is routed to the fuel tanks) from adjacent wiring. This amendment also requires installation of flame arrestors and pressure relief valves in the fuel vent system. This amendment is prompted by testing results, obtained in support of an accident investigation, and by re-examination of possible causes of a similar accident. The actions specified by this AD are intended to prevent possible ignition of fuel vapors in the fuel tanks, and external ignition of fuel vapor exiting the fuel vent system and consequent propagation of a flame front into the fuel tanks.

**EFFECTIVE DATE:** March 9, 1999.

**ADDRESSES:** This information may be examined at the Federal Aviation Administration (FAA), Transport Airplane Directorate, Rules Docket, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Chris Hartonas, Aerospace Engineer, Systems and Equipment Branch, ANM-130S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2864; fax (425) 227-1181; or Dorr Anderson, Aerospace Engineer, Propulsion Branch, ANM-140S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055-4056; telephone (425) 227-2684; fax (425) 227-1181.

**SUPPLEMENTARY INFORMATION:** A proposal to amend part 39 of the Federal Aviation Regulations (14 CFR part 39) to include an airworthiness directive (AD) that is applicable to all Boeing Model 737-100, -200, -300, -400, and -500 series airplanes was published in the **Federal Register** on April 22, 1998 (63 FR 19852). [An action to reopen the comment period for the proposal was issued on July 8, 1998 (63 FR 38524, July 17, 1998).] That action proposed to require installation of components for the suppression of electrical transients, and/or installation of components to provide shielding and separation of the fuel system wiring (that is routed to the fuel tanks) from adjacent wiring. That action also proposed to require installation of flame arrestors and pressure relief valves in the fuel vent system.

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

### Support for the Proposal

Two commenters support the proposed rule.

### Request To Withdraw or Delay the Release of the AD

Two commenters, the airplane manufacturer and a supplier of fuel quantity indication system (FQIS) components, indicate that the current fuel system wiring configuration is safe when properly maintained, and that modifications are not necessary or, at the very minimum, should be delayed until further testing can be completed. Both commenters stress that the safety record regarding the existing FQIS for Boeing Model 737-100 through -500 series airplanes is excellent and exceeds all regulatory requirements. In addition, the commenters note there is no proof that the FQIS contributed to the center fuel tank explosions on a Model 737-300 series airplane in 1990 and on a Model 747-100 series airplane in 1996. The commenters further note that the data gathered to date relative to electromagnetic interference (EMI) testing of the FQIS do not clearly support the contention that an unsafe condition exists. The airplane manufacturer also states that additional data should be gathered on potential ignition threats, in order to reach a regulatory and industry consensus regarding the adequacy of the current FQIS. The features of the existing FQIS that are intended to prevent an ignition source from entering the fuel tank are also extensively discussed by the airplane manufacturer.

The FAA does not concur with the request to withdraw or delay the release of the final rule. The FAA has determined that sufficient data currently are available to support a requirement to incorporate shielding and separation of the fuel system wiring on Model 737-100 through -500 series airplanes to protect against hot shorts or EMI transients, which may result in in-tank energy levels of sufficient magnitude to ignite fuel vapor. Therefore, the current fuel system wiring configuration on Model 737-100 through -500 series airplanes must be modified. In addition, the FAA has determined that delaying publication of the final rule to accommodate further testing is not in the best interest of the public or industry. No change to the AD in this regard is necessary.

Regarding safety of the existing FQIS and compliance with 14 CFR part 25 ("Airworthiness Standards: Transport Category Airplanes"), the FAA notes that the current regulations do not explicitly address the unsafe condition

that is or may be present in the fuel tanks of Model 737-100 through -500 series airplanes. Therefore, the fact that the existing FQIS was determined to be in compliance with part 25 when these airplane models were certificated is not relevant. In addition, the FAA is currently working on a proposal to amend part 25 that would explicitly require demonstrating that ignition sources could not be present in fuel tanks when failure conditions and aging are considered. The FAA agrees with the commenters that no conclusive evidence exists to indicate that the FQIS contributed to the two accidents referred to by the commenters. However, it is the nature of such accidents that they often destroy the evidence that could lead to a conclusive identification of the cause of the accident. Even without the destruction caused by the accident, there often is no specific physical evidence of low energy electrical arcing.

The FAA does not concur that the final rule should be delayed until further EMI testing and data gathering can be completed. The FAA recognizes the value of further testing; however, the final rule should not be delayed for this purpose. Though further testing may be used to better understand possible scenarios that may lead to excessive voltage reaching the fuel tanks, the FAA has determined that separation and shielding is the most practical and reliable method to eliminate or minimize this hazard. An explanation of how the FAA reached this determination follows.

The FAA has developed the requirement for fuel system wiring separation and shielding as a result of investigation into the 1996 accident referred to by the commenter. During the investigation, the National Transportation Safety Board (NTSB) used systems analysis methods to determine what systems on the Model 747 series airplane are most likely to have been the source of ignition energy in the center fuel tank. That analysis included examinations of system failure modes and effects, service history, and similar airplanes.

The FAA notes that more than one failure would be required to create an ignition source inside the tank. The fact that fuel tank explosions on Model 737 and 747 series airplanes are rare would seem to support a claim that single failures have not been causing fuel tank explosions. However, during the 1996 Model 747 accident investigation, the fuel system wiring safety analysis and the examinations of Model 747 series airplanes performed by the NTSB revealed several scenarios in which a

combination of a latent failure or aging condition within the fuel tank and a subsequent single failure or electrical interference condition outside the tank can cause an ignition source to occur inside a fuel tank.

Examples of these in-tank and out-of-tank conditions that can contribute to a multiple failure ignition scenario were found in airplane service records and on Model 747 series airplanes that were inspected by the FAA and the NTSB. Various center wing fuel tanks were found to have conductive debris in the tanks, damaged FQIS wire insulation at the fuel probes, and contamination of probes and in-tank wiring by conductive copper/sulfur or silver/sulfur films. Each of these conditions can create latent potential ignition sources inside the fuel tank.

During the investigation into the 1990 accident involving a Model 737-300 series airplane, examination of the fuel system float switch wiring revealed damaged insulation and exposed conductor material of several wires. Further examination of wire bundles for other systems revealed numerous areas in which wire insulation had been damaged. The wire insulation damage may have resulted during a modification after the airplane was delivered to the airline. However, because other wires were found to have damage not related to any post-delivery modifications, the wire insulation damage may have resulted from the installation of the wire bundle at the factory. Recent inspections of the final assembly revealed wiring damage during out-of-sequence production on Model 737 series airplanes.

In addition, several conditions have been identified that can lead to sufficient energy in the fuel system wiring to create an ignition source if combined with one of the latent conditions described above. For example, direct short circuit conditions can occur in wire bundles containing FQIS wiring. Model 737 series airplanes have recently been observed with aluminum drill shavings on and inside various wire bundles in several locations between the flight deck and the fuel tank. Such shavings can, with vibration or other motion, cut through wire insulation and provide a conductive path between wires in a bundle. Service history contains records of wire bundle fires, which may have been due to such conditions. Also, electromagnetic coupling can occur between systems routed together in bundles.

When the fuel system wiring practices used on other manufacturers' transport airplanes certificated in the same time

period as the Model 737 series airplane are examined, the FAA finds that those other airplanes incorporated wiring features (shielding and separation from other systems) that preclude the multiple failure scenarios discussed above. An examination of the service history for those other airplane manufacturers' models also shows that significantly fewer fuel tank fire/explosion events have occurred (a tabulation of transport airplane fuel tank fires was included in the FAA Notice of Request for Comments on NTSB Safety Recommendations published in the **Federal Register** on April 3, 1997). The two most recent fuel tank explosion accidents (in 1990 and 1996, as referred to previously) remain unsolved, and both airplane types involved in those accidents follow the wiring practices addressed by this AD. Therefore, the FAA has determined that, to address the potential for fuel tank ignition due to a latent failure plus one subsequent failure, the type design of Model 737-100 through -500 series airplanes must be brought up to the same wiring standards as other transport airplanes certificated during the same time period the Model 737 was certificated. No change to the final rule is necessary in this regard.

#### **Request To Extend Compliance Time**

Five commenters, comprising the airplane manufacturer, a supplier of FQIS components, two operators of Model 737 series airplanes, and an association of airlines operating in the U.S., request an extension of the compliance period for incorporation of fuel system wiring modifications and installation of fuel vent system flame arrestors. In general, the commenters consider the 12-month compliance period to be too short.

One commenter recommends a 24-month compliance time for both actions, to ease the demand on hangar space and to spread the cost out over two fiscal years instead of one. In addition, one commenter is concerned that service instructions are not yet available.

Two of the commenters, including the airplane manufacturer, recommend a longer compliance period for modification of fuel system wiring. One commenter recommends 36 months because of the lack of immediate safety concern associated with the existing wiring configuration and because of logistical considerations for accomplishing the modification. In addition, this commenter notes that the fuel system modification for Model 737-100 through -500 series airplanes required by this AD, as well as the modification for Model 747 series

airplanes required by AD 98-20-40, amendment 39-10808 (63 FR 52147, September 30, 1998), will affect up to 3,500 airplanes, and the requirements for manpower and hangar space will require that the work be spread out over several years. The other commenter recommends that the compliance time for the fuel system wiring modification be extended to 72 months, adding that such an extension would accommodate a flow time of 12 months to develop service instructions and 36 months to fabricate the required parts, as well as a projected incorporation rate that allows operators to complete the modification during a normal "D" check interval.

Two of the commenters state that the proposed compliance period for installation of vent system flame arrestors is too short, based on anticipated parts availability. The airplane manufacturer recommends a 3-year compliance period for that action, based on anticipated availability of parts and service instructions.

The FAA concurs with the request to extend the compliance period for accomplishment of the actions required by this AD. Generally, the commenters recommend that the compliance period for the wiring modification be different from that for the flame arrestor installation. The FAA concurs with this approach and has revised the final rule to extend the compliance period from 12 months to 48 months for modification of the fuel system wiring, and from 12 months to 36 months for installation of fuel vent system flame arrestors and pressure relief valves. These extensions are intended to allow sufficient time for the fabrication of required parts and subsequent modification of most of the affected airplanes during scheduled maintenance visits. The FAA has determined that these extensions will not have a significant adverse effect on the safety of the fleet of Model 737-100 through -500 series airplanes.

The FAA also agrees that, as these modifications are spread out over several years, the cost per year is reduced and the demand for hangar space and manpower is reduced. The FAA finds that both compliance periods allow ample time for development of service instructions and the fabrication of parts. The FAA has taken into account the size of the fleet in determining appropriate compliance times. The airplane manufacturer recommends a 72-month compliance time to accomplish fuel system wiring modifications. However, the FAA has determined that this activity may be completed in 48 months. This

determination was made by accepting the maximum compliance period requested from commenters (other than the manufacturer) and allowing 12 months for development of service instructions and retrofit kits. The manufacturer indicates that service information will be available within 12 months, and sufficient parts to support all U.S.-registered airplanes will be available within 24 months. In addition, the manufacturer predicts an incorporation rate of 50 airplanes per month. In light of these numbers (all of which the FAA considers to be conservative), wiring modifications on the U.S.-registered fleet can be accomplished in a total of 36 months. Recognizing that non-U.S.-registered airplanes will also be requiring parts, which will delay incorporation on U.S.-registered airplanes, the FAA believes it is sufficient to extend the compliance period for an additional 12 months for a total of 48 months.

#### **Request To Delay Issuance of the AD Pending Release of Service Information**

Two commenters, comprising an association of airlines operating in the United States and an operator of U.S.-registered airplanes, note that detailed compliance methods for the fuel system wiring modification and flame arrestor installation must be developed before the AD is released. The commenters indicate that, without such detailed instructions, the operators will have to be reactive instead of proactive; therefore, design and implementation errors may be introduced. One of the commenters stresses that the compliance methods must be based on results from EMI tests conducted on Model 737 FQIS's and that caution should be taken because wiring modifications may cause damage to existing wiring. The other commenter stresses that, because of the fleet size and the relatively short proposed compliance times, the rule should not be released until compliance methods are available.

The FAA concurs partially. The FAA does not concur that delaying this action until after the release of the manufacturer's planned service instructions is warranted, because sufficient technology currently exists to devise and install the required features within reasonable compliance times. However, as discussed previously, the final rule has been modified to allow 36 months to install fuel vent system flame arrestors and 48 months to modify fuel system wiring.

The FAA has taken into account the size of the fleet in determining appropriate compliance times and has

adopted the recommendation of the airplane manufacturer relative to the compliance period for the installation of fuel vent system flame arrestors. The selection of a 48-month compliance time for fuel system wiring modification also has taken into account the fleet size (explained in detail under the heading "Request to Extend Compliance Time," above).

The FAA does not concur with the request to delay release of the rule to complete further EMI testing on additional Model 737 series airplanes. The airplane manufacturer has completed testing on one Model 737 series airplane to date. The FAA has determined that the test procedures used during the EMI testing are not representative of the many possible conditions on an airplane in operation. Specifically, no attempt was made to represent any system failure conditions or compromise shielding/grounding provisions on the systems that were powered and switched. Also, because of the way airplane wire bundles are manufactured and installed, significant variation in levels of coupling between systems has been seen in the past and would be expected on Model 737 series airplanes.

Moreover, the FAA's determination of the existence of an unsafe condition is not wholly dependent on the results of the EMI testing. In the Model 747 fuel system wiring safety analysis and airplane inspections performed by the NTSB during the investigation of the 1996 accident, several tank ignition scenarios were identified involving a combination of a latent failure or aging condition inside the fuel tank and a subsequent failure or electromagnetic coupling outside the tank. Various FAA and NTSB activities identified actual examples of the specific potential for each of those types of contributing conditions on Model 747 series airplanes. In addition, the FAA has determined that these same types of scenarios are applicable to Model 737-100 through -500 series airplanes.

The FAA shares the commenters' concern that modification of fuel system wiring may damage existing wiring, and the airplane manufacturer has carefully considered this concern as well. To minimize possible damage, the manufacturer's service instructions will not specify removal of any of the existing wiring; instead, this wiring will be terminated properly and retained in the airplane. In addition, newly installed shielded wiring will be spatially separated from all other airplane wiring.

#### **Preference for a Specific Design Solution**

Two commenters discuss application of transient suppression devices as they relate to the proposed AD. Responses to these comments have not been included in this AD because the optional requirement for installation of transient suppression devices has been removed from the final rule.

Based on comments from the airplane manufacturer, and on its own further analysis, the FAA has determined that installation of transient suppression devices alone would not meet the intent of the rule. The FAA has concerns that transient suppression devices may have latent failure modes that would render the transient suppression function inoperative, or may have failure modes that would cause introduction of high voltage signals into the fuel tank that otherwise would not have occurred. Therefore, paragraph (a) of the final rule has been revised to eliminate the general requirement for transient suppression components and to delete the reference to "install components." Operators that have specific design changes other than those required by the AD that may provide an acceptable level of safety may request approval of an alternative method of compliance in accordance with paragraph (c) of this AD.

#### **Request To Separate the Proposed Rule Into Two AD's**

One commenter, an operator of U.S.-registered airplanes, requests that the AD be divided into two AD's. The commenter points out that the corrective actions cannot be done in one maintenance visit.

The FAA does not concur with the request to separate the rule. Although both required actions most likely will not be accomplished during the same shop visit, the FAA notes that more than one shop visit to accomplish the actions required by an AD is not uncommon. The manufacturer plans to issue service information for each modification separately, which will allow the actions to be readily performed at different maintenance visits. No change to the AD in this regard is required.

#### **Request To Revise Cost Estimate for Wiring Modification**

Two commenters, an operator of U.S.-registered airplanes and the airplane manufacturer, discuss work hour and cost estimates regarding modification of fuel system wiring. One commenter questions how the FAA determined the work hour and cost estimates for wiring changes in the proposed rule. The other

commenter provides its own specific work hour and cost estimates for wiring modifications.

The FAA infers that the commenters request a revision of the work hour and cost estimates for the wiring modification. The FAA concurs. In the absence of specific instructions addressing wiring modifications, the FAA based its original work hour estimate (40 work hours) and cost estimate (\$12,400 per airplane) on similar modifications accomplished on other airplane models. The cost impact information, below, has been revised in this regard, based on the information provided by the manufacturer.

#### **Request To Revise Cost Estimate for Installation of Flame Arrestor**

Three commenters, comprising an operator of U.S.-registered airplanes, an association of airlines operating in the U.S., and the airplane manufacturer, discuss work hour and cost estimates regarding installation of fuel vent system flame arrestors and pressure relief valves. One commenter suggests that the FAA's determination of 48 work hours to install flame arrestors is underestimated. Another commenter questions the method the FAA used to estimate the work hours and parts necessary to install the flame arrestors. A third commenter provides its own specific work hour and cost estimates.

The FAA infers that the commenters request a revision of the cost estimate for this installation. The FAA concurs partially. The FAA considers the cost estimates provided in the proposed rule to be generally representative of the actual costs associated with this modification. The FAA's estimated work hours and costs are based on previously released service instructions from the airplane manufacturer that detailed installation of fuel vent system flame arrestors and pressure relief valves on Model 737-200 series airplanes. The airplane manufacturer's labor cost estimate is comparable to the FAA's estimate and its parts cost estimate is actually lower than that of the FAA. The cost impact information, below, has been revised in this regard, based on the information provided by the manufacturer.

#### **Request To Maintain Minimum FQIS Performance Requirements**

One commenter, a manufacturer of fuel system components, requests that the minimum performance requirements for FQIS's regarding maximum allowable energy into the fuel tank not be changed as a result of this AD. The commenter states that a change to the minimum performance requirements

implies the currently certified FQIS is not safe.

The FAA concurs with the request and finds that the changes that result from this AD do not directly affect the minimum performance requirements for fuel system wiring and components in the future. Though the AD does not specifically address the performance requirements, the FAA notes studies are in progress that may address the currently accepted maximum allowable energy levels in fuel tanks. If, as part of this study activity, it is determined that the currently recognized levels need to be adjusted, then the FAA may consider further rulemaking to address that. As stated previously, the fact that two unexplained center fuel tank explosions have occurred in the last eight years on Boeing airplanes leads the FAA to conclude that modifications to the fuel system wiring are necessary. The FAA has determined that wire separation and shielding is the appropriate action to take at this time. These modifications do not directly affect the minimum performance requirements for fuel system wiring. Therefore, no change to the AD in this regard is required.

#### **Concerns Regarding Flame Arrestor Qualification Tests**

One commenter expresses concern that flame arrestor qualification tests are not sufficiently defined and that the installation of fuel vent system flame arrestors would not have prevented the 1990 center fuel tank explosion on a Model 737-300 series airplane.

The FAA recognizes there are credible explanations for the accident that do not involve an external flame front traveling through the vent system into the center fuel tank. Regardless of the role a fuel vent system flame arrestor may have played in that specific accident, the FAA has determined that the lack of fuel vent system flame arrestors in Model 737-100 through -500 series airplanes creates an unacceptable risk of fuel tank explosion and constitutes an unsafe condition. Based on comments received on the NPRM, this opinion appears to be held by a number of commenters (including the airplane manufacturer) as well. The sufficiency of qualification testing for flame arrestors does not have a specific bearing on this AD.

However, the FAA is interested in obtaining more information regarding this commenter's concerns. The FAA has asked the commenter to submit additional detailed information on this concern to the Seattle Aircraft Certification Office for consideration.

#### **Concerns Regarding Detection of Wire Chafing**

One commenter, a manufacturer of electronic test equipment, states it believes that electrical coupling between adjacent wires is not plausible as a cause for either accident referred to previously. The commenter notes these wires have been adjacent to other wires for years with no apparent problems. In addition, the commenter suggests the test equipment utilized by industry is not sophisticated enough to detect the types of wire damage that may be present in the fuel system wiring. The commenter also details the benefits of utilizing more advanced test equipment for detection of wire damage. The commenter further indicates that it manufactures this advanced equipment.

The FAA does not agree with the commenter's opinion that electrical coupling between adjacent wires could not be a factor in either the 737-300 or the 747-100 fuel tank explosion. As noted in the proposed rule, the FAA participated in testing of fuel system wiring in which electrical coupling was induced in combination with an aging condition or a latent failure of the FQIS probes, which resulted in energy in excess of that required to ignite fuel vapor. The fact that the wires had been adjacent for years with no apparent problems prior to the tank ignition may only indicate that neither the aging condition nor the latent failure inside the tank was present during that time to allow the induced voltage to cause an ignition source inside the fuel tank.

Regarding the advanced test equipment discussed by the commenter, the FAA cannot dictate the types of electrical equipment that industry utilizes in conducting airplane wiring tests. This AD is based on the determination that separation and shielding of the fuel system wiring is currently the only practical method to ensure that induced transients or wire-to-wire hot shorts do not cause an ignition source inside the fuel tank. No change to the AD in this regard is required.

#### **Clarification of Systems Affected**

Since the issuance of the NPRM, the FAA recognized the proposed AD may be unclear with respect to which electrical circuits were intended to be affected by the proposed AD. The NPRM proposed, and the final rule requires, providing shielding and separation of the fuel system wiring (that is routed to the fuel tanks) from adjacent wiring. The FAA considers "fuel system wiring" to include all electrical circuits associated with the control or indication

of the fuel quantity on the airplane. This would include, but not be limited to, the FQIS tank probe circuits, the volumetric shutoff compensator circuits, densitometer circuits, and float switch circuits. The term "circuits" is considered by the FAA to include airplane wiring as well as wiring within electrical equipment.

### 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 described previously. The FAA has determined that these changes will neither increase the economic burden on any operator nor increase the scope of the AD.

### Cost Impact

There are approximately 2,780 airplanes of the affected design in the worldwide fleet. The FAA estimates that 1,140 airplanes of U.S. registry will be affected by this AD.

It will take approximately 278 work hours per airplane to accomplish the required installation of shielding/separation components, at an average labor rate of \$60 per work hour. Required parts will cost approximately \$4,500 per airplane. Based on these figures, the cost impact of this action on U.S. operators is estimated to be \$24,145,200, or \$21,180 per airplane.

It will take approximately 48 work hours per airplane to accomplish the required installation of flame arrestors, at an average labor rate of \$60 per work hour. Required parts will cost approximately \$17,100 per airplane. Based on these figures, the cost impact of this action on U.S. operators is estimated to be \$22,777,200, or \$19,980 per airplane.

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

### Regulatory Impact

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

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

### List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, 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:

**99-03-04 Boeing:** Amendment 39-11018. Docket 98-NM-50-AD.

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

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

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

To prevent possible ignition of fuel vapors in the fuel tanks, and external ignition of fuel vapor exiting the fuel vent system and consequent propagation of a flame front into the fuel tanks, accomplish the following:

(a) Within 48 months after the effective date of this AD, provide shielding and separation of the fuel system wiring (that is routed to the fuel tanks) from adjacent wiring, in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

(b) Within 36 months after the effective date of this AD, install flame arrestors and pressure relief valves in the fuel vent system, in accordance with a method approved by the Manager, Seattle ACO.

(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, Seattle ACO. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

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

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

(e) This amendment becomes effective on March 9, 1999.

Issued in Renton, Washington, on January 26, 1999.

**Darrell M. Pederson,**

*Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.*  
[FR Doc. 99-2272 Filed 2-1-99; 8:45 am]

BILLING CODE 4910-13-U

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Food and Drug Administration

#### 21 CFR Part 5

### Delegations of Authority and Organization; Center for Devices and Radiological Health

**AGENCY:** Food and Drug Administration, HHS.

**ACTION:** Final rule.

**SUMMARY:** The Food and Drug Administration (FDA) is amending the regulations for delegations of authority, to reflect redelegations to other officials within the Center for Devices and Radiological Health (CDRH) pertaining to: Certifying true copies and using the Department seal, disclosing official records, issuing reports of minor violations, and medical device reporting procedures. This amendment is intended to reflect those redelegations.

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:**

Deb A. Baclawski, Center for Devices and Radiological Health (HFZ-026), Food and Drug Administration, 1350 Piccard Dr., Rockville, MD 20850, 301-443-1060, or

Donna G. Page, Division of Management Systems and Policy (HFA-340), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301-827-4816.

**SUPPLEMENTARY INFORMATION:** FDA is amending the delegations of authority under § 5.22 *Certification of true copies and use of the Department seal* (21 CFR 5.22); § 5.23 *Disclosure of official records* (21 CFR 5.23); § 5.37 *Issuance of reports of minor violations* (21 CFR 5.37); and § 5.98 *Authority relating to medical device reporting procedures* (21 CFR 5.98) to reflect redelegations to other officials within CDRH. These redelegations will improve the efficiency of operations for the center.

Further redelegation of the authorities delegated is not authorized at this time. Authority delegated to a position by title may be exercised by a person officially designated to serve in such position in an acting capacity or on a temporary basis.

**List of Subjects in 21 CFR Part 5**

Authority delegations (Government agencies), Imports, Organization and functions (Government agencies).

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 5 is amended as follows:

**PART 5—DELEGATIONS OF AUTHORITY AND ORGANIZATION**

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

**Authority:** 5 U.S.C. 504, 552, App. 2; 7 U.S.C. 138a, 2271; 15 U.S.C. 638, 1261-1282, 3701-3711a; 15 U.S.C. 1451-1461; 21 U.S.C. 41-50, 61-63, 141-149, 321-394, 467f, 679(b), 801-886, 1031-1309; 35 U.S.C. 156; 42 U.S.C. 241, 242, 242a, 242l, 242n, 243, 262, 263, 264, 265, 300u-300u-5, 300aa-1, 1395y, 3246b, 4332, 4831(a), 10007-10008; E.O. 11921, 41 FR 24294, 3 CFR, 1977 Comp., p. 124-131; E.O. 12591, 52 FR 13414, 3 CFR, 1988 Comp., p. 220-223.

2. Section 5.22 is amended by revising paragraph (a)(10)(v) and by adding paragraph (a)(10)(vi) to read as follows:

**§ 5.22 Certification of true copies and use of Department seal.**

- (a) \* \* \*
- (10) \* \* \*

(v) The Director and Deputy Director, Office of Surveillance and Biometrics

(OSB), CDRH, and the Director and Deputy Director, Division of Surveillance Systems (DSS), OSB, CDRH.

(vi) Freedom of Information Officers, CDRH.

\* \* \* \* \*

3. Section 5.23 is amended by adding paragraph (c)(5) to read as follows:

**§ 5.23 Disclosure of official records.**

\* \* \* \* \*

(c) \* \* \*

(5) The Director and Deputy Director, Office of Surveillance and Biometrics (OSB), CDRH, the Director and Deputy Director, Division of Surveillance Systems (DSS), OSB, CDRH, and the Chief Reporting Systems Monitoring Branch, DSS, OSB, CDRH.

\* \* \* \* \*

3. Section 5.37 is amended by adding paragraphs (a)(2)(iv) and (b)(4) to read as follows:

**§ 5.37 Issuance of reports of minor violations.**

(a) \* \* \*

(2) \* \* \*

(iv) The Director and Deputy Director, Office of Surveillance and Biometrics (OSB), CDRH, and the Director and Deputy Director, Division of Surveillance Systems (DSS), OSB, CDRH.

\* \* \* \* \*

(b) \* \* \*

(4) The Director and Deputy Director, OSB, CDRH, and the Director and Deputy Director, DSS, OSB, CDRH.

\* \* \* \* \*

5. Section 5.98 is revised to read as follows:

**§ 5.98 Authority relating to medical device reporting procedures.**

(a) The Director and Deputy Directors, Center for Devices and Radiological Health (CDRH), the Director and Deputy Director, Office of Surveillance and Biometrics, (OSB), CDRH and the Director and Deputy Director, Division of Surveillance Systems (DSS), OSB, CDRH, are authorized to approve electronic reporting under § 803.14 of this chapter.

(b) The Director and Deputy Directors, CDRH, the Director and Deputy Director, OSB, CDRH, and the Director and Deputy Director, DSS, OSB, CDRH, are authorized to request the submission of additional information under § 803.15 of this chapter.

(c) The Director and Deputy Directors, CDRH, the Director and Deputy Director, OSB, CDRH, and the Director and Deputy Director, DSS, OSB, CDRH, are authorized to grant or revoke exemptions and variances from

reporting requirements under § 803.19 of this chapter.

Dated: January 22, 1999.

**William K. Hubbard,**  
Associate Commissioner for Policy  
Coordination.

[FR Doc. 99-2357 Filed 2-1-99; 8:45 am]

BILLING CODE 4160-01-F

**DEPARTMENT OF HEALTH AND HUMAN SERVICES****Food and Drug Administration****21 CFR Part 558****New Animal Drugs for Use In Animal Feeds; Narasin and Nicarbazine With Bacitracin Methylene Disalicylate**

**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 Elanco Animal Health, a Division of Eli Lilly & Co. The NADA provides for combining approved narasin/nicarbazin (1:1 fixed ratio) and bacitracin methylene disalicylate (BMD) Type A medicated articles to make combination drug Type C medicated broiler chicken feeds for prevention of certain forms of coccidiosis and for increased rate of weight gain and improved feed efficiency.

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Charles J. Andres, Center for Veterinary Medicine (HFV-128), Food and Drug Administration, 7500 Standish Pl., Rockville, MD 20855, 301-827-1600.

**SUPPLEMENTARY INFORMATION:** Elanco Animal Health, a Division of Eli Lilly & Co., Lilly Corporate Center, Indianapolis, IN 46285, filed NADA 140-926 that provides for combining approved narasin/nicarbazin (1:1 fixed ratio) Maxiban® and BMD Type A medicated articles to make combination drug Type C medicated broiler chicken feeds. The feeds contain 27 to 45 grams per ton (g/t) each of narasin and nicarbazine and 4 to 50 g/t BMD. The feeds are used for the prevention of coccidiosis caused by *Eimeria tenella*, *E. necatrix*, *E. acervulina*, *E. maxima*, *E. brunetti*, and *E. mivati*, and for increased rate of weight gain and improved feed efficiency. The NADA is approved as of January 4, 1999, and the regulations are amended in 21 CFR 558.76, 558.363, and 558.366 to reflect the approval.

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.

This approval is for use of approved Type A medicated articles to make combination drug Type C medicated feeds. One ingredient, nicarbazin, is a Category II drug as defined in 21 CFR 558.3(b)(1)(ii). As provided in 21 CFR 558.4(b), an approved form FDA 1900 is required for making a Type B or C medicated feed as in this application. Under 21 U.S.C. 360b(m), as amended by the Animal Drug Availability Act of 1996 (Pub. L. 104-250), medicated feed applications have been replaced by a requirement for manufacture in a licensed feed mill. Therefore, use of narasin/nicarbazin and BMD Type A medicated articles to make Type C

medicated feeds as in NADA 140-926 requires manufacture in a licensed feed mill.

The agency has determined under 21 CFR 25.33(a)(2) 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 558**

Animal drugs, Animal feeds. 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 558 is amended as follows:

**PART 558—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS**

1. The authority citation for 21 CFR part 558 continues to read as follows:

**Authority:** 21 U.S.C. 360b, 371.

2. Section 558.76 is amended by adding paragraph (d)(3)(xix) to read as follows:

**§ 558.76 Bacitracin methylene disalicylate.**

\* \* \* \* \*

(d) \* \* \*

(3) \* \* \*

(xix) Narasin and nicarbazin as in § 558.366.

3. Section 558.363 is amended by adding paragraph (d)(2)(ii) to read as follows:

**§ 558.363 Narasin.**

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(ii) Nicarbazin and bacitracin methylene disalicylate as in § 558.366.

4. Section 558.366 is amended in the table in paragraph (c) under entry "27 to 45" by alphabetically adding an entry for "Narasin 27 to 45 and bacitracin methylene disalicylate 4 to 50" to read as follows:

**§ 558.366 Nicarbazin.**

\* \* \* \* \*

(c) \* \* \*

Nicarbazin in grams per ton	Combination in grams per ton	Indications for use	Limitations	Sponsor
27 to 45	Narasin 27 to 45 and bacitracin methylene disalicylate 4 to 50	Broiler chickens; prevention of coccidiosis caused by <i>Eimeria tenella</i> , <i>E. necatrix</i> , <i>E. acervulina</i> , <i>E. maxima</i> , <i>E. brunetti</i> , <i>E. mivati</i> ; for increased rate of weight gain and improved feed efficiency.	Feed continuously as sole ration. Withdraw 5 days before slaughter. Do not allow turkeys, horses, or other equines access to formulations containing narasin. Ingestion of narasin by these species has been fatal. Do not feed to laying hens. Narasin and nicarbazin as provided by 000986, bacitracin methylene disalicylate by 046573.	000986
*	*	*	*	*

Dated: January 22, 1999.  
**Stephen F. Sundlof**,  
 Director, Center for Veterinary Medicine.  
 [FR Doc. 99-2411 Filed 2-1-99; 8:45 am]  
 BILLING CODE 4160-01-F

**NATIONAL INDIAN GAMING COMMISSION**

**25 CFR Part 542**

RIN 3141-AA11

**Minimum Internal Control Standards**

**AGENCY:** National Indian Gaming commission.

**ACTION:** Final Rule; Correction.

**SUMMARY:** The National Indian Gaming Commission published the Final Rule on Minimum Internal Control Standards (MICS) on January 5, 1999. The

compliance dates stated in the preamble under "Dates" were incorrect. This publication is to correct the mistakes.

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Mai Dinh, National Indian Gaming Commission, 1441 L Street, NW, Suite 9100, Washington, DC 20005. Telephone: 202-632-7003.

**SUPPLEMENTARY INFORMATION:** The Final Rule on Minimum Internal Control Standards, published on January 5, 1999, in Part III of the **Federal Register**, should be corrected as follows. On page

590 in the first column, the paragraphs under "Dates" should be:

*Effective Date:* February 4, 1999.

*Compliance Date:* Tribal MICS must be developed by August 4, 1999. Gaming operations operating on or before March 31, 1999, must be in full compliance no later than February 4, 2000. Gaming operations which commence operation after March 31, 1999, must be in full compliance prior to commencement of operations.

#### Authority and Signature

This Final Rule Correction was prepared under the direction of Barry W. Brandon, General Counsel, National Indian Gaming Commission, 1441 L Street, NW, Suite 9100, Washington, DC 20005.

Signed at Washington, DC this 25th day of January, 1999.

**Barry W. Brandon,**  
General Counsel.

[FR Doc. 99-2219 Filed 2-1-99; 8:45 am]

BILLING CODE 7565-01-P

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Parts 301 and 602

[TD 8813]

RIN 1545-AU74

#### Residence of Trusts and Estates—7701

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

**ACTION:** Final Regulations.

**SUMMARY:** This document contains final regulations providing guidance regarding the definition of a trust as a United States person (domestic trust) or a foreign trust. This document also provides guidance regarding the election for certain trusts to remain domestic trusts for taxable years beginning after December 31, 1996. The regulations incorporate changes to the law made by the Small Business Job Protection Act of 1996 and by the Taxpayer Relief Act of 1997. The final regulations affect the determination of the residency of trusts as foreign or domestic for federal tax purposes.

**DATES:** *Effective date:* These regulations are effective February 2, 1999.

*Dates of applicability:* See § 301.7701-7(e).

**FOR FURTHER INFORMATION CONTACT:** Concerning the regulations, James A. Quinn at (202) 622-3060 (not a toll-free number).

**SUPPLEMENTARY INFORMATION:**

#### Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget for review in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1600.

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

The collections of information in these final regulations are in § 301.7701-7 (d)(2)(ii) and (f). This information is required by the IRS to assure compliance with the provisions of the Small Business Job Protection Act of 1996 and by the Taxpayer Relief Act of 1997 for trusts seeking to retain their residency as domestic or foreign trusts in the event of an inadvertent change and for trusts electing to remain domestic trusts. The likely respondents are trusts. The estimated average annual burden per respondent is 0.5 hours.

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

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

#### Background

On June 5, 1997, the IRS published in the **Federal Register** a notice of proposed rulemaking (62 FR 30796) to provide guidance on the definition of a foreign trust and a domestic trust under section 7701(a) (30) and (31), as amended by section 1907 of the Small Business Job Protection Act of 1996 (SBJP Act), Public Law 104-188, 110 Stat. 1755 (August 20, 1996).

Written comments responding to the notice of proposed rulemaking were received, and a public hearing was held on September 16, 1997. After consideration of the comments received, the proposed regulations are adopted as revised by this Treasury decision.

Section 1161(a) of the Taxpayer Relief Act of 1997 (TRA 1997), Public Law 105-34, 111 Stat. 788 (August 5, 1997), provides that, to the extent prescribed in

regulations by the Secretary of the Treasury or his delegate, a trust that was in existence on August 20, 1996 (other than a trust treated as owned by the grantor under subpart E of part I of subchapter J of chapter 1 of the Internal Revenue Code of 1986 (Code)), and that was treated as a United States person on August 19, 1996, may elect to continue to be treated as a United States person notwithstanding the enactment of section 7701(a)(30)(E). Notice 98-25 (1998-18 I.R.B. 11) provides guidance regarding the election to remain a domestic trust. The IRS and the Treasury Department are incorporating the guidance contained in Notice 98-25 concerning the election to remain a domestic trust in these final regulations. The final regulations also provide guidance regarding the circumstances that cause a termination of the election and guidance concerning revocation of the election to remain a domestic trust.

In addition, section 1601(i)(3)(A) of TRA 1997 amended section 7701(a)(30)(E)(ii) by striking the word "fiduciaries" and inserting "persons" in its place. The final regulations have been drafted consistent with this change.

#### Explanation of Provisions

##### A. Court Test and Safe Harbor Issues

##### 1. Foreign Classification Bias and Safe Harbor

Some commentators point out generally that the Code and the proposed regulations are biased in favor of trusts being treated as foreign trusts. The commentators recommend that the regulations should reduce the bias in favor of foreign treatment. The safe harbor in the proposed regulations provides that a trust is a domestic trust if, pursuant to the terms of a trust instrument, the trust has only United States fiduciaries, such fiduciaries are administering the trust exclusively in the United States, and the trust is not subject to an automatic migration provision. One commentator recommends that the safe harbor be made clearly applicable in the case of any trust if a majority of the trustees are United States persons and the other requirements are met.

The IRS and the Treasury Department agree with the commentator that the safe harbor should not be limited to trusts with only United States fiduciaries. Since the primary concern addressed by the safe harbor is the difficulty in determining whether the court of a particular state would assert primary supervision over the administration of a trust if that trust had never appeared before a court, the final regulations

provide a safe harbor only for the court test. A trust that satisfies the safe harbor, therefore, would also need to meet the control test in order to be a domestic trust. In addition, an example has been added to the control test illustrating that the control test is satisfied if United States persons control all substantial decisions by a majority vote.

Commentators note that many trust instruments do not direct where the trust is to be administered. Therefore, they suggest that a trust should satisfy the safe harbor if the trust is in fact administered in the United States (regardless of whether this is mandated by the trust document).

The IRS and the Treasury Department believe that, if a trust is administered exclusively in the United States, it is not necessary that the trust instrument actually direct that the trust be administered in the United States. Accordingly, the final regulations provide that a trust satisfies the safe harbor if the trust instrument does not direct that the trust be administered in a jurisdiction outside the United States, and the trust is in fact administered in the United States.

These changes in the final regulations will allow more trusts to fall within the safe harbor.

## 2. Automatic Migration or Flee Clauses

The proposed regulations provide that a trust will not satisfy the court test if the trust instrument contains an automatic migration clause that would cause the trust to migrate from the United States if a United States court attempts to assert jurisdiction or otherwise supervise the administration of the trust. Commentators argue that the rule in the proposed regulations concerning automatic migration clauses is too broad. They argue that an automatic migration clause should not cause a trust to be treated as a foreign trust if migration is triggered only by events that are not particular to a given trust, its trustees, beneficiaries, or grantors. For example, if a trust will migrate because of foreign invasion of the United States, the residency of the trust should not be affected.

The final regulations adopt the suggestion and provide that a trust will not fail the court test if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.

## 3. Clarify That the List of Specific Situations for Meeting the Court Test Is Not an Exclusive List

Commentators recommend that the regulations be clarified to provide that the situations set forth in § 301.7701-7(d)(2) of the proposed regulations that meet the court test are not the exclusive ways to meet the court test.

The purpose of setting forth specific situations that meet the court test was to provide bright-line rules that would give taxpayers certainty of treatment to the extent possible. These rules, however, are not exclusive. The court test will also be satisfied by meeting the requirements set forth in the final regulations in § 301.7701-7(c).

## 4. Disregard State Law

A commentator recommends that the regulations should establish bright-line rules for the court test without reference to state law.

The IRS and the Treasury Department believe that the proper interpretation of section 7701(a)(30)(E) requires that state law be applied under the court test. In addition, the proposed regulations provide bright-line rules for both the court test and the control test to the extent permitted by the statute. For example, the regulations provide a safe harbor and provide for specific cases where the court test is satisfied. Therefore, the final regulations remain unchanged in this regard.

## 5. Court Test Excessively Broad

One commentator argues that the court test is excessively broad because many trusts that are, in the commentator's view, foreign trusts will potentially be deemed domestic trusts. Specifically, the commentator is concerned about a trust in which the only domestic aspect is a single United States trustee who controls all substantial decisions of the trust. Another commentator recommends that the regulations should make clear that trustee meetings and other trustee activities in the United States will not cause the court test to be met.

The IRS and the Treasury Department do not believe that there is statutory authority for modifying the court test as suggested and, therefore, the final regulations remain unchanged. Furthermore, trustee meetings and activities in the United States may be a relevant factor to be taken into account in determining whether the court test has been met.

## 6. Petition of Court by a Single Beneficiary

A commentator recommends that § 301.7701-7(d)(2)(iii) of the proposed

regulations should be clarified to provide that the court test is met only if either (i) a court within the United States actually exercises primary supervision over the trust, or (ii) a majority of beneficiaries take steps to cause a United States court to exercise primary supervision. The commentator expresses concern about a possible situation where, under the commentator's interpretation of the regulations, a single beneficiary of a foreign trust takes steps with a United States court petitioning it to assume primary supervision of the trust and, regardless of whether the court does in fact exercise primary supervision of the trust, the foreign trust becomes a domestic trust.

While § 301.7701-7(d)(2)(iii) of the proposed regulations permits the trustees and/or beneficiaries of a trust to take steps to ensure that the court test is satisfied, taking preliminary steps with a United States court without in fact causing the administration of the trust to be subject to the primary supervision of the United States court would not satisfy the court test. Thus, the concern about a single beneficiary altering the residence of the trust by merely taking preliminary steps is unwarranted.

## B. Control Test Issues

### 1. Who Counts for Purposes of the Control Test

The proposed regulations provide that substantial decisions do not include decisions exercisable by a grantor or by a beneficiary of the trust that affect solely the beneficiary's interest in the trust, unless the grantor or beneficiary is acting in a fiduciary capacity. The proposed regulations provide this rule because the statute prior to amendment by TRA 1997 provided that United States *fiduciaries* must control all substantial decisions of a domestic trust. Therefore, the proposed regulations exclude decisions by those who are not holding powers in a fiduciary capacity.

As noted, TRA 1997 substituted "persons" for "fiduciaries" in the control test. In light of the change in the statute, commentators point out that there is no statutory basis for ignoring the powers held by grantors and beneficiaries for purposes of the control test.

Therefore, the final regulations change the rule set forth in the proposed regulations and, for purposes of the control test, count all powers held by grantors and powers held by beneficiaries including those that affect solely the portion of the trust in which the beneficiary has an interest.

Accordingly, all persons with any power over substantial decisions of the trust, whether acting in a fiduciary capacity or not, must be counted for purposes of the control test.

Under the proposed regulations, excluding grantors (and beneficiaries) from the control test would have allowed certain individual retirement accounts (IRAs) and other tax-exempt trusts to continue to be treated as domestic trusts and thus retain their tax-exempt status even if the grantor/beneficiary of the trust is a foreign person. The IRS and the Treasury Department believe that Congress did not intend the TRA 1997 changes to affect the tax-exempt status of IRAs and other tax-exempt trusts whose tax-exempt status depends on their being domestic trusts. Because these trusts are required to be created or organized in the United States, and are subject to other detailed requirements for qualification under the Code, the final regulations provide that these trusts satisfy the control test, provided that United States fiduciaries control all of the substantial decisions of the trust that are made by trust fiduciaries. This provision of the final regulations generally reaches the same result as the provision in the proposed regulations.

## 2. Time to Correct Inadvertent Changes in Fiduciaries

The proposed regulations provide that in the event of an inadvertent change in the fiduciaries that would cause a change in the residency of a trust, the trust is allowed six months from the date of change in the fiduciaries to adjust either the fiduciaries or the residence of the fiduciaries so as to avoid a change in the residence of the trust.

Commentators recommend that trusts be given more time to take corrective action to avoid a change in residency or, alternatively, the regulations should give the IRS discretionary authority to continue treating a trust that inadvertently fails the control test as a domestic trust even if the control test is not met within six months.

The final regulations extend the period of time to 12 months from the date of the change to complete corrective action. The final regulations also provide that the district director may grant an extension of time to make the modification if the failure to make the modification within the 12-month period was due to reasonable cause. In addition, the final regulations define the term *inadvertent change* to mean a change with respect to a person who has a power to make a substantial decision of the trust, if such change (if not

corrected) would cause an unintended change to the foreign or domestic residency of the trust.

## 3. Effect of Power To Veto Decisions

The proposed regulations define control to mean having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. Thus, if United States fiduciaries have the power to make all the substantial decisions of the trust, but a foreign person could veto one of the decisions, the trust would fail the control test and would be a foreign trust. A commentator disagrees with the conclusion that the power to veto decisions may be determinative of who has control.

The final regulations retain the definition of control set forth in the proposed regulations. The effect of a veto power is specifically noted in the legislative history. H.R. Rep. No. 542, Part 2, 104th Cong., 2d Sess. 31 (1996). Furthermore, control should be defined to mean full power over the trust consistent with a trustee's traditional role in trust administration. Accordingly, if a United States person only has the power to veto the decisions of a foreign trustee, the control test is not satisfied. Likewise, if a foreign person has the power to veto the decisions of a United States trustee, the control test is not satisfied. Thus, in both cases, the trust would be a foreign trust.

## 4. Power To Remove, Add, or Replace a Trustee

Some commentators disagree with treating a decision to remove, add, or replace a trustee as a substantial decision. Commentators also argue that the proposed regulations are not consistent with the rules that apply for determining the ownership of grantor trusts or with the rules for determining whether property is included in a decedent's estate for estate tax purposes. A commentator recommends that the final regulations provide that a decision to appoint a trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, without the power to remove the trustee, is not a substantial decision.

The IRS and the Treasury Department believe that the purpose of the control test is to determine the residence of a trust and therefore is different from the purpose of the rules for grantor trusts and for estate taxes. The final regulations continue to treat the decision to remove, add, or replace a trustee as a substantial decision. In addition, the final regulations provide

that the decision to appoint a successor fiduciary to succeed a fiduciary who has died, resigned, or otherwise ceased to act as a trustee, even if it is not accompanied by an unrestricted power to remove a trustee, is a substantial decision, unless this power is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa.

## 5. Investment Decisions

Commentators argue that investment decisions should not be treated as substantial decisions.

The final regulations continue to treat investment decisions as substantial decisions. However, the final regulations provide that if a United States fiduciary contracts for the services of an investment advisor, and the advisor's power to make investment decisions can be terminated at the will of the United States fiduciary, the United States fiduciary will be treated as retaining control over the investment decisions made by the investment advisor, whether the investment advisor is foreign or domestic.

## C. Transition Rule and Grandfathering Issues

### 1. Pre-existing Foreign Trusts

Commentators recommend various grandfathering rules for pre-existing foreign trusts that would allow them to remain treated as foreign trusts. A commentator recommends that a trust would be deemed to be a foreign trust prior to the effective date of section 7701(a) (30) and (31), as amended by the SBJP Act (new law), if the trust is treated as a foreign trust under the new law. In particular, the commentator expresses concern that some trusts believed to be foreign trusts under section 7701(a) (30) and (31), prior to amendment by the SBJP Act (prior law), may have in fact been domestic trusts under prior law. If such trusts qualify as foreign trusts under the new law, they will be considered to have changed their classification from domestic to foreign on January 1, 1997. Trusts that change from domestic to foreign may be subject to tax for the deemed transfer to a foreign trust under section 1491 (as in effect prior to its repeal by TRA 1997) and subject to penalties for failure to report such transfer under section 6677 if they continue to treat themselves as foreign trusts.

In addition, a commentator recommends that trusts that were formed prior to August 20, 1996, as group trust arrangements exempt from tax under sections 501(a) and 408(e) and

described in Rev. Rul. 81-100 (1981-1 C.B. 326) not be subject to section 7701(a) (30) and (31) as amended by the SBJP Act, but should be subject to section 7701(a) (30) and (31) as in effect prior to August 20, 1996.

The IRS and the Treasury Department do not believe that there is statutory authority for adopting the requested grandfathering rules for pre-existing foreign trusts or for applying prior law to group trust arrangements described in Rev. Rul. 81-100. The election provision included in TRA 1997 provides specific transition relief only for trusts that treated themselves as domestic trusts prior to August 20, 1996, not for trusts that treated themselves as foreign trusts. Therefore, the final regulations do not include the recommended transition rules.

## 2. Foreign Trust Safe Harbor

A commentator recommends that newly-created trusts established under foreign law should benefit from a foreign trust safe harbor. The commentator suggests a safe harbor that would provide that a trust established under foreign law, which does not by its terms provide for administration in the United States, and which does not file United States federal income tax returns as a United States trust will fail the court test and will be treated as a foreign trust unless the trust is described in § 301.7701-7(d)(2) (i) or (ii) of the proposed regulations (situations that meet the court test).

Given the statutory bias towards foreign trust classification, the IRS and Treasury Department do not agree that a safe harbor for foreign trusts is necessary because sufficient guidance is given as to the circumstances that will cause a trust to be foreign. Therefore, the final regulations do not include the recommended rules.

## D. Puerto Rico Trusts

The statute uses the term *the United States* in a geographical sense and thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See Section 7701(a)(9). Accordingly, a court within a territory or possession of the United States is not a court within the United States and all trusts subject to the supervision of such a court are thereby foreign. That rule was stated explicitly in the proposed regulations.

Some commentators argue that adverse tax consequences result from this rule. Therefore, they recommend that the final regulations provide, contrary to what the statute implies, that Puerto Rico courts are "courts within the United States" for purposes of

section 7701(a)(30)(E)(i) and, therefore, that Puerto Rico trusts will meet the court test.

The final regulations do not adopt the suggestion. Rather, the final regulations continue to provide that a trust that is subject to the primary supervision of the Puerto Rico courts will be treated as a foreign trust for federal tax purposes.

## E. Effective Date

The proposed regulations provide that the regulations would be applicable to trusts for taxable years beginning after December 31, 1996, and to trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the SBJP Act.

The final regulations modify the effective date in the proposed regulations. Except for § 301.7701-7(f) of the final regulations, which applies beginning February 2, 1999, the final regulations are applicable to trusts for taxable years ending after February 2, 1999. In addition, trusts may rely on the final regulations (i) for taxable years of the trusts beginning after December 31, 1996, and (ii) for taxable years ending after August 20, 1996, in the case of trusts electing under section 1907(a)(3)(B) of the SBJP Act.

If a trust is created after August 19, 1996, and before April 5, 1999, and the trust satisfies the control test set forth in the proposed regulations published under section 7701(a)(30) and (31) (62 FR 30796, June 5, 1997), but does not satisfy the control test set forth in the final regulations, the trust may be modified to satisfy the control test of the final regulations by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as satisfying the control test of the final regulations for taxable years beginning after December 31, 1996 (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

## Effect on Other Documents

Notice 98-25 (1998-18 I.R.B. 11) is obsolete as of February 2, 1999.

## Special Analyses

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It is hereby certified that the collections of information in these regulations will not have a significant economic impact on a substantial number of small entities. This certification is based upon the fact

that the estimated average burden per trust in complying with the collection of information in § 301.7701-7(d)(2)(ii) and (f) is 0.5 hours. In addition, each trust will only have to file the election statement to remain a domestic trust once. Therefore, a Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking preceding these regulations was submitted to the Small Business Administration for comment on its impact on small business.

Drafting Information: The principal author of these regulations is James A. Quinn of the Office of Assistant Chief Counsel (Passthroughs and Special Industries). However, other personnel from the IRS and Treasury Department participated in their development.

## List of Subjects

### 26 CFR Part 301

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

### 26 CFR Part 602

Reporting and recordkeeping requirements.

## Adoption of Amendments to the Regulations

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

## PART 301—PROCEDURE AND ADMINISTRATION

**Paragraph 1.** The authority citation for part 301 continues to read in part as follows:

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

### § 301.7701-5 [Amended]

**Par. 2.** The last sentence of § 301.7701-5 is removed.

**Par. 3.** Section 301.7701-7 is added to read as follows:

### § 301.7701-7 Trusts—domestic and foreign.

(a) *In general.* (1) A trust is a United States person if—

(i) A court within the United States is able to exercise primary supervision over the administration of the trust (court test); and

(ii) One or more United States persons have the authority to control all substantial decisions of the trust (control test).

(2) A trust is a United States person for purposes of the Internal Revenue Code (Code) on any day that the trust meets both the court test and the control

test. For purposes of the regulations in this chapter, the term *domestic trust* means a trust that is a United States person. The term *foreign trust* means any trust other than a domestic trust.

(3) Except as otherwise provided in part I, subchapter J, chapter 1 of the Code, the taxable income of a foreign trust is computed in the same manner as the taxable income of a nonresident alien individual who is not present in the United States at any time. Section 641(b). Section 7701(b) is not applicable to trusts because it only applies to individuals. In addition, a foreign trust is not considered to be present in the United States at any time for purposes of section 871(a)(2), which deals with capital gains of nonresident aliens present in the United States for 183 days or more.

(b) *Applicable law.* The terms of the trust instrument and applicable law must be applied to determine whether the court test and the control test are met.

(c) *The court test*—(1) *Safe harbor.* A trust satisfies the court test if—

(i) The trust instrument does not direct that the trust be administered outside of the United States;

(ii) The trust in fact is administered exclusively in the United States; and

(iii) The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section.

(2) *Example.* The following example illustrates the rule of paragraph (c)(1) of this section:

*Example.* A creates a trust for the equal benefit of A's two children, B and C. The trust instrument provides that DC, a State Y corporation, is the trustee of the trust. State Y is a state within the United States. DC administers the trust exclusively in State Y and the trust instrument is silent as to where the trust is to be administered. The trust is not subject to an automatic migration provision described in paragraph (c)(4)(ii) of this section. The trust satisfies the safe harbor of paragraph (c)(1) of this section and the court test.

(3) *Definitions.* The following definitions apply for purposes of this section:

(i) *Court.* The term *court* includes any federal, state, or local court.

(ii) *The United States.* The term *the United States* is used in this section in a geographical sense. Thus, for purposes of the court test, the United States includes only the States and the District of Columbia. See section 7701(a)(9). Accordingly, a court within a territory or possession of the United States or within a foreign country is not a court within the United States.

(iii) *Is able to exercise.* The term *is able to exercise* means that a court has

or would have the authority under applicable law to render orders or judgments resolving issues concerning administration of the trust.

(iv) *Primary supervision.* The term *primary supervision* means that a court has or would have the authority to determine substantially all issues regarding the administration of the entire trust. A court may have primary supervision under this paragraph (c)(3)(iv) notwithstanding the fact that another court has jurisdiction over a trustee, a beneficiary, or trust property.

(v) *Administration.* The term *administration* of the trust means the carrying out of the duties imposed by the terms of the trust instrument and applicable law, including maintaining the books and records of the trust, filing tax returns, managing and investing the assets of the trust, defending the trust from suits by creditors, and determining the amount and timing of distributions.

(4) *Situations that cause a trust to satisfy or fail to satisfy the court test.* (i) Except as provided in paragraph (c)(4)(ii) of this section, paragraphs (c)(4)(i) (A) through (D) of this section set forth some specific situations in which a trust satisfies the court test. The four situations described are not intended to be an exclusive list.

(A) *Uniform Probate Code.* A trust meets the court test if the trust is registered by an authorized fiduciary or fiduciaries of the trust in a court within the United States pursuant to a state statute that has provisions substantially similar to Article VII, *Trust Administration*, of the Uniform Probate Code, 8 Uniform Laws Annotated 1 (West Supp. 1998), available from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois 60611.

(B) *Testamentary trust.* In the case of a trust created pursuant to the terms of a will probated within the United States (other than an ancillary probate), if all fiduciaries of the trust have been qualified as trustees of the trust by a court within the United States, the trust meets the court test.

(C) *Inter vivos trust.* In the case of a trust other than a testamentary trust, if the fiduciaries and/or beneficiaries take steps with a court within the United States that cause the administration of the trust to be subject to the primary supervision of the court, the trust meets the court test.

(D) *A United States court and a foreign court are able to exercise primary supervision over the administration of the trust.* If both a United States court and a foreign court are able to exercise primary supervision

over the administration of the trust, the trust meets the court test.

(ii) *Automatic migration provisions.* Notwithstanding any other provision in this section, a court within the United States is not considered to have primary supervision over the administration of the trust if the trust instrument provides that a United States court's attempt to assert jurisdiction or otherwise supervise the administration of the trust directly or indirectly would cause the trust to migrate from the United States. However, this paragraph (c)(4)(ii) will not apply if the trust instrument provides that the trust will migrate from the United States only in the case of foreign invasion of the United States or widespread confiscation or nationalization of property in the United States.

(5) *Examples.* The following examples illustrate the rules of this paragraph (c):

*Example 1.* A, a United States citizen, creates a trust for the equal benefit of A's two children, both of whom are United States citizens. The trust instrument provides that DC, a domestic corporation, is to act as trustee of the trust and that the trust is to be administered in Country X, a foreign country. DC maintains a branch office in Country X with personnel authorized to act as trustees in Country X. The trust instrument provides that the law of State Y, a state within the United States, is to govern the interpretation of the trust. Under the law of Country X, a court within Country X is able to exercise primary supervision over the administration of the trust. Pursuant to the trust instrument, the Country X court applies the law of State Y to the trust. Under the terms of the trust instrument the trust is administered in Country X. No court within the United States is able to exercise primary supervision over the administration of the trust. The trust fails to satisfy the court test and therefore is a foreign trust.

*Example 2.* A, a United States citizen, creates a trust for A's own benefit and the benefit of A's spouse, B, a United States citizen. The trust instrument provides that the trust is to be administered in State Y, a state within the United States, by DC, a State Y corporation. The trust instrument further provides that in the event that a creditor sues the trustee in a United States court, the trust will automatically migrate from State Y to Country Z, a foreign country, so that no United States court will have jurisdiction over the trust. A court within the United States is not able to exercise primary supervision over the administration of the trust because the United States court's jurisdiction over the administration of the trust is automatically terminated in the event the court attempts to assert jurisdiction. Therefore, the trust fails to satisfy the court test from the time of its creation and is a foreign trust.

(d) *Control test*—(1) *Definitions*—(i) *United States person.* The term *United States person* means a United States

person within the meaning of section 7701(a)(30). For example, a domestic corporation is a United States person, regardless of whether its shareholders are United States persons.

(ii) *Substantial decisions.* The term *substantial decisions* means those decisions that persons are authorized or required to make under the terms of the trust instrument and applicable law and that are not ministerial. Decisions that are ministerial include decisions regarding details such as the bookkeeping, the collection of rents, and the execution of investment decisions. Substantial decisions include, but are not limited to, decisions concerning—

- (A) Whether and when to distribute income or corpus;
- (B) The amount of any distributions;
- (C) The selection of a beneficiary;
- (D) Whether a receipt is allocable to income or principal;
- (E) Whether to terminate the trust;
- (F) Whether to compromise, arbitrate, or abandon claims of the trust;
- (G) Whether to sue on behalf of the trust or to defend suits against the trust;
- (H) Whether to remove, add, or replace a trustee;

(I) Whether to appoint a successor trustee to succeed a trustee who has died, resigned, or otherwise ceased to act as a trustee, even if the power to make such a decision is not accompanied by an unrestricted power to remove a trustee, unless the power to make such a decision is limited such that it cannot be exercised in a manner that would change the trust's residency from foreign to domestic, or vice versa; and

(J) Investment decisions; however, if a United States person under section 7701(a)(30) hires an investment advisor for the trust, investment decisions made by the investment advisor will be considered substantial decisions controlled by the United States person if the United States person can terminate the investment advisor's power to make investment decisions at will.

(iii) *Control.* The term *control* means having the power, by vote or otherwise, to make all of the substantial decisions of the trust, with no other person having the power to veto any of the substantial decisions. To determine whether United States persons have control, it is necessary to consider all persons who have authority to make a substantial decision of the trust, not only the trust fiduciaries.

(iv) *Treatment of certain employee benefit trusts.* Provided that United States fiduciaries control all of the substantial decisions made by the trustees or fiduciaries, the following

types of trusts are deemed to satisfy the control test set forth in paragraph (a)(1)(ii) of this section—

- (A) A qualified trust described in section 401(a);
- (B) A trust described in section 457(g);
- (C) A trust that is an individual retirement account described in section 408(a);
- (D) A trust that is an individual retirement account described in section 408(k) or 408(p);
- (E) A trust that is a Roth IRA described in section 408A;
- (F) A trust that is an education individual retirement account described in section 530;
- (G) A trust that is a voluntary employees' beneficiary association described in section 501(c)(9);
- (H) Such additional categories of trusts as the Commissioner may designate in revenue procedures, notices, or other guidance published in the Internal Revenue Bulletin (see § 601.601(d)(2)(ii)(b)).

(v) *Examples.* The following examples illustrate the rules of paragraph (d)(1) of this section:

*Example 1.* Trust has three fiduciaries, A, B, and C. A and B are United States citizens and C is a nonresident alien. No persons except the fiduciaries have authority to make any decisions of the trust. The trust instrument provides that no substantial decisions of the trust can be made unless there is unanimity among the fiduciaries. The control test is not satisfied because United States persons do not control all the substantial decisions of the trust. No substantial decisions can be made without C's agreement.

*Example 2.* Assume the same facts as in *Example 1*, except that the trust instrument provides that all substantial decisions of the trust are to be decided by a majority vote among the fiduciaries. The control test is satisfied because a majority of the fiduciaries are United States persons and therefore United States persons control all the substantial decisions of the trust.

*Example 3.* Assume the same facts as in *Example 2*, except that the trust instrument directs that C is to make all of the trust's investment decisions, but that A and B may veto C's investment decisions. A and B cannot act to make the investment decisions on their own. The control test is not satisfied because the United States persons, A and B, do not have the power to make all of the substantial decisions of the trust.

*Example 4.* Assume the same facts as in *Example 3*, except A and B may accept or veto C's investment decisions and can make investments that C has not recommended. The control test is satisfied because the United States persons control all substantial decisions of the trust.

(2) *Replacement of any person who had authority to make a substantial decision of the trust—(i) Replacement within 12 months.* In the event of an

inadvertent change in any person that has the power to make a substantial decision of the trust that would cause the domestic or foreign residency of the trust to change, the trust is allowed 12 months from the date of the change to make necessary changes either with respect to the persons who control the substantial decisions or with respect to the residence of such persons to avoid a change in the trust's residency. For purposes of this section, an inadvertent change means the death, incapacity, resignation, change in residency or other change with respect to a person that has a power to make a substantial decision of the trust that would cause a change to the residency of the trust but that was not intended to change the residency of the trust. If the necessary change is made within 12 months, the trust is treated as retaining its pre-change residency during the 12-month period. If the necessary change is not made within 12 months, the trust's residency changes as of the date of the inadvertent change.

(ii) *Request for extension of time.* If reasonable actions have been taken to make the necessary change to prevent a change in trust residency, but due to circumstances beyond the trust's control the trust is unable to make the modification within 12 months, the trust may provide a written statement to the district director having jurisdiction over the trust's return setting forth the reasons for failing to make the necessary change within the required time period. If the district director determines that the failure was due to reasonable cause, the district director may grant the trust an extension of time to make the necessary change. Whether an extension of time is granted is in the sole discretion of the district director and, if granted, may contain such terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries. If the district director does not grant an extension, the trust's residency changes as of the date of the inadvertent change.

(iii) *Examples.* The following examples illustrate the rules of paragraphs (d)(2)(i) and (ii) of this section:

*Example 1.* A trust that satisfies the court test has three fiduciaries, A, B, and C. A and B are United States citizens and C is a nonresident alien. All decisions of the trust are made by majority vote of the fiduciaries. The trust instrument provides that upon the death or resignation of any of the fiduciaries, D, is the successor fiduciary. A dies and D automatically becomes a fiduciary of the trust. When D becomes a fiduciary of the trust, D is a nonresident alien. Two months

after *A* dies, *B* replaces *D* with *E*, a United States person. Because *D* was replaced with *E* within 12 months after the date of *A*'s death, during the period after *A*'s death and before *E* begins to serve, the trust satisfies the control test and remains a domestic trust.

*Example 2.* Assume the same facts as in *Example 1* except that at the end of the 12-month period after *A*'s death, *D* has not been replaced and remains a fiduciary of the trust. The trust becomes a foreign trust on the date *A* died unless the district director grants an extension of the time period to make the necessary change.

(3) *Automatic migration provisions.* Notwithstanding any other provision in this section, United States persons are not considered to control all substantial decisions of the trust if an attempt by any governmental agency or creditor to collect information from or assert a claim against the trust would cause one or more substantial decisions of the trust to no longer be controlled by United States persons.

(4) *Examples.* The following examples illustrate the rules of this paragraph (d):

*Example 1.* *A*, a nonresident alien individual, is the grantor and, during *A*'s lifetime, the sole beneficiary of a trust that qualifies as an individual retirement account (IRA). *A* has the exclusive power to make decisions regarding withdrawals from the IRA and to direct its investments. The IRA's sole trustee is a United States person within the meaning of section 7701(a)(30). The control test is satisfied with respect to this trust because the special rule of paragraph (d)(1)(iv) of this section applies.

*Example 2.* *A*, a nonresident alien individual, is the grantor of a trust and has the power to revoke the trust, in whole or in part, and revest assets in *A*. *A* is treated as the owner of the trust under sections 672(f) and 676. *A* is not a fiduciary of the trust. The trust has one trustee, *B*, a United States person, and the trust has one beneficiary, *C*. *B* has the discretion to distribute corpus or income to *C*. In this case, decisions exercisable by *A* to have trust assets distributed to *A* are substantial decisions. Therefore, the trust is a foreign trust because *B* does not control all substantial decisions of the trust.

*Example 3.* A trust, Trust T, has two fiduciaries, *A* and *B*. Both *A* and *B* are United States persons. *A* and *B* hire *C*, an investment advisor who is a foreign person, and may terminate *C*'s employment at will. The investment advisor makes the investment decisions for the trust. *A* and *B* control all other decisions of the trust. Although *C* has the power to make investment decisions, *A* and *B* are treated as controlling these decisions. Therefore, the control test is satisfied.

*Example 4.* *G*, a United States citizen, creates a trust. The trust provides for income to *A* and *B* for life, remainder to *A*'s and *B*'s descendants. *A* is a nonresident alien and *B* is a United States person. The trustee of the trust is a United States person. The trust instrument authorizes *A* to replace the trustee. The power to replace the trustee is

a substantial decision. Because *A*, a nonresident alien, controls a substantial decision, the control test is not satisfied.

(e) *Effective date—(1) General rule.* Except for the election to remain a domestic trust provided in paragraph (f) of this section, this section is applicable to trusts for taxable years ending after February 2, 1999. This section may be relied on by trusts for taxable years beginning after December 31, 1996, and also may be relied on by trusts whose trustees have elected to apply sections 7701(a)(30) and (31) to the trusts for taxable years ending after August 20, 1996, under section 1907(a)(3)(B) of the Small Business Job Protection Act of 1996, (the SBJP Act) Public Law 104-188, 110 Stat. 1755 (26 U.S.C. 7701 note).

(2) *Trusts created after August 19, 1996.* If a trust is created after August 19, 1996, and before April 5, 1999, and the trust satisfies the control test set forth in the regulations project REG-251703-96 published under section 7701(a)(30) and (31) (1997-1 C.B. 795) (See § 601.601(d)(2) of this chapter), but does not satisfy the control test set forth in paragraph (d) of this section, the trust may be modified to satisfy the control test of paragraph (d) by December 31, 1999. If the modification is completed by December 31, 1999, the trust will be treated as satisfying the control test of paragraph (d) for taxable years beginning after December 31, 1996, (and for taxable years ending after August 20, 1996, if the election under section 1907(a)(3)(B) of the SBJP Act has been made for the trust).

(f) *Election to remain a domestic trust—(1) Trusts eligible to make the election to remain domestic.* A trust that was in existence on August 20, 1996, and that was treated as a domestic trust on August 19, 1996, as provided in paragraph (f)(2) of this section, may elect to continue treatment as a domestic trust notwithstanding section 7701(a)(30)(E). This election is not available to a trust that was wholly-owned by its grantor under subpart E, part I, subchapter J, chapter 1, of the Code on August 20, 1996. The election is available to a trust if only a portion of the trust was treated as owned by the grantor under subpart E on August 20, 1996. If a partially-owned grantor trust makes the election, the election is effective for the entire trust. Also, a trust may not make the election if the trust has made an election pursuant to section 1907(a)(3)(B) of the SBJP Act to apply the new trust criteria to the first taxable year of the trust ending after August 20, 1996, because that election, once made, is irrevocable.

(2) *Determining whether a trust was treated as a domestic trust on August 19, 1996—(i) Trusts filing Form 1041 for the taxable year that includes August 19, 1996.* For purposes of the election, a trust is considered to have been treated as a domestic trust on August 19, 1996, if: the trustee filed a Form 1041, "U.S. Income Tax Return for Estates and Trusts," for the trust for the period that includes August 19, 1996 (and did not file a Form 1040NR, "U.S. Nonresident Alien Income Tax Return," for that year); and the trust had a reasonable basis (within the meaning of section 6662) under section 7701(a)(30) prior to amendment by the SBJP Act (prior law) for reporting as a domestic trust for that period.

(ii) *Trusts not filing a Form 1041.* Some domestic trusts are not required to file Form 1041. For example, certain group trusts described in Rev. Rul. 81-100 (1981-1 C.B. 326) (See § 601.601(d)(2) of this chapter) consisting of trusts that are parts of qualified retirement plans and individual retirement accounts are not required to file Form 1041. Also, a domestic trust whose gross income for the taxable year is less than the amount required for filing an income tax return and that has no taxable income is not required to file a Form 1041. Section 6012(a)(4). For purposes of the election, a trust that filed neither a Form 1041 nor a Form 1040NR for the period that includes August 19, 1996, will be considered to have been treated as a domestic trust on August 19, 1996, if the trust had a reasonable basis (within the meaning of section 6662) under prior law for being treated as a domestic trust for that period and for filing neither a Form 1041 nor a Form 1040NR for that period.

(3) *Procedure for making the election to remain domestic—(i) Required Statement.* To make the election, a statement must be filed with the Internal Revenue Service in the manner and time described in this section. The statement must be entitled "Election to Remain a Domestic Trust under Section 1161 of the Taxpayer Relief Act of 1997," be signed under penalties of perjury by at least one trustee of the trust, and contain the following information—

(A) A statement that the trust is electing to continue to be treated as a domestic trust under section 1161 of the Taxpayer Relief Act of 1997;

(B) A statement that the trustee had a reasonable basis (within the meaning of section 6662) under prior law for treating the trust as a domestic trust on August 19, 1996. (The trustee need not

explain the reasonable basis on the election statement.);

(C) A statement either that the trust filed a Form 1041 treating the trust as a domestic trust for the period that includes August 19, 1996, (and that the trust did not file a Form 1040NR for that period), or that the trust was not required to file a Form 1041 or a Form 1040NR for the period that includes August 19, 1996, with an accompanying brief explanation as to why a Form 1041 was not required to be filed; and

(D) The name, address, and employer identification number of the trust.

(ii) *Filing the required statement with the Internal Revenue Service.* (A) Except as provided in paragraphs (f)(3)(ii)(E) through (G) of this section, the trust must attach the statement to a Form 1041. The statement may be attached to either the Form 1041 that is filed for the first taxable year of the trust beginning after December 31, 1996 (1997 taxable year), or to the Form 1041 filed for the first taxable year of the trust beginning after December 31, 1997 (1998 taxable year). The statement, however, must be filed no later than the due date for filing a Form 1041 for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated. If the trust filed a Form 1041 for the 1997 taxable year without the statement attached, the statement should be attached to the Form 1041 filed for the 1998 taxable year.

(B) If the trust has insufficient gross income and no taxable income for its 1997 or 1998 taxable year, or both, and therefore is not required to file a Form 1041 for either or both years, the trust must make the election by filing a Form 1041 for either the 1997 or 1998 taxable year with the statement attached (even though not otherwise required to file a Form 1041 for that year). The trust should only provide on the Form 1041 the trust's name, name and title of fiduciary, address, employer identification number, date created, and type of entity. The statement must be attached to a Form 1041 that is filed no later than October 15, 1999.

(C) If the trust files a Form 1040NR for the 1997 taxable year based on application of new section 7701(a)(30)(E) to the trust, and satisfies paragraph (f)(1) of this section, in order for the trust to make the election the trust must file an amended Form 1040NR return for the 1997 taxable year. The trust must note on the amended Form 1040NR that it is making an election under section 1161 of the Taxpayer Relief Act of 1997. The trust must attach to the amended Form 1040NR the statement required by

paragraph (f)(3)(i) of this section and a completed Form 1041 for the 1997 taxable year. The items of income, deduction and credit of the trust must be excluded from the amended Form 1040NR and reported on the Form 1041. The amended Form 1040NR for the 1997 taxable year, with the statement and the Form 1041 attached, must be filed with the Philadelphia Service Center no later than the due date, plus extensions, for filing a Form 1041 for the 1998 taxable year.

(D) If a trust has made estimated tax payments as a foreign trust based on application of section 7701(a)(30)(E) to the trust, but has not yet filed a Form 1040NR for the 1997 taxable year, when the trust files its Form 1041 for the 1997 taxable year it must note on its Form 1041 that it made estimated tax payments based on treatment as a foreign trust. The Form 1041 must be filed with the Philadelphia Service Center (and not with the service center where the trust ordinarily would file its Form 1041).

(E) If a trust forms part of a qualified stock bonus, pension, or profit sharing plan, the election provided by this paragraph (f) must be made by attaching the statement to the plan's annual return required under section 6058 (information return) for the first plan year beginning after December 31, 1996, or to the plan's information return for the first plan year beginning after December 31, 1997. The statement must be attached to the plan's information return that is filed no later than the due date for filing the plan's information return for the first plan year beginning after December 31, 1997, plus extensions. The election will be effective for the first plan year beginning after December 31, 1996, and thereafter, until revoked or terminated.

(F) Any other type of trust that is not required to file a Form 1041 for the taxable year, but that is required to file an information return (for example, Form 5227) for the 1997 or 1998 taxable year must attach the statement to the trust's information return for the 1997 or 1998 taxable year. However, the statement must be attached to an information return that is filed no later than the due date for filing the trust's information return for the 1998 taxable year, plus extensions. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(G) A group trust described in Rev. Rul. 81-100 consisting of trusts that are parts of qualified retirement plans and individual retirement accounts (and any other trust that is not described above and that is not required to file a Form

1041 or an information return) need not attach the statement to any return and should file the statement with the Philadelphia Service Center. The trust must make the election provided by this paragraph (f) by filing the statement by October 15, 1999. The election will be effective for the 1997 taxable year, and thereafter, until revoked or terminated.

(iii) *Failure to file the statement in the required manner and time.* If a trust fails to file the statement in the manner or time provided in paragraphs (f)(3)(i) and (ii) of this section, the trustee may provide a written statement to the district director having jurisdiction over the trust setting forth the reasons for failing to file the statement in the required manner or time. If the district director determines that the failure to file the statement in the required manner or time was due to reasonable cause, the district director may grant the trust an extension of time to file the statement. Whether an extension of time is granted shall be in the sole discretion of the district director. However, the relief provided by this paragraph (f)(3)(iii) is not ordinarily available if the statute of limitations for the trust's 1997 taxable year has expired. Additionally, if the district director grants an extension of time, it may contain terms with respect to assessment as may be necessary to ensure that the correct amount of tax will be collected from the trust, its owners, and its beneficiaries.

(4) *Revocation or termination of the election—(i) Revocation of election.* The election provided by this paragraph (f) to be treated as a domestic trust may only be revoked with the consent of the Commissioner. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(ii) *Termination of the election.* An election under this paragraph (f) to remain a domestic trust terminates if changes are made to the trust subsequent to the effective date of the election that result in the trust no longer having any reasonable basis (within the meaning of section 6662) for being treated as a domestic trust under section 7701(a)(30) prior to its amendment by the SBJP Act. The termination of the election will result in the trust changing its residency from a domestic trust to a foreign trust on the effective date of the termination of the election. See sections 684, 6048, and 6677 for the federal tax consequences and reporting requirements related to the change in trust residence.

(5) *Effective date.* This paragraph (f) is applicable beginning on February 2, 1999.

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

**Par. 4.** The authority citation for part 602 continues to read as follows:

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

**Par. 5.** In § 602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

**§ 602.101 OMB Control numbers.**

CFR part of section where identified and described	Current OMB control No.
301.7701-7	1545-1600

Dated: January 13, 1999.

**Robert E. Wenzel,**  
*Deputy Commissioner of Internal Revenue.*

**Donald C. Lubick,**  
*Assistant Secretary of the Treasury.*

[FR Doc. 99-1892 Filed 2-1-99; 8:45 am]

BILLING CODE 4830-01-U

**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 136**

[FRL-6227-4]

**Whole Effluent Toxicity: Guidelines Establishing Test Procedures for the Analysis of Pollutants; Final Rule, Technical Corrections**

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

**ACTION:** Final rule, technical corrections.

**SUMMARY:** EPA is amending the "Guideline Establishing Test Procedures for the Analysis of Pollutants" at 40 CFR part 136 for whole effluent toxicity (WET) testing under the Clean Water Act, and also is amending three technical documents incorporated by reference in those regulations. The amendments correct minor errors and omissions, provide technical clarifications, and establish consistency among the technical documents.

**DATES:** These corrections are effective March 4, 1999. The incorporation by reference of the publication dates listed in this rule is approved by the Director of the Office of the Federal Register on March 4, 1999. In accordance with 40 CFR 23.2, this rule shall be considered issued for the purposes of judicial

review February 16, 1999, at 1:00 pm EST.

**FOR FURTHER INFORMATION CONTACT:** Marion Thompson, Engineering and Analysis Division (4303), U.S. Environmental Protection Agency, Office of Science and Technology, 401 M Street, SW, Washington, DC 20460, or call (202) 260-7117; or Teresa J. Norberg-King, National Health and Environmental Effects Research Laboratory, Mid-Continent Ecology Division, Office of Research and Development, U.S. Environmental Protection Agency, 6201 Congdon Boulevard, Duluth, MN 55804, or call (218) 529-5163.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In 1995, EPA amended the "Guidelines Establishing Test Procedures for the Analysis of Pollutants," 40 CFR part 136, to add whole effluent toxicity (WET) testing methods to the list of Agency approved methods in Tables IA and II, for data gathering and compliance monitoring under the Clean Water Act (60 FR 53529, October 16, 1995). This "WET final rule" amended 40 CFR 136.3 by adding methods that employ standardized freshwater, marine, and estuarine vertebrates, invertebrates, and plants to directly measure the acute and short-term chronic toxicity of effluents and receiving waters. The WET final rule incorporated the following three technical documents by reference: Methods for Measuring the Acute Toxicity of Effluents and Receiving Water to Freshwater and Marine Organisms; Fourth Edition, August 1993 (EPA/600/4-90/027F); Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Water to Freshwater Organisms, Third Edition, July 1994 (EPA/600/4-91/002); and Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Water to Marine and Estuarine Organisms, Second Edition, July 1994 (EPA/600/4-91/003).

The WET final rule and the aquatic toxicity test manuals contained various minor errors; today's amendments correct typographical errors and minor omissions. These amendments also provide technical clarifications and changes for consistency among the three test manuals.

The Administrative Procedure Act, 5 U.S.C. 553, states that when an Agency finds good cause, it may issue a rule without first providing for notice and comment. This rule corrects typographical errors and minor omissions, and provides consistency

among the WET final rule and the aquatic toxicity test manuals incorporated by reference at 40 CFR 136.3. Today's revisions eliminate confusion and provide clarification. The revisions are not substantive. Most of these minor, non-substantive corrections were brought to the Agency's attention by the public. Therefore, prior notice and public opportunity for comment is unnecessary.

**II. Corrections to the Regulation**

This rule corrects typographical errors and minor omissions and provides consistency in the regulatory language and the three aquatic toxicity test manuals incorporated by reference in the WET final rule. Corrections include replacing or amending text with appropriate wording for clarification and consistency.

Specifically, this rule corrects a typographical error in the regulatory language for the WET final rule in Table II at § 136.3(e) by changing the "maximum holding time" for aquatic toxicity tests from 6 hours to 36 hours. Despite the inclusion of the correct 36 hour maximum holding time in the aquatic toxicity test manuals, 6 hours was inadvertently listed in the regulatory language for the WET final rule. The Agency's intention was to include the 36 hour maximum holding time in the regulatory language for the WET final rule.

This rule also incorporates by reference an "errata" document that lists specific corrections to each aquatic toxicity test manual incorporated by reference in the WET final rule. The following three paragraphs (A, B, and C) describe the errata for each aquatic toxicity methods manual and address specific corrections included in each manual that the Agency believes require further explanation. The title of the errata document is: Errata for the Effluent and Receiving Water Toxicity Testing Manuals: Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms; Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms; and Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms (EPA-600/R-98/182, January 1999). A listing of the reference for this errata document and where it can be viewed or obtained is provided in Sections IV and V of this notice.

### A. Corrections to Acute Manual

There are eight items in the errata: Methods for Measuring the Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms (hereinafter, acute manual). Four items (Items 1, 2, 3 and 7) establish consistent language among the three test manuals to prevent confusion. When the WET rule was promulgated in 1995, the language in the acute manual should have been the same as the language included in the other two manuals. Upon close consideration after rulemaking, it became apparent that the acute manual (published in 1993) did not include portions of the other manuals (published in 1994). Today's amendments, by incorporation of the errata document, correct those omissions. Items 4 and 8 correct typographical errors and minor omissions. Items 5 and 6 correct typographical errors to avoid confusion regarding the supplemental test species list (Appendix B) and the recommended test conditions for *Cyprinella leedsi* and *Holmesimysis costata*. The name change of the species *Notropis leedsi* to *Cyprinella leedsi* occurred after publication of acute manual and the correct reference for this change is now cited.

### B. Corrections to Freshwater Chronic Manual

There are 10 items in the errata: Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms (hereinafter, freshwater chronic manual). For Item 1, the section regarding effluent sampling in the freshwater chronic manual are identical to those included in the acute manual. This language is inappropriate and not intended for chronic tests because excessive testing would be done and flow-through tests are not conducted for the short-term tests in the freshwater chronic manual. Items 2 and 3 clarify the wording that describes the handling and feeding of nauplii. Items 4, 5, 6, 7, and 9 are minor typographical corrections. Item 8 provides consistency in terminology and prevents confusion in the reporting of survival values in the test controls and the mean number of young per female for the *Ceriodaphnia dubia* test. Item 10 corrects errors made in presenting the LC<sub>50</sub> value.

### C. Corrections to Marine and Estuarine Chronic Manual

There are nine items in the errata: Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and

Estuarine Organisms (hereinafter, marine and estuarine chronic manual). For Item 1, the section regarding effluent sampling in the marine and estuarine chronic manual are identical to those included in the acute manual. This language is inappropriate and not intended for chronic tests and would, therefore, cause excessive testing because flow-through tests are not included for the short-term chronic tests included in the marine and estuarine chronic manual. Items 2, 4, 5, 6, 7, 8 and 9 correct typographical errors. Item 3 corrects an inconsistency between the tabulated data and the probit analysis of that data.

### III. Administrative Requirements

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and is therefore not subject to review by the Office of Management and Budget. In addition, this action does not impose any enforceable duty, contain any unfunded mandate, or impose any significant or unique impact on small governments as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4). This rule also does not require prior consultation with State, local, and tribal government officials as specified by Executive Order 12875 (58 FR 58093, October 23, 1993) or Executive Order 13084 (63 FR 27655, May 10, 1998), or involve special consideration of environmental justice related issues as required by Executive Order 12898 (59 FR 7629, February 16, 1994). Because this action is not subject to notice-and-comment requirements under the Administrative Procedure Act or any other statute, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). This rule also is not subject to Executive Order 13045 (62 FR 19885, April 23, 1997) because EPA interprets E.O. 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5-501 of the Order has the potential to influence the regulation. This rule is not subject to E.O. 13045 because it does not establish an environmental standard intended to mitigate health or safety risks. This action contains no information collection requirements. Therefore, no information collection request has been submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of Congress and to the Comptroller General of the United States. However, section 808 provides that any rule for which the issuing agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rule) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest, shall take effect at such time as the Agency promulgating the rule determines. 5 U.S.C. 808(2). As stated previously, EPA has made such a good cause finding, including the reasons therefor, and established an effective date of March 4, 1999. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. 804(2).

### IV. Materials Incorporated by Reference Into 40 CFR Part 136

USEPA, 1999. Errata for the Effluent and Receiving Water Toxicity Testing Manuals: Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms; Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms; and Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms. January 1999. U.S. Environmental Protection Agency, Office of Research and Development, Duluth, MN. EPA-600/R-98/182.

### V. Public Availability of Materials To Be Incorporated by Reference

The full text of the errata document incorporated by reference in today's rulemaking will be available to the general public from the following sources:

*Water Docket*: Paper version of the errata document, along with the public record for this rule and the WET final rule, are available from the U.S. Environmental Protection Agency, Water Docket, 401 M Street SW, Washington, DC 20460. For access to these materials, call 202-260-3027 on Monday through Friday, excluding Federal holidays, between 9:00 a.m. and 3:30 p.m. Eastern Time for an appointment.

*Internet:* Electronic version is available via the Internet at <http://www.epa.gov/OST>.

*National Center for Environmental Publications and Information (NCEPI):* Electronic or paper version is available from the U.S. Environmental Protection Agency, National Center for Environmental Publications and Information (NCEPI), P.O. Box 42419, Cincinnati, OH 45242 by phone at 1-800/490-9198, fax at (513) 489-8695, or via the Internet at <http://www.epa.gov/ncepihom>.

*EPA Office of Water Resource Center:* Electronic or paper version is available from the Water Resource Center, 401 M Street, SW, Washington, DC 20460 by phone at (202) 260-7786.

*EPA Regional Office Libraries:* EPA has 10 Regional offices around the country, each with a publicly accessible library. Copies of the errata document can be viewed and copied at these EPA Regional libraries: EPA Region 1, JFK Federal Building, One Congress Street, Boston, MA 02203-0001, (617) 918-1111; EPA Region 2, 290 Broadway, New York, NY 10007, (212) 637-3185; EPA Region 3, 1650 Arch Street, Philadelphia, PA 19103-2029, (215) 814-5000; EPA Region 4, Sam Nunn Atlanta Federal Center, 61 Forsythe Street SW, Atlanta, GA 30303, (404) 562-8190; EPA Region 5, 77 West Jackson Blvd., Chicago, IL 60604-3507, (312) 353-2022; EPA Region 6, First Interstate Bank Tower at Fountain Place, 1445 Ross Avenue, 12th Floor, Suite 1200, Dallas, TX 75202-2733, (214) 665-6424; EPA Region 7, 726 Minnesota Avenue, Kansas City, KS 66101, (913) 551-7003; EPA Region 8, 999 18th Street, Suite 500, Denver, CO 80202-2466, (303) 312-6312; EPA Region 9, 75 Hawthorne Street, San Francisco, CA 94105, (415) 744-1570; EPA Region 10, 1200 Sixth Avenue, Seattle, WA 98101, (206) 553-1200.

*Public Libraries:* A summary of this rule and the errata document have been placed in the combined catalogues of the Online Computer Library Center (OCLC) in Columbus, Ohio, available to all member libraries across the country (approximately 13,000). This summary will facilitate public access through interlibrary loans from the Regional EPA libraries. Through OCLC, EPA has placed the summary and access information in the Online Library System. Finally, EPA has provided the national association of public libraries with a summary of this rule and the errata document as a way of emphasizing their availability.

The errata document will also be available for viewing and copying through the following state library

associations: Alabama Library Association, 400 S. Union Street, Suite 140, Montgomery, AL 36104; Alaska Library Association, PO Box 81084, Fairbanks, AL 99708-1084; Arizona State Library Association, 14449 North 73rd Street, Scottsdale, AZ 85260-7838; Arkansas Library Association, 9 Shackelford Plaza, Suite 1, Little Rock, AR 72203; California Library Association, 717 K. Street, Suite 300, Sacramento, CA 95814-3477; Colorado Library Association, 4350 Wadsworth Boulevard, #340, Wheat Ridge, CO 80033; Connecticut Library Association, Franklin Commons, 106 Route 32, Franklin, CT 06254; Delaware Library Association, PO Box 816, Wilmington, DE 19903; District of Columbia Library Association, PO Box 14177, Benjamin Franklin Station, Washington, DC 20044; Florida Library Association, 1133 W. Morse Blvd., Winter Park, FL 32789-3788; Georgia Library Association, c/o SOLINET, 1438 West Peachtree Street NW, Atlanta, GA 30309-2955; Guam Library Association, PO Box 22515 GFM, Barrigada, GU 96921; Hawaii Library Association, PO Box 4441, Honolulu, HI 96813; Idaho Library Association, 3577 East Pecan, Boise, ID 83716-7115; Illinois Library Association, 33 W. Grand Avenue, #301, Chicago, IL 60610; Indiana Library Federation 6408 Carrollton Avenue, Indianapolis, IN 46220-1615; Iowa Library Association, 505 Fifth Avenue, Suite 823, Des Moines, IA 50309; Kansas Library Association, South Central Kansas Library System, 901 N. Main, Hutchinson, KS 67501-4401; Kentucky Library Association, 1501 Twilight Tr., Frankfort, KY 40601; Louisiana Library Association, PO Box 3058, Baton Rouge, LA 70821; Maine Library Association, Community Drive, Augusta, ME 04330; Maryland Library Association, 400 Cathedral Street, 3rd Floor, Baltimore, MD 21201; Massachusetts Library Association, Countryside Offices 707 Turnpike St., North Andover, MA 08145; Michigan Library Association, 6810 S. Cedar, Suite 6, Lansing, MI 48911; Minnesota Library Association, 1315 Lowrey Avenue, N. Minneapolis, MN 55411-1398; Mississippi Library Association, PO Box 20488, Jackson, MS 39289-1448; Missouri Library Association, 1306 Business 63 South, Suite B, Columbia, MO 65201; Montana Library Association, 507 Fifth Avenue, Helena, MT 59601-4359; Nebraska Library Association, 1422 Boswell Avenue, Box 98, Crete, NE 68333; Nevada Library Association, 100 Stewart Street, Carson City, NV 89710; New Hampshire Library Association, PO Box 2322, Concord, NH

03235; New Jersey Library Association, Box 1534, Trenton, NJ 08607; New Mexico Library Association, PO Box 26074, Albuquerque, NM 87125; New York Library Association, 252 Hudson Avenue, Albany, NY 12210; North Carolina Library Association, State Library of North Carolina, 109 East Jones Street, Raleigh, NC 27601; North Dakota Library Association, University of North Dakota-Lake Region, 1800 N. College Drive, Devil's Lake, ND 58301; Ohio Library Council, 35 E. Gay Street, Suite 305, Columbus, OH 43215; Oklahoma Library Association, 300 Hardy Drive, Edmond, OK 73013; Oregon Library Association, PO Box 2042, Salem, OR 97308; Pennsylvania Library Association, 1919 N. Front Street, Harrisburg, PA 17110; Rhode Island Library Association, PO Box 7858, Warwick, RI 02887-7858; South Carolina Library Association, PO Box 219, Goose Creek, SC 29445; South Dakota Library Association, PO Box 673, Pierre, SD 57501; Tennessee Library Association, PO Box 158417, Nashville, TN 37215-8417; Texas Library Association, 3355 Bee Cave Road, #401, Austin, TX 78746; Utah Library Association, PO Box 711789, Salt Lake City, UT 84171-1789; Vermont Library Association, Box 803, Burlington, VT 05402-0803; St. Thomas/St. John Library Association, University of Virgin Islands, St. Thomas, VI 00802; St. Croix Library Association, PO Box 306164, Veterans Drive Station, Charlotte Amalie, VI 00803; Virginia Library Association, PO Box 8277, Norfolk, VA 23503-0277; Washington Library Association, 4016 First Avenue NE, Seattle, WA 98105-6502; West Virginia Library Association, PO Box 5221, Charleston, WV 25361; Wisconsin Library Association, 5250 East Terrace Drive, Suite A, Madison, WI 53718-8345; Wyoming Library Association, Sweetwater County Library, PO Box 550, Green River, WY 82935.

A limited number of copies of the errata document incorporated by reference will be available from the EPA Regional offices and the State NPDES permitting offices. Finally, after first printing, copies will be available from the National Technical Information Service (NTIS), Springfield, VA by phone at (703) 487-4650, by fax at (703) 321-8547, or via the Internet at <http://www.ntis.gov>. NTIS is an organization within the U.S. Department of Commerce.

EPA is also notifying the following groups of the availability of these documents: International Association of Environmental Testing Laboratories; American Society of Testing Materials; Society of Environmental Toxicology

and Chemistry; American Chemical Society; Water Environment Federation; Association of Metropolitan Sewerage Agencies; AOAC International; and EPA's Discharge Monitoring Requirement Quality Assurance Program.

**List of Subjects in 40 CFR Part 136**

Environmental protection, Analytical methods, Incorporation by reference, Monitoring, Reporting and recordkeeping requirements, Waste treatment and disposal, Water pollution control.

Dated: January 22, 1999.

**J. Charles Fox,**

*Assistant Administrator, Office of Water.*

For the reasons set out in the preamble, Part 136, title 40, chapter I of

the Code of Federal Regulations, is amended as follows:

**PART 136—GUIDELINES ESTABLISHING TEST PROCEDURES FOR THE ANALYSIS OF POLLUTANTS**

1. The authority citation for Part 136 continues to read as follows:

**Authority:** Secs. 301, 304(h), 307, and 501(a) Pub. L. 95-217, 91 Stat. 1566, *et seq.* (33 U.S.C. 1251, *et seq.*) (the Federal Water Pollution Control Act Amendments of 1972 as amended by the Clean Water Act of 1977.)

2. Section 136.3 is amended by adding paragraph (b)(41) and revising the entry for "Table IA—Aquatic Toxicity Tests" in paragraph (e) Table II as follows:

**§ 136.3 Identification of test procedures.**

\* \* \* \* \*

(b) \* \* \*

(41) USEPA, January 1999 Errata for the Effluent and Receiving Water Testing Manuals: Acute Toxicity of Effluents and Receiving Waters to Freshwater and Marine Organisms; Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Freshwater Organisms; and Short-Term Methods for Estimating the Chronic Toxicity of Effluents and Receiving Waters to Marine and Estuarine Organisms. U.S. Environmental Protection Agency, Office of Research and Development, Duluth, MN. EPA-600/R-98/182.

\* \* \* \* \*

(e) \* \* \*

TABLE II.—REQUIRED CONTAINERS, PRESERVATION TECHNIQUES, AND HOLDING TIMES

Parameter No./name	Container <sup>1</sup>	Preservation <sup>2,3</sup>	Maximum holding time <sup>4</sup>
* * * * *	* * * * *	* * * * *	* * * * *
Table IA—Aquatic Toxicity Tests: 6–10 Toxicity, acute and chronic .....	P,G.	Cool, 4 °C <sup>16</sup>	36 hours.
* * * * *	* * * * *	* * * * *	* * * * *

<sup>1</sup> Polyethylene (P) or glass (G). For microbiology, plastic sample containers must be made of sterilizable materials (polypropylene or other autoclavable plastic).

<sup>2</sup> Sample preservation should be performed immediately upon sample collection. For composite chemical samples, each aliquot should be preserved at the time of collection. When use of an automatic sampler makes it impossible to preserve each aliquot, then chemical samples may be preserved by maintaining at 4C until compositing and sample splitting is completed.

<sup>3</sup> When any sample is to be shipped by common carrier or sent through the United States Mails, it must comply with the Department of Transportation Hazardous Materials Regulations (49 CFR Part 172). The person offering such material for transportation is responsible for ensuring such compliance. For the preservation requirements of Table II, the Office of Hazardous Materials, Transportation Bureau, Department of Transportation, has determined that the Hazardous Materials Regulations do not apply to the following materials: Hydrochloric Acid (HCl) in water solutions at concentrations of 0.04% by weight or less (pH about 1.96 or greater); Nitric Acid (HNO<sub>3</sub>) in water solutions of 0.15% by weight or less (pH about 1.62 or greater); Sulfuric Acid (H<sub>2</sub> SO<sub>4</sub>) in water solutions of 0.35% less (pH about 1.15 or greater); and Sodium Hydroxide (NaOH) in water solutions at concentrations of 0.080% by weight or less (pH about 12.30 or less).

<sup>4</sup> Samples should be analyzed as soon as possible after collection. The times listed in the table are the maximum times that samples may be held before analyses and still be considered valid. Samples used for toxicity tests are to be used for test initiation or for renewal of test solutions within 36h of collection as grab samples, or within 36 hours of the collection of the last sample of the composite. Samples for bacteria or chemical analysis may be held for longer periods than specified in this table only if the permittee or monitoring laboratory has data on file to show that the specific types of samples under study, the analytes are stable for the longer time, and has received a variance from the Regional Administrator under Para. 136.3(e). Some samples may not be stable for the maximum time period given in the table. A permittee or monitoring laboratory is obligated to hold the samples for a shorter time if knowledge exists to show that this is necessary to maintain sample stability. See Para. 136.3(e) for details. The term "analyze immediately" usually means within 15 minutes or less of sample collection.

<sup>16</sup> Sufficient ice should be placed with the samples in the shipping container to ensure that ice is still present when the samples arrive at the laboratory. However, even if ice is present when the samples arrive, it is necessary to immediately measure the temperature of the samples and confirm that the 4C temperature maximum has not been exceeded. In the isolated cases where it can be documented that this holding temperature can not be met, the permittee can be given the option of on-site testing or can request a variance. The request for a variance should include supportive data which show that the toxicity of the effluent samples is not reduced because of the increased holding temperature.

[FR Doc. 99-2197 Filed 2-1-99; 8:45 am]  
BILLING CODE 6560-50-P

**FEDERAL EMERGENCY MANAGEMENT AGENCY**

**44 CFR Part 64**

[Docket No. FEMA-7706]

**List of Communities Eligible for the Sale of Flood Insurance**

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

**ACTION:** Final rule.

**SUMMARY:** This rule identifies communities participating in the National Flood Insurance Program (NFIP). These communities have applied to the program and have agreed to enact certain floodplain management measures. The communities' participation in the program authorizes the sale of flood insurance to owners of property located in the communities listed.

**EFFECTIVE DATES:** The dates listed in the third column of the table.

**ADDRESSES:** Flood insurance policies for property located in the communities listed can be obtained from any licensed property insurance agent or broker serving the eligible community, or from the NFIP at: Post Office Box 6464, Rockville, MD 20849, (800) 638-6620.

**FOR FURTHER INFORMATION CONTACT:** Robert F. Shea, Jr., Division Director, Program Support Division, Mitigation Directorate, 500 C Street SW., room 417, Washington, DC 20472, (202) 646-3619.

**SUPPLEMENTARY INFORMATION:** The NFIP enables property owners to purchase

flood insurance which is generally not otherwise available. In return, communities agree to adopt and administer local floodplain management measures aimed at protecting lives and new construction from future flooding. Since the communities on the attached list have recently entered the NFIP, subsidized flood insurance is now available for property in the community.

In addition, the Associate Director of the Federal Emergency Management Agency has identified the special flood hazard areas in some of these communities by publishing a Flood Hazard Boundary Map (FHBM) or Flood Insurance Rate Map (FIRM). The date of the flood map, if one has been published, is indicated in the fourth column of the table. In the communities listed where a flood map has been published, Section 102 of the Flood Disaster Protection Act of 1973, as amended, 42 U.S.C. 4012(a), requires the purchase of flood insurance as a condition of Federal or federally related financial assistance for acquisition or construction of buildings in the special flood hazard areas shown on the map.

The Associate Director finds that the delayed effective dates would be contrary to the public interest. The Associate Director also finds that notice

and public procedure under 5 U.S.C. 553(b) are impracticable and unnecessary.

**National Environmental Policy Act**

This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

**Regulatory Flexibility Act**

The Associate Director certifies that this rule will not have a significant economic impact on a substantial number of small entities in accordance with the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because the rule creates no additional burden, but lists those communities eligible for the sale of flood insurance.

**Regulatory Classification**

This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

**Paperwork Reduction Act**

This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

**Executive Order 12612, Federalism**

This rule involves no policies that have federalism implications under Executive Order 12612, Federalism, October 26, 1987, 3 CFR, 1987 Comp., p. 252.

**Executive Order 12778, Civil Justice Reform**

This rule meets the applicable standards of section 2(b)(2) of Executive Order 12778, October 25, 1991, 56 FR 55195, 3 CFR, 1991 Comp., p. 309.

**List of Subjects in 44 CFR Part 64**

Flood insurance, Floodplains.  
Accordingly, 44 CFR part 64 is amended as follows:

**PART 64—[AMENDED]**

1. The authority citation for part 64 continues to read as follows:

**Authority:** 42 U.S.C. 4001 *et seq.*, Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp., p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp., p. 376.

**§ 64.6 [Amended]**

2. The tables published under the authority of § 64.6 are amended as follows:

State/location	Community No.	Effective date of eligibility	Current effective map date
<b>NEW ELIGIBLES—Emergency Program:</b>			
Iowa:			
Imogene, city of, Fremont County .....	190391	December 3, 1998	October 29, 1976.
Westfield, city of, Plymouth County .....	190482	.....do .....	August 13, 1976.
Kentucky: Elkton, city of, Todd County .....	210381	December 4, 1998..	
South Dakota: Potter County, unincorporated areas .....	460285	December 10, 1998.	
Texas: Ranger, city of, Eastland County .....	480205	December 15, 1998	April 23, 1976.
Illinois: Davis Junction, village of, Ogle County .....	171076	December 16, 1998.	
Missouri: Shelbina, city of, Shelby county .....	290665	December 30, 1998	April 25, 1975.
<b>NEW ELIGIBLES—Regular Program:</b>			
Georgia: Appling County, unincorporated areas .....	130001	December 3, 1998	May 3, 1990.
Tennessee: Lawrence County, unincorporated areas .....	470354	December 10, 1998	December 16, 1988.
North Carolina:			
Marvin, village of, Union County <sup>1</sup> .....	370514	December 28, 1998	January 17, 1997.
Walstonburg, town of, Greene County <sup>2</sup> .....	370515	.....do .....	January 6, 1983.
Waxhaw, town of, Union County .....	370473	.....do .....	NSFHA.
Missouri:			
Dutchtown, village of, Cape Girardeau County <sup>3</sup> .....	290927	December 30, 1998	August 15, 1989.
Huntleigh, city of, St. Louis County .....	290359	.....do .....	August 2, 1995.
<b>REINSTATEMENTS:</b>			
Tennessee: Hardin County, unincorporated areas .....	470082	April 16, 1976, Emerg; September 1, 1986, Reg.; April 2, 1991, Susp; December 3, 1998 Rein.	April 2, 1991.
Wisconsin: Wyeville, village of, Monroe County .....	550293	July 18, 1975, Emerg; March 1, 1984, Reg; March 1, 1984, Susp; December 3, 1998, Rein.	March 1, 1984.

State/location	Community No.	Effective date of eligibility	Current effective map date
Pennsylvania: West Pikeland, township of, Chester County .....	420051	April 10, 1974, Emerg; June 1, 1983, Reg; November 20, 1996, Susp; December 17, 1998, Rein.	November 20, 1996.
<b>REGULAR PROGRAM CONVERSIONS:</b>			
<i>Region I:</i>			
Maine: Portland, city of, Cumberland County .....	230051	December 8, 1998, Suspension Withdrawn.	December 8, 1998.
<i>Region II:</i>			
New Jersey: Allendale, borough of, Bergen County .....	340019	.....do .....	Do.
Fair Lawn, borough of, Bergen County .....	340033	.....do .....	Do.
Glen Rock, borough of, Bergen County .....	340038	.....do .....	Do.
Ho-Ho-Kus, borough of, Bergen County .....	340044	.....do .....	Do.
Mahwah, township of, Bergen County .....	340049	.....do .....	Do.
Midland Park, borough of, Bergen County .....	340051	.....do .....	Do.
Montvale, borough of, Bergen County .....	340052	.....do .....	Do.
Park Ridge, borough of, Bergen County .....	340063	.....do .....	Do.
Ramsey, borough of, Bergen County .....	340064	.....do .....	Do.
Ridgewood, village of, Bergen County .....	340067	.....do .....	Do.
Saddle River, borough of, Bergen County .....	340073	.....do .....	Do.
Upper Saddle River, borough of, Bergen County .....	340077	.....do .....	Do.
Waldwick, borough of, Bergen County .....	340078	.....do .....	Do.
Woodcliff Lake, borough of, Bergen County .....	340082	.....do .....	Do.
Wyckoff, township of, Bergen County .....	340084	.....do .....	Do.
<i>Region V:</i>			
Ohio: Tipp City, city of, Miami County .....	390401	.....do .....	Do.
<i>Region VI:</i>			
Louisiana:			
Natchez, village of, Natchitoches Parish .....	220370	.....do .....	Do.
Natchitoches Parish, unincorporated areas .....	220129	.....do .....	Do.
Richland Parish, unincorporated areas .....	220154	.....do .....	Do.
Texas:			
Bastrop County, unincorporated areas .....	481193	.....do .....	Do.
Luling, city of, Caldwell County .....	480096	.....do .....	Do.
Martindale, town of, Caldwell County .....	481587	.....do .....	Do.
<i>Region IX:</i>			
California:			
Menlo Park, city of, San Mateo County .....	060321	.....do .....	Do.
Palo Alto, city of, Santa Clara County .....	060348	.....do .....	Do.
<i>Region X:</i>			
Washington: Mason County, unincorporated areas .....	530115	.....do .....	Do.
<i>Region II:</i>			
New Jersey: Highlands, borough of, Monmouth County .....	345297	December 22, 1998 Suspension Withdrawn.	December 22, 1998
<i>Region III:</i>			
Pennsylvania: Reynoldsville, borough of, Jefferson County .....	420513	.....do .....	Do.
<i>Region IX:</i>			
Arizona: Quartzsite, town of, La Paz County .....	040134	.....do .....	Do.
California:			
Morgan Hill, city of, Santa Clara County .....	060346	.....do .....	Do.
<i>Region X:</i>			
Oregon:			
Burns, city of, Harney County .....	410084	.....do .....	Do.
Harney County, unincorporated areas .....	410083	.....do .....	Do.

Code for reading third column: Emerg.—Emergency; Reg.—Regular; Rein.—Reinstatement; Susp.—Suspension; With.—Withdrawn; NSFHA—Non Special Flood Hazard Area.

<sup>1</sup> The Village of Marvin has adopted the Union County (CID #370234) Flood Insurance Rate Map dated January 17, 1997.

<sup>2</sup> The Town of Walstonburg has adopted the Greene County (CID #370378) Flood Insurance Rate Map dated January 6, 1983.

<sup>3</sup> The Village of Dutchtown has adopted the Cape Girardeau County (CID #290790) Flood Insurance Rate Map dated August 15, 1989 (panel 125B).

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance")

Issued: January 21, 1999.

**Michael J. Armstrong,**

*Associate Director for Mitigation.*

[FR Doc. 99-2432 Filed 2-1-99; 8:45 am]

BILLING CODE 6718-05-P

## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 46 CFR Parts 1 and 10

[USCG-1998-3824]

RIN 2115-AF58

#### Maritime Course Approval Procedures

**AGENCY:** Coast Guard, DOT.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard issues a final rule revising the regulations that govern Maritime Course Approval Procedures. The rule streamlines the process by which courses are submitted to and reviewed by the Coast Guard. The rule also adds a mechanism to allow us to suspend or withdraw approvals for courses. Although the current regulations govern training schools with approved courses, only a methodology for course approval is provided. Revising the regulations to include suspension and withdrawal procedures will motivate schools to maintain a uniformly high standard, improve compliance with course approval regulations, and ultimately promote public safety.

**DATES:** This final rule is effective on March 4, 1999.

**ADDRESSES:** Documents as indicated in this preamble are available for inspection or copying at the Docket Management Facility, (USCG-1998-3824), U.S. Department of Transportation, room PL-401, 400 Seventh Street SW., Washington, DC 20590-0001.

**FOR FURTHER INFORMATION CONTACT:** For questions on this rule, contact James Cavo, National Maritime Center (NMC), 703-235-0018. For questions on viewing, or submitting material to, the docket, contact Dorothy Walker, Chief, Dockets, Department of Transportation, telephone 202-366-9329.

#### SUPPLEMENTARY INFORMATION:

##### Regulatory History

On May 13, 1998, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled "Maritime Course Approval Procedures" in the *Federal Register* (63 FR 26566). The

Coast Guard received eight comments in response to the proposed rulemaking.

##### Background and Purpose

Regulations for merchant mariner course approvals have been in place for several years and are found in 46 CFR part 10. Courses were first approved for education mandated by regulation such as radar observer, fire-fighting, and first aid. Courses were then approved for formal training instead of required sea service for both renewal and raise in grade of a license or an endorsement, and to substitute for a Coast Guard examination.

With the publication of a Focus Group Study, *Licensing 2000 and Beyond* in 1993, the Coast Guard began approving courses to substitute for certain modules of examination, especially for lower level licenses. Now, with the implementation of the 1995 Amendments to the International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW) of the International Maritime Organization (IMO), requirements for basic entry-level education, structured shipboard training programs, and specific assessment protocols, the course approval burden has increased considerably.

Presently, the Coast Guard has approved in excess of 700 courses presented by over 225 schools and the number is growing weekly. As part of a Quality Standard System (QSS), Coast Guard Regional Examination Centers (RECs) are charged with oversight of these widespread training institutions.

The majority of schools consistently operate according to the regulations governing course approvals. There are times, however, when audits of a particular school show evidence of infractions ranging from incomplete recordkeeping to major deficiencies dealing with examination tampering, operating outside the conditions of the course approval, and outright misrepresentation of course material. Some primary reasons for suspending or withdrawing a course approval include (but are not limited to):

- Failure to comply with the provisions of the course approval.
- Failure to comply with the provisions of parts 10, 12, 13 or 15 of Title 46, Code of Federal Regulations (46 CFR) especially Part 10, Subpart C.
- Scheduling and teaching an approved course at a location other than the site requested in the application for approval and authorized in the approval letter unless prior site approval is requested of and granted by the Officer in Charge, Marine Inspection (OCMI) of

the Regional Exam Center in whose area of responsibility the "remote site" is located.

- Not adhering to the approved length of the course; cutting short instructional time on a daily or weekly basis. Substituting "homework" or "preparation time," either on computer-based questions or artificially drawn-out plotting exercises for quality classroom instructional contact hours.

- Using unqualified instructors, substandard facilities or otherwise presenting the course in a manner that is not sufficient for or conducive to achieving the learning objectives of the course.

- Not giving a final (end-of-course) exam equal in scope and difficulty to the Coast Guard exam for that particular license or endorsement. Also, for not giving a final exam or a "re-take" exam which is totally different than any homework, classroom "practice exercise" or exam previously viewed by the student.

- Issuing certificates of course completion to students who have not demonstrated competency or who have not otherwise met the course requirements.

- Advertising, holding a course, or issuing certificates of course completion to students as having passed a course of instruction for which the school does not hold a valid Coast Guard approval.

- Assisting a student in passing the final (end-of-course) exam by either directly or indirectly providing any assistance including, but not limited to, supplying answers, hinting at the correct answer, grading and returning the exam for completion and indicating that certain answers or choices are incorrect prior to grading.

- Giving a student a final (end-of-course) exam orally. The authority to give an oral examination rests with the OCMI per 46 CFR 10.205.

- Allowing a student to enroll or join the course after the beginning of course instruction.

In order to prevent these infractions, and ensure the integrity of Coast Guard approved courses, the Coast Guard is issuing this rule to establish suspension, withdrawal, and appeal provisions in our regulations.

##### Discussion of Comments and Changes

The Coast Guard is substituting the words "withdraw," "withdrawn," and "withdrawal" wherever the words "revoke," "revoked," and "revocation" were used in the NPRM and in the regulatory text of sections 1.03-15, 1.03-45, and 10.302. This is being done for clarity and to avoid any confusion with the suspension and revocation

provisions of 46 CFR 1.10–20, which are not applicable to maritime course approvals. This does not substantively change the regulatory text.

The Coast Guard received a total of eight comment letters responding to the NPRM, of these, two letters were identical in content and filed by the same entity and were considered as a single comment letter. Two comments recommended public meetings citing potential impact on maritime educators. As only four maritime educators commented on the NPRM, no public meetings were held. Following is a discussion of comments received.

### 1. General Comments

The majority of the comments supported the NPRM and did not recommend major changes. Two comments expressed strong support and felt that the “suspension and revocation” provisions (now labeled withdrawal) were necessary to ensure the quality and integrity of mariner training. One comment felt the Coast Guard should use this rulemaking to change the way in which it administers Merchant Marine license examinations. Such an undertaking is beyond the scope of this rulemaking.

### 2. Course Expiration

Four comments expressed confusion or concern regarding the expiration of a course approval when the school no longer offers the course. Two comments suggested that this apply only when the training organization informs the Coast Guard that it would no longer be offering the course or that the school be provided an opportunity to confirm that it no longer will offer the course. The Coast Guard agrees that the proposed language was potentially confusing and has revised section 10.302, paragraphs (c) and (d), to indicate that a course approval will terminate when the school notifies the Coast Guard that it will no longer offer the course.

One comment suggested that section 10.302, paragraphs (c) and (d), be amended to provide for revocation when a school is acquired by another school, but continues to offer its courses using the same facilities and instructors. Because Section 10.302, paragraphs (c) and (d), already provide that a course approval or renewal of approval expire upon any change in ownership of the school, no changes were made in response to this comment.

One comment suggested the rulemaking be expanded to specifically address procedures to be followed when adding instructors and facilities to a course approval, selling approved courses, or franchising approved

courses. These issues are beyond the scope of this rulemaking.

### 3. Suspension and Withdrawal of Course Approvals

One comment suggested deleting the provision in the proposed rule that a course approval be suspended for failure to comply with applicable portions of the Code of Federal Regulations if the Coast Guard fails to ensure that the course meets parts 10, 12, 13 or 15 of Title 46, Code of Federal Regulations (46 CFR) prior to approval, noting that the school would not be able to bring the course into compliance without violating the terms of the course approval. The Coast Guard disagrees. If a training organization wishes to make changes to an approved course, for any reason, it must obtain written approval from the National Maritime Center to do so. If the Coast Guard becomes aware that a course that does not meet applicable regulations was erroneously approved, the approval holder will be given a reasonable time period to make any required changes before the approval is suspended. If changes to regulations impact on an already approved course, the approval holder would also be given a reasonable period in which to modify the course to bring it into compliance with the regulations.

One comment suggested that section 10.302, paragraph (e), identify the specific office of the Coast Guard that will determine whether a course is not in compliance with applicable regulations. The Coast Guard disagrees. Such a determination may be made by a number of Coast Guard offices, including an OCMI, the National Maritime Center or their representatives. Whether or not suspension or withdrawal action will be taken will be determined by the cognizant OCMI or the National Maritime Center, as provided for by this rule.

Two comments stated that the determination that a course is being presented in a manner that is insufficient to achieve learning objectives be made by person(s) with expertise in the subject area. The Coast Guard agrees, but does not feel a change to the proposed rule is necessary. The decision to suspend or withdraw a course approval will be made with input from subject matter experts at the National Maritime Center.

Three comments stated that a training organization should be given an opportunity to correct any deficiencies prior to suspension. The Coast Guard agrees, but does not believe that a change to the proposed rule is needed. The rule clearly provides that an approval holder will be given an

opportunity to correct deficiencies before suspension by the OCMI. Upon suspension by the OCMI, the NMC may also grant the approval holder an opportunity to correct the problem(s).

Three comments felt the OCMI should only have the authority to issue warnings or to place a school on probation. The Coast Guard disagrees. As previously discussed, a warning and the opportunity to correct deficiencies will be given before the OCMI suspends a course approval. Two of the comments expressed concern over the “nationwide” impact a suspension by an OCMI would have on an approval holder. This is a necessary safeguard to ensure the integrity of training. The authority to suspend a course approval should not be confined only to the OCMI’s zone.

One comment stated that the specific examples given in the NPRM that might result in a suspension or withdrawal of a course approval were misleading as the examples were all different examples of not following the course curriculum. The Coast Guard disagrees. The examples given are intended to provide guidance on what action by a training organization would be considered grounds for suspension. The Coast Guard does not believe a change to the proposed rule is necessary and considers the cited examples to be indicative of, but not exclusive of, the conduct that might result in a suspension or withdrawal of course approval.

One comment suggested that students be permitted to join a course in progress if they will make up the lost hours. The Coast Guard may permit this for “modular” courses if doing so will not compromise the achievement of learning objectives. However, this is a determination that must be made after a review of the specific course. Such a provision may be proposed by a training organization in its original course approval request or by a request to modify an existing approved course.

One comment stated that a course approval should not be suspended or withdrawn for scheduling and teaching a course at an unapproved location as this does not effect the content of the course. The Coast Guard disagrees. Site approvals are given after an inspection of the proposed facility and only if the proposed facility is adequate for the proposed use and the achievement of a course’s learning objectives. Schools are required to obtain written approval for any change in facilities or to conduct the course at a new or remote location as a requirement of the course approval. Failure to follow any condition

specified in the course approval may lead to suspension.

One comment felt that withdrawal of all of a school's course approvals when there is a demonstrated history of failing to comply with course approval requirements is a necessary safeguard to protect the quality of mariner training, while another felt this authority had too much potential abuse. The Coast Guard believes that the appeal mechanism provides adequate safeguards against abuse. The Coast Guard considers this an appropriate action when an approval holder has consistently failed to comply with requirements. As another comment noted, this action is only for extraordinary circumstances. The situations in which this action would be used will be specified in National Maritime Center Policy Letters and/or the Coast Guard *Marine Safety Manual*.

#### 4. Changes to Approved Course Curriculum

One comment suggested that a request to modify the curriculum of an approved course be deemed approved if the National Maritime Center fails to respond to the request within 3 weeks. The Coast Guard disagrees. The National Maritime Center has established a program goal of responding to all requests for course approval, renewal of approval or modifications to an approved course in a timely manner. A training organization may not change its approved curriculum, facilities or instructors without written approval from the Commanding Officer, National Maritime Center.

#### 5. Suspensions and Withdrawal Procedures and Appeals

Two comments suggested that the suspension and withdrawal process be amended to include an impartial arbiter such as a district hearing officer or administrative law judge. The Coast Guard disagrees. The rule gives the cognizant OCMI the authority to suspend a course approval, and the Commanding Officer of the National Maritime Center the authority to withdraw a course approval. The National Maritime Center provides oversight, establishes guidelines and determines policy for Coast Guard approved courses, and the OCMI monitors the various courses offered by the schools. The National Maritime Center and the OCMI are in the best position to determine when a school is failing to meet its obligations and can work with a school to ensure the highest standards are maintained. Most schools operate within our regulations, and suspension and withdrawal procedures

are initiated only in those rare instances when a school deviates from the norm. No changes were made to the rule in response to these comments.

One comment suggested that appeals of course approval decisions to the Commandant be addressed to the Commandant (G-MO) so that the Commanding Officer, National Maritime Center is not the recipient for these appeals. The Coast Guard does not feel a change to the proposed rule is necessary. This rule provides that appeals of course approval issues are to be made to the Commandant (G-MO) via the Commanding Officer, National Maritime Center. The recipient of appeals under this section is the Commandant (G-MO). As addressee, National Maritime Center will forward the appeal and all relevant documents from its files, and provide other assistance as requested.

#### Regulatory Evaluation

This rule is not a significant regulatory action under section 3(f) of Executive Order 12866 and does not require an assessment of potential costs and benefits under section 6(a)(3) of that Order. It has not been reviewed by the Office of Management and Budget under that Order. It is not significant under the regulatory policies and procedures of the Department of Transportation (DOT) (44 FR 11040; February 26, 1979). The Coast Guard expects the economic impact of this rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary.

Course approval suspensions, withdrawals, or expirations do not impose specific requirements on any course holder. Rather, this rule establishes a standard enforcement method for the rare number of course approval holders who do not comply with applicable statutes, regulations, and the terms of course approval.

#### Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considers whether this rule, if adopted, would have a significant economic impact on a substantial number of small entities. "Small entities" include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

The small entities affected by this rule are privately owned and operated schools with one to several employees, community colleges, and maritime labor union owned and operated schools. Suspension or withdrawal of an

approval for a course or courses depends on the nature and severity of the infraction.

We realize that most schools operate within the confines of course approval regulations, guidelines and letters. This rule would provide a standard mechanism, in regulation, for the rare instances when a school might deviate from those course approval regulations, guidelines and letters. Also, this rule would provide an opportunity for the approval holder to correct any deficiencies prior to revocation.

Therefore, the Coast Guard certifies under 5 U.S.C. 605(b) that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

#### Assistance for Small Entities

In accordance with section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Pub. L. 104-121), the Coast Guard will provide assistance to small entities to determine how this rule applies to them. If you are a small business and need assistance understanding the provisions of this rule, please contact James Cavo, 703-235-0018.

The Small Business and Agriculture Regulatory Enforcement Ombudsman and 10 Regional Fairness Boards were established to receive comments from small businesses about Federal agency enforcement actions. The Ombudsman will annually evaluate the enforcement activities and rate each agency's responsiveness to small business. If you wish to comment on the enforcement actions of the Coast Guard, call 1-888-REG-FAIR (1-888-734-3247).

#### Collection of Information

This rule contains no new collection-of-information requirements under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*).

#### Federalism

The Coast Guard has analyzed this rule under the principles and criteria contained in Executive Order 12612 and has determined that this rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

#### Environment

The Coast Guard considered the environmental impact of this rule and concluded that, under figure 2-1, paragraph (34)(a) of Commandant Instruction M16475.IC, this rule is categorically excluded from further environmental documentation. This exclusion is in accordance with paragraph (a), concerning regulations

that are procedural. A "Categorical Exclusion Determination" is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects

46 CFR Part 1

Administrative practice and procedure, Organization and functions (Government agencies), Reporting and recordkeeping requirements.

46 CFR Part 10

Reporting and recordkeeping requirements, Schools, Seamen.

For the reasons discussed in the preamble, the Coast Guard amends 46 CFR parts 1 and 10 as follows:

PART 1—ORGANIZATION, GENERAL COURSE AND METHODS GOVERNING MARINE SAFETY FUNCTIONS

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

Authority: 5 U.S.C. 552; 14 U.S.C. 633; 46 U.S.C. 7701; 49 CFR 1.45, 1.46; § 1.01-35 also issued under the authority of 44 U.S.C. 3507.

2. In § 1.03-15, revise paragraph (h)(3) to read as follows:

§ 1.03-15 General.

\* \* \* \* \*

(h) \* \* \*

(3) Commanding Officer, National Maritime Center, for appeals involving vessel documentation issues, tonnage issues, and suspension or withdrawal of course approvals.

\* \* \* \* \*

3. Revise § 1.03-45 to read as follows:

§ 1.03-45 Appeals from decisions or actions involving documentation of vessels and suspension or withdrawal of course approvals.

Any person directly affected by a decision or action of an officer or employee of the Coast Guard acting on or in regard to the documentation of a vessel under part 67 or suspension or withdrawal of course approvals under part 10 of this chapter, may make a formal appeal of that decision or action to the Commandant (G-MO) via the Commanding Officer, National Maritime Center, in accordance with procedures contained in §§ 1.03-15 through 1.03-25 of this subpart.

PART 10—LICENSING OF MARITIME PERSONNEL

4. The authority citation for part 10 continues to read as follows:

Authority: 31 U.S.C. 9701; 46 U.S.C. 2101, 2103, 2110; 46 U.S.C. Chapter 71; 46 U.S.C. 7502, 7505, 7701; 49 CFR 1.45, 1.46; Sec. 10.107 also issued under the authority of 44 U.S.C. 3507.

5. In § 10.302, in paragraphs (c) and (d), remove the word "revoked" and add, in its place, the word "withdrawn"; immediately preceding the words "or on the date of", add the words "when the school closes, when the school gives notice that it will no longer offer the course,"; revise paragraph (a) introductory text; and add paragraphs (e), (f), and (g) to read as follows:

§ 10.302 Course approval.

(a) The Coast Guard approves courses satisfying regulatory requirements and those that substitute for a Coast Guard examination or a portion of a sea service requirement. The owner or operator of a training school desiring to have a course approved by the Coast Guard shall submit a written request to the Commanding Officer, National Maritime Center, NMC-4B, 4200 Wilson Boulevard, Suite 510, Arlington, VA 22203-1804, that contains:

\* \* \* \* \*

(e) Suspension of approval. If the Coast Guard determines that a specific course does not comply with the provisions of 46 CFR parts 10, 12, 13 or 15, or the requirements specified in the course approval; or substantially deviates from the course curriculum package as submitted for approval; or if the course is being presented in a manner that is insufficient to achieve learning objectives; the cognizant OCMI may suspend the approval, may require the holder to surrender the certificate of approval, if any, and may direct the holder to cease claiming the course is Coast Guard approved. The Cognizant OCMI will notify the approval holder in writing of its intention to suspend the approval and the reasons for suspension. If the approval holder fails to correct the reasons for suspension, the course will be suspended and the matter referred to the Commanding Officer, National Maritime Center. The Commanding Officer, National Maritime Center, will notify the approval holder that the specific course fails to meet applicable requirements, and explain how those deficiencies can be corrected. The Commanding Officer, National Maritime Center, may grant the approval holder up to 60 days in which to correct the deficiencies.

(f) Withdrawal of approval. (1) The Commanding Officer, National Maritime Center, may withdraw approval for any course when the approval holder fails to correct the deficiency(ies) of a suspended course within a time period allowed under paragraph (e) of this section.

(2) The Commanding Officer, National Maritime Center, may withdraw

approval of any or all courses by an approval holder upon a determination that the approval holder has demonstrated a pattern or history of:

(i) Failing to comply with the applicable regulations or the requirements of course approvals;

(ii) Substantial deviations from their approved course curricula; or

(iii) Presenting courses in a manner that is insufficient to achieve learning objectives.

(g) Appeals of suspension or withdrawal of approval. Anyone directly affected by a decision to suspend or withdraw an approval may appeal the decision to the Commandant via the Commanding Officer, National Maritime Center, as provided in § 1.03-45 of this chapter.

6. In § 10.303, revise paragraph (e) to read as follows:

§ 10.303 General standards.

\* \* \* \* \*

(e) Not change its approved curriculum unless approved, in writing, after the request for change has been submitted in writing to the Commanding Officer, National Maritime Center (NMC-4B).

\* \* \* \* \*

Dated: January 20, 1999.

Robert C. North,

Rear Admiral, U.S. Coast Guard, Assistant Commandant for Marine Safety and Environmental Protection.

[FR Doc. 99-2359 Filed 2-1-99; 8:45 am]

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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 0, 2, 15, 25, and 68

[GEN Docket No. 98-68; FCC 98-338]

Streamlining the Equipment Authorization Process; Implementation of Mutual Recognition Agreements and the GMPCS MOU

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: The Commission is amending the rules to provide the option of private sector approval of equipment that currently requires an approval by the Commission. It is also adopting rule changes to implement a Mutual Recognition Agreement (MRA) for product approvals with the European Community (EC), the Asia Pacific Economic Cooperation (APEC) and to allow for similar agreements with other foreign trade partners. These actions will eliminate the need for

manufacturers to wait for approval from the Commission before marketing equipment in the United States, thereby reducing the time needed to bring a product to market. The Commission is also adopting an interim procedure to issue equipment approvals for Global Mobile Personal Communication by Satellite (GMPCS) terminals prior to domestic implementation of the GMPCS-MoU Arrangements. That action will benefit manufacturers of GMPCS terminals by allowing greater worldwide acceptance of their products.

**DATE:** Effective May 3, 1999.

**FOR FURTHER INFORMATION CONTACT:** Hugh L. Van Tuyl, (202) 418-7506, Office of Engineering and Technology. For part 68 specific questions, contact Vincent M. Paladini, (202) 418-2332, Common Carrier Bureau. For part 25 specific questions, contact Tracey Weisler at 202-418-0744.

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's Report and Order, GEN Docket 98-68, FCC 98-338, adopted December 17, 1998, and released December 23, 1998. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Reference Center (Room 239) 1919 M Street, N.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.

### Summary of the Report and Order

1. In this order, we adopt measures to reduce the burden of the equipment authorization program on manufacturers, ensure market access and promote competition in the provision of telecommunication and electronic equipment, and allow greater worldwide acceptance of GMPCS equipment. We address the comments filed in response to our proposals to recognize private entities to certify equipment as complying with Commission rules. The program we adopt will be used both to streamline our domestic equipment approval programs and satisfy the United States' obligations to implement MRAs.

### Telecommunications Certification Bodies (TCBs)

2. In the *Notice of Proposed Rule Making* ("NPRM") 63 FR 31685, June 10, 1998, we proposed to allow designated private entities to issue equipment approvals in essentially the same manner as the Commission. Under this proposal, private entities in the U.S. and designated entities in other

countries would certify that equipment intended for use within the U.S. complies with Commission requirements. We proposed that these certifying organizations be called "Telecommunication Certification Bodies", or TCBs, since their purpose will be to grant certification to telecommunications equipment. This approach would provide manufacturers with alternatives where they could possibly obtain certification faster than with the Commission and from a facility in a more convenient location. We also anticipated that the TCB program would result in a reduction of applications filed with the Commission, thus enabling the Commission to redirect resources toward enforcement of the rules. Finally, allowing equipment to be certified by parties in other countries is an essential step in implementing MRAs, and using private entities for domestic certification purposes would parallel our MRA obligations.

3. In ET Docket 97-94, we recently examined the part 2 authorization program, relaxing the authorization requirements for many types of equipment to permit manufacturer's self-approval (verification or DoC). We estimate that our actions in Docket 97-94 will reduce by approximately half the number of applications required to be filed with us. The equipment for which we relaxed the authorization requirement includes receivers, which is the only type of equipment that was suggested be placed under the DoC program. We determined in Docket 97-94 that a certain "core group" of equipment requires a higher level of oversight than manufacturer's self-approval, due to a high risk of non-compliance, the potential to create significant interference to safety and other communication services, and the need to ensure compliance with the requirements to protect against radio frequency exposure. Accordingly, we decline to expand further the DoC program for equipment subject to a part 2 authorization requirement at this time.

4. Since the NPRM did not propose to place terminal equipment subject to the part 68 registration program under DoC, the record does not yet contain sufficient information or analysis to ensure that it would be fair and equitable to do so. Accordingly, we decline to expand further the DoC program to equipment subject to part 68 registration at this time. We may, however, consider this possibility in the context of future proceedings where we may more fully investigate and resolve the relevant issues.

5. By carefully specifying the qualification criteria for TCBs, as well as

exercising the proper oversight, we intend to ensure the TCB system will be as fair and impartial as the current system. The TCB system also may be significantly faster than the Commission's current system, since manufacturers should have more than one approval body to choose from and can select one with a shorter processing time. We expect TCBs to function much like the Commission by certifying a product based on the test results of one representative sample. Further, competition among TCBs, as well as expectations of manufacturers, should encourage TCBs to process applications quickly and at reasonable expense. TCBs should provide conveniently located expertise and "one stop shopping" for manufacturers, thereby eliminating the uncertainty and delay in assembling and forwarding applications to the Commission inherent in the current system. We also recognize and agree with commenters that the integrity of the TCB program must be based on our ability to enforce our rules effectively. As we stated in the NPRM, we intend to redirect resources toward enforcement of the rules. Further, we intend to review and revise our rules and procedures, as necessary, to ensure that we fulfill our responsibilities to ensure credible rule enforcement. We recognize that there will be initial start-up problems and we plan to work with industry and the National Institute of Standards and Technology (NIST) to facilitate the training and implementation of TCBs. Accordingly, we find it is in the public interest to adopt the TCB system as proposed in the NPRM, for equipment authorized under both parts 2 and 68 of our rules.

### TCB Qualification Criteria

6. In the NPRM, we tentatively concluded that the International Organization for Standardization (ISO) / International Electrotechnical Commission (IEC) Guide 65 (1996), General requirements for bodies operating product certification systems ("Guide 65"), sets forth the requirements that must be used to establish the primary qualification criteria for TCBs. TCB equipment certification would be based on type testing, which is the option listed in subclause 1.2(a) of Guide 65. We also proposed that TCBs:

- Demonstrate expert knowledge of the regulations for each product with respect to which the body seeks designation, including knowledge of all applicable technical regulations, administrative provisions or requirements, as well as the relevant policies and procedures.

- Be accredited in accordance with ISO/IEC Guide 25, General Requirements for the Competence of Calibration and Testing Laboratories ("Guide 25"), in order to demonstrate that they are competent to perform testing of the products they will certify.

- Have the ability to recognize when interpretations of the rules or test procedures are necessary and demonstrate a knowledge of how to obtain current and correct interpretations.

- Participate in consultative activities identified by the Commission to establish a common understanding and interpretation of the regulations.

7. We find that Guide 65, an existing international standard, establishes appropriate qualifications for product certifiers. Guide 65 will be used as the primary qualification criteria for TCBs under MRAs, so use of this document for domestic purposes as well will facilitate acceptance of U.S. certifications internationally, and thereby promote U.S. trade abroad. We also find that TCBs should have the expertise and capability to test equipment they certify, since they will either perform measurements themselves or will use this expertise and capability to correctly review test data from other parties and perform audit testing as required. Thus, we also find that TCBs must be accredited to Guide 25 to demonstrate appropriate knowledge and capability to perform product testing. Accordingly, we require TCBs to be both Guide 65 and 25 accredited.

8. CCL requests that the Commission recognize current accreditation schemes for testing laboratories, such as the National Voluntary Laboratory Accreditation Program (NVLAP) and the American Association for Laboratory Accreditation (A2LA). Laboratories that perform testing of equipment approved under DoC must be accredited through NVLAP, A2LA or other parties recognized by the Commission, see 47 CFR 2.948(d). These accreditations are based on Guide 25 and cover testing of certain devices subject to part 15 of the rules. We find that these accreditations would satisfy our requirement for a TCB to be Guide 25 accredited. Accordingly, a prospective TCB which is already accredited by A2LA, NVLAP or another recognized party, based on Guide 25, will not have to obtain another Guide 25 accreditation, provided the equipment it certifies is covered by the scope of the accreditation.

9. We also adopt the additional qualification criteria that we proposed, i.e., TCBs must demonstrate expert knowledge of the regulations for each

product with respect to which they seek designation; recognize when interpretations of the rules or test procedures are necessary and demonstrate knowledge of how to obtain current and correct interpretations; and participate in consultative activities identified by the Commission to establish a common understanding and interpretation of the regulations. The MRAs, for example, identify regulations and requirements that are applicable to certifying equipment intended for import into the United States.<sup>1</sup> Since such regulations and requirements may be modified in the future, we delegate authority to the Chief, Office of Engineering and Technology (OET), and to the Chief, Common Carrier Bureau (CCB), to identify specific regulations and requirements for which TCBs certifying equipment for use within the United States shall demonstrate expert knowledge. Both OET and CCB shall provide public notice of the specific regulations and requirements identified for this purpose, to ensure that prospective TCBs will know for which specific regulations and requirements they must demonstrate expert knowledge as required under our qualifying criteria.

10. *Subcontractors.* Several parties address the issue of whether subcontractors to TCBs (e.g., test laboratories) should also be Guide 25 accredited. Under Guide 65, a TCB may use a subcontractor to perform certain tasks (e.g., testing or inspection).<sup>2</sup> Guide 65 further states that a TCB shall take full responsibility for subcontracted work, and shall "ensure that the subcontracted body or person is competent and complies with the applicable provisions of [Guide 65] and other standards and guides relevant to testing, inspection or other technical activities." Thus, TCBs must ensure that subcontractors, which perform their work under the direction of, and generally with compensation from, the TCB, are competent and in compliance. We do not interpret Guide 65 as requiring subcontractors to be Guide 25 accredited. We expect that as a result of our requirement that TCBs must be accredited to Guides 65 and 25, TCBs will have the expertise to determine

<sup>1</sup> The US/EC MRA contains a non-exclusive list for telecommunications equipment. The model APEC MRA provides that countries will identify the relevant regulations and requirements at the time they enter into bilateral agreements.

<sup>2</sup> See Guide 65, clause 4.4. Although a TCB might use a subcontractor to perform certain tasks related to the certification process, a TCB is precluded by Guide 65 from delegating to a third party, such as a subcontractor, any authority for granting certifications. See Guide 65, clauses 4.4(a) and 12.2.

whether a manufacturer or independent laboratory that is a subcontractor is competent to correctly measure the equipment being tested. We will allow TCBs to use any reasonable means, including requiring Guide 25 accreditation, to determine whether a subcontractor is competent and in compliance with relevant standards or guidelines.

11. *Manufacturers.* Retlif, Rockwell and Kenwood request that the Commission confirm that a manufacturer can be a TCB, provided it meets the Guide 65 requirement for impartiality. ACIL, CCL and Intertek want the Commission to provide a clear definition of "independence" for TCBs, and propose a definition based on the language in European Directives, which would exclude manufacturers from being TCBs.

12. Guide 65 clearly requires that the certifying body be impartial. More specifically, clause 4.2 of Guide 65 requires that the certifying body "not supply or design products of the type it certifies," nor "provide any product or service which could compromise the confidentiality, objectivity or impartiality of the certification process and decisions." We interpret these guidelines to effectively preclude manufacturers from becoming TCBs. Thus, we do not find it necessary to adopt a specific definition of independence in order to preclude manufacturers from TCB designation. On the other hand, we find Guide 65 less restrictive regarding subcontractors. Clause 4.4 of Guide 65 states that the certifying body is to ensure that the subcontractor "is not involved either directly or through the person's employer with the design or production of the product in such a way that impartiality would be compromised." Thus, manufacturers satisfying the conditions of clause 4.4 of Guide 65 could be used as subcontractors, provided the TCB is satisfied that its own impartiality would not be compromised. Since the TCB is the party whose impartiality must be maintained, the TCB is in the best position to determine whether the use of a particular subcontractor would in any way jeopardize that requirement. We expect, nonetheless, that a manufacturer would not be used as a subcontractor to test its own products or similar products made by a competing manufacturer.

#### *Designation Procedure*

13. The NPRM proposed that TCBs be accredited by NIST under its National Voluntary Conformity Assessment System Evaluation (NVCASE) program. In accordance with our proposal, we

designate NIST as the entity with primary responsibility for accrediting TCBs. NIST may directly accredit TCBs or may, in consultation with the Commission, designate additional accreditation bodies who will, in turn, accredit TCBs. We will work directly with NIST to develop the many administrative details of the criteria and processes for accreditation of TCBs. The Commission will identify for NIST, for example, the specific types of tests that need to be done for telecommunications equipment and the types of measurements that should be done to demonstrate compliance with our rules; identify processes that TCBs will use to obtain current and correct interpretations of rules or test procedures; and identify consultative activities requiring TCB participation. The Commission will provide public notice of the methods that NIST will use to accredit TCBs consistent with the qualification criteria adopted herein.

14. We will designate as a TCB any organization that meets the qualification criteria and is accredited by NIST or its recognized accreditor. An organization may seek accreditation and designation as a TCB for all or only some equipment requiring authorization under parts 2 and 68. The Commission will issue a public notice listing each accredited entity that it designates as a TCB and maintain a current list of all designated TCBs. We will not limit the number of TCBs that will be designated, nor will we limit the time period during which an organization must be accredited and designated. We will not require periodic renewals of a TCB designation, but we note that under international standards, accreditations are only valid for a specific number of years. The Commission will withdraw the designation of a TCB if the TCB's accreditation by NIST or its recognized accreditor is withdrawn or expires, if the Commission otherwise determines there is just cause for withdrawing the designation, or if the TCB requests that it no longer hold the designation. The Commission will provide a TCB with 30 days notice of its intention to withdraw TCB designation and provide the TCB with an opportunity to respond. Withdrawal of designation will be announced by public notice.

15. There are many details of the qualification and accreditation process that remain to be worked out between the Commission and NIST. Therefore, we delegate authority to the Chief, OET and the Chief, CCB to identify the specific methods that will be used by NIST to accredit TCBs, consistent with the qualification criteria adopted herein, and to enter into a memorandum of

understanding with NIST on the accreditation process for TCBs. We also delegate authority to the Chief, OET and the Chief, CCB to designate and withdraw the designation of TCBs, consistent with the terms of this *Report and Order*.

#### Implementation Matters

16. In the *NPRM*, we proposed to allow TCBs to certify equipment under parts 2 and 68 of our rules, performing the same application processing functions as used by the Commission. In particular, the following requirements were proposed for TCBs.

(a) Certification must be based on the submittal to the TCB of an application that contains all the information required under the Commission's rules.

(b) TCBs will be required to issue a written grant of certification.

(c) The grantee of certification will remain the party responsible to the Commission for compliance of the product.

(d) The type testing as defined in Guide 65 should normally be done on only one unmodified sample of the equipment for which approval is sought.

(e) There is no restriction on the fees that TCBs may charge for certification.

(f) TCBs may either perform the required compliance testing themselves, or may accept and review the test data from manufacturers or other laboratories. TCBs may also subcontract with others to perform the testing. However, the TCB remains responsible for ensuring that the tests were performed as required and in this regard TCBs are expected to perform periodic audits to ensure that the data they may receive from others is indeed reliable.

(g) Equipment certified by a TCB must meet all the Commission's labelling requirements, including the use of an FCC Identifier.

(h) TCBs must submit an electronic copy of each granted application to the Commission using the new electronic filing system for equipment authorization applications. This will allow us to easily verify whether a piece of equipment has been approved without having to locate the TCB which approved it and obtain the records. It will also allow us to monitor the activities of the TCBs to determine how many approvals are issued and for what types of equipment. Finally, this would create a common database that all parties can use to verify approvals and obtain copies of applications. Where appropriate, the file should be accompanied by a request for confidentiality for any material that qualifies as trade secrets.

(i) TCBs may approve requests for permissive changes to certified equipment, irrespective of who originally certified the equipment.

(j) TCBs must periodically perform audits of equipment on the market that they have certified to ensure continued compliance.

17. In the *NPRM*, we tentatively concluded that some functions not be performed by TCBs but, rather, by the Commission. In particular, we tentatively concluded that TCBs not grant waivers of Commission rules and regulations; not certify new or unique equipment for which Commission rules or requirements do not exist or for which application of the rules or requirements is not clear; not take enforcement action but rather report rule violations to the Commission; and not grant transfers of control or assignments of certifications. Finally, we proposed that any action of a TCB be subject to review by the Commission.

18. Commenters were generally supportive of the implementation requirements. Some specific concerns were expressed. In light of the comments, we adopt these requirements as modified and clarified below.

19. *Scope of responsibility.* Consistent with section 302(e) of the Communications Act, as well as the terms of the MRAs, we will use TCBs to test and certify equipment as complying with our technical rules and requirements. Under this authority, TCBs are to certify equipment in accordance with Commission rules and policies. It is important that applicants are treated fairly and equitably regardless of where their equipment is certified, since a certification granted by a TCB will be treated the same as one issued by the Commission. In that regard, should equipment manufacturers take issue with a TCB's decision, they may seek Commission review of such decision. Thus, TCBs are not to impose their own requirements, and must conform their testing and certification processes and procedures to comply with any changes the Commission makes in its rules and requirements. We recognize that changes to the Commission's technical rules may require TCBs to be re-accredited in order to continue to be qualified to test and certify certain equipment. Finally, we anticipate that TCBs will test and certify a broad range of equipment, and we do not intend to preclude TCBs from certifying any class of equipment at this time. We would, however, only designate a TCB to test and certify equipment requiring routine evaluation for RF exposure if it demonstrates that it has the appropriate

knowledge and expertise. Any concerns that TCBs may have about specific test procedures for RF exposure will be addressed by the Office of Engineering and Technology during the TCB program implementation.

20. Although we intend to use TCBs to certify a broad range of equipment, we find that certain functions regarding certifying equipment should continue to be performed by the Commission. Specifically, TCBs will not be permitted to waive the rules, nor to certify new or unique equipment for which Commission rules or requirements do not exist or for which application of the rules or requirements is not clear. The Commission in the first instance will determine whether and under what conditions rules may be waived, and provide interpretations of novel issues concerning the Commission's technical standards, testing requirements or certification procedures. We expect that in many instances the Commission's decisions can provide adequate guidance to TCBs to allow them to certify equipment that is similarly situated. In some instances, the Commission may have to develop new rules. We find that by reserving for the Commission all waiver requests and new and novel rule applications and interpretations, we can ensure that all TCBs will certify equipment in a uniform manner, consistent with Commission policies.

21. We also conclude that TCBs should not take any enforcement actions, but rather report apparent violations of rules to the Commission. Enforcement actions that the Commission may undertake include, for example, revocation of an authorization and imposing a fine and forfeiture. Neither section 302(e) of the Communications Act of 1934, as amended, nor the MRAs contemplate using TCBs as enforcement agents. Moreover, the Commission has specific statutory obligations that it must satisfy in this area.<sup>3</sup>

22. We will not permit TCBs to authorize transfers of control of part 2 grants of certification, however, because the Commission's rule on these transfers requires that we make a determination on a case-by-case basis as to whether new equipment authorization applications are required.<sup>4</sup> We will continue to perform that function to ensure that the rule is applied in a consistent manner. We determine, however, that TCBs may authorize transfers of part 68 certifications. Commission approval of such transfers

is not required, although the Commission requires notification of such transfers.<sup>5</sup> We intend to develop an electronic filing system to accommodate part 68. We expect that the electronic filing system will permit TCBs to notify the Commission of transfers of control. In the interim, we will accept part 68 transfers of control by utilizing the same means of communication we employ during the TCB program implementation period.<sup>6</sup>

23. *Written grant of certification.* Several parties would like the Commission to ensure that grants issued by TCBs are exactly equivalent to grants issued by the FCC. ACIL, Intertek and TIA suggest that TCB-issued grants indicate that the TCB is FCC designated, and that the FCC publish the list of TCBs under its letterhead. Motorola and PCTEST recommend that the FCC standardize the format of TCB grants. We find that the first two suggestions have merit. We believe the success of the TCB program will depend in part on our ensuring that TCB certifications are truly equivalent to those issued by the Commission. Accordingly, we will require a TCB grant to indicate that the TCB is designated to grant the certification, citing the source of authority (e.g., the rules that we are adopting in this *Report and Order*). We will not require a specific format for TCB grants, but the certification must include the same information as contained in one issued by the Commission. We will make samples of the Commission's format available to TCBs that wish to follow it.

24. Consistent with the Commission's rules,<sup>7</sup> a TCB may set aside a grant on its own motion within 30 days of the effective date of the grant in the event of administrative errors, e.g., the application was not complete. The TCB will be required to provide notice of such action to the applicant and to the Commission. After the 30 day period, only the Commission may revoke a grant if, for example, we discover misrepresentations in the application or failure of the equipment to conform to the applicable technical standards.<sup>8</sup>

25. *Unmodified sample for type testing.* Curtis-Strauss requests clarification on what constitutes an

"unmodified" sample for testing. Curtis-Strauss points out that manufacturers often apply for certification during product development, and product modifications are often needed for compliance. In proposing this requirement, we intended that TCBs use the same standards that we currently use in certifying equipment (i.e., the sample of the equipment for which certification is being obtained must be representative of what will actually be marketed). In the event modifications to a sample are required during compliance testing<sup>9</sup> to make a product comply with the standards, those modifications must be incorporated into the finished marketed product.<sup>10</sup>

26. *Test data.* Some commenters express concern that TCBs will not accept test data from manufacturers or independent labs, preferring instead to conduct compliance testing themselves. Under the Commission's current certification process, manufacturers and independent laboratories may test products and submit applications to the Commission for certification. Under the TCB system we are adopting, manufacturers and independent labs may continue to test products as they do now, except applications can be submitted to a TCB rather than the Commission.<sup>11</sup> Thus, a manufacturer or a test lab does not have to be a subcontractor in order to test products and submit applications to a TCB. We agree with Motorola that a TCB will want a manufacturer to demonstrate a basis for confidence in the manufacturer's test procedures and results. Consistent with our decision regarding subcontractor's competence, a TCB can establish confidence in a manufacturer's or independent lab's test results by any reasonable means, but we will not require accreditation of the test lab under Guide 25. We expect that a TCB will examine a test report for completeness of data and documentation; notify applicants in writing of any deficiencies in the test report; request additional information to address the deficiencies; and not retest or duplicate testing for minor equipment changes that do not affect compliance with technical requirements. Our oversight of TCBs should identify any abusive practices concerning the acceptance of test data.

27. *Common Database of Certified Equipment.* We conclude that it is necessary to maintain a common

<sup>5</sup> See 47 CFR 68.214(b).

<sup>6</sup> We will accept FCC form 730 for transfer of control purposes until we have developed and implemented an electronic filing system for part 68. We may utilize interim filing procedures as necessary during the development and implementation of the electronic filing system. We will provide public notice of any changes in our filing procedures.

<sup>7</sup> See 47 CFR 1.108.

<sup>8</sup> See 47 CFR 2.939(a).

<sup>9</sup> "Compliance testing" and "type testing" mean the same thing.

<sup>10</sup> See 47 CFR 2.907(b) (equipment marketed by a grantee must be identical to the sample tested).

<sup>11</sup> A TCB is required to make its services available to all applicants. See clause 4.1.2 of Guide 65.

<sup>3</sup> See, e.g., Title V of the Communications Act.

<sup>4</sup> See 47 CFR 2.929(d).

database of certified equipment by having all TCBs send an electronic copy of each granted application, including the certification the TCB issued, to the Commission using the electronic filing system for part 2 applications. As we explained in the NPRM, a common database will allow the Commission to verify whether a piece of equipment was approved without having to locate the TCB that approved it and obtaining their records; to monitor the activities of TCBs to determine how many approvals are issued and for what types of equipment; and to provide one location which all parties can use to verify approvals and obtain copies of applications. However, requiring submission of a copy of the complete application to the database, including all the photographs, user manuals and test reports would be an unnecessary burden on TCBs. We will only require submission of the application Form 731 and an electronic copy of the TCB's grant of equipment authorization. In the event we need additional information about a particular piece of equipment, we can obtain it from the TCB. We are amending our rules to require TCBs to provide a copy of the application file within 30 days of a request by the Commission, or to provide an explanation as to why the file cannot be provided. Where appropriate, the TCB will provide a copy of any request for confidentiality for any material in the application file that qualifies as trade secrets, to ensure appropriate handling. OET will notify TCBs of the specific information it will need about a TCB grant and in what electronic format it should be provided.

28. We recognize that we have not yet developed an electronic filing system to accommodate part 68, but intend to do so in the future. We will utilize conventional means for collecting information in the interim.<sup>12</sup> We will authorize submission of part 68 certification information into a common database, and describe the information that must be filed for part 68 purposes, after we have developed an electronic filing system to accommodate that information.

29. *Surveillance Activities.* ISO/IEC Guide 65 requires TCBs to perform surveillance on products they have approved. It does not specify the number or percentage of products that need to be examined. The Commission will continue to perform its own surveillance of products on the market, by periodically conducting random

product testing as well as by investigating allegations of non-compliance. However, we find that surveillance is an appropriate activity for TCBs to supplement the Commission's efforts. Under clause 13 of Guide 65, a TCB is obligated to ensure that products that it has certified continue to comply with Commission requirements, particularly after a manufacturer notifies a TCB that the product has been modified. We will not specify a specific number or percentage of products that a TCB should test to satisfy this guideline, since our experience has shown that different levels of scrutiny are required for different products to ensure compliance.<sup>13</sup> We will rely on TCBs to use their judgment in complying with this guideline. In addition, we may periodically require a TCB to test for continued compliance certain types of products that the TCB certified and which are already being marketed (post-market surveillance). We do not view post-market surveillance by TCBs as an abdication of our enforcement responsibilities, since the TCB will report apparent violations to the Commission and not take action on its own against the manufacturer. To ensure that TCBs conduct audits impartially, the Commission will devise procedures that TCBs will use for post-market surveillance, and we delegate authority to the Chief, OET and the Chief, CCB to develop procedures that TCBs will use for conducting post-market surveillance. These procedures will address, for example, conducting field audits or acquiring samples for testing. The TCB will test the products under the Commission guidelines and report the results to us. TCBs will be able to check the Commission's common database, described above, to avoid reporting as non-compliant products that actually were subsequently re-certified by another TCB. By using the TCBs to conduct audits, the Commission will be able to secure information quickly from a variety of sources about ongoing compliance, while focusing its own resources on investigating specific problem cases. Based on the TCBs' reports, the Commission may conduct further investigations and take appropriate enforcement action against companies found to be marketing non-compliant products. The Commission

will also continue to perform post-market surveillance in cases where we deem it warranted, and to audit the performance of TCBs. These actions will help ensure that TCBs act in a fair, impartial manner. We expect that TCBs will take the cost of post-market surveillance into account when setting their fees. As previously stated, we are not regulating the fees that TCBs charge, but we expect that competitive pressures in the market will prevent a TCB from charging excessive fees.

30. *Consultative Activities.* Several parties suggest that the Commission develop a joint public-private sector working group to address implementation issues as they arise. Commenters recommend that this working group include all interested parties, such as TCBs, test labs and manufacturers. We refrain from establishing a new formal organization at this time, and choose to rely instead on existing voluntary industry consensus groups. For example, for part 68 issues, we intend to continue our cooperative association with TIA's TR.41 committees. Moreover, we intend to work with all interested parties to implement the TCB program and to ensure its success.

#### *Continued Certification by the Commission*

31. We solicited comments on whether the Commission should eventually stop certifying equipment once TCBs are designated. We received mixed comments on this issue. Our goal in this proceeding is to discontinue granting routine, non-controversial applications under parts 2 and 68 of our rules when TCBs are available to perform the work, but we do not at this time set a date when the Commission will cease to issue authorizations. We conclude that the Commission should continue approving equipment, including processing routine applications, during the implementation of the TCB program. This will help smooth the transition to the new system and ensure that at least one organization is available to certify all types of equipment. After we have some experience with the new system, we will assess the effectiveness of the TCB program and determine when the Commission should discontinue approving products. After the TCB program is initiated, however, the Commission will continue to be the authorizing body if no TCB is available to authorize a given type of equipment and to process applications raising novel issues regarding application of our rules.

<sup>12</sup> We will accept FCC form 730 during the development and implementation of the electronic filing system.

<sup>13</sup> For example, low-power, unlicensed transmitters such as cordless telephones and baby monitors have frequently been a source of compliance problems because of pressures in the marketplace to build them as cheaply as possible, or to increase their operating range by increasing their transmitter power above the legal limit.

32. We conclude that it is unnecessary for the Commission to continue approving certification applications for personal computers and peripherals, since that equipment can be authorized through the DoC procedure. We find that processing these voluntarily filed applications is not an efficient use of the Commission's resources. Accordingly, once domestic TCBs are available to process applications for personal computer equipment for those applicants who choose to use the certification process rather than DoC, the Commission will stop accepting these applications a reasonable time thereafter. The Commission will announce by public notice when it will cease to accept these applications. We amend § 15.101 of the rules to reflect this change.

#### *Implementation Dates and Transition Periods*

33. We proposed that a transition period of 24 months elapse before any TCBs would be allowed to certify equipment. This time period was proposed because it is similar to the provision of the US/EC MRA, which specifies a 24 month transition period after the MRA effective date, so that countries have time to modify requirements and procedures to meet the MRA's obligations. Some commenters suggest that a transition period be no more than 24 months, and perhaps less. Upon further consideration, we do not find it necessary to delay the introduction of the TCB system for a 24 month period, and we would rather implement the TCB system as soon as practicable. Nonetheless, we cannot implement the TCB system immediately because of a number of tasks which need to be completed first. For example, we need to specify the documentation necessary to meet the qualification criteria for TCBs, as discussed above, and we need to develop with NIST the accreditation and designation procedures. Although we will immediately begin taking the necessary steps to implement the TCB system, we recognize that it is difficult to specify a fixed date when TCBs will begin to certify equipment. We also conclude that a fixed date would not serve the ongoing accreditation and implementation processes. For example, TCBs may be identified readily for some equipment, but not for others, accreditation compliance dates may vary, and TCBs can enter and exit the system at different times. Thus, we conclude that we will authorize the use of TCBs as they are designated by the Chief, OET and the Chief, CCB in a public notice.

#### *Part 68 Issues*

34. *Terminology.* In the *NPRM*, we discussed the use of the terms "certification" and "registration" as they apply to the part 68 program. Commenters suggest that the two terms are functional equivalents, and recommend that we expand our use of the term "certification" to include our part 68 program. Commenters point out that such usage would be consistent with various other parts of the **Federal Register**, the norms of international terminology, and specifically the language of the MRAs. We agree with commenters that the use of common terminology benefit clarity and consistency, and determine that the terms "registration" and "certification" are equivalent for the purposes of our part 68 rules. To the extent practicable, we will implement this change in the course of future rule makings and administrative actions affecting part 68.

35. *FCC Form 730.* The part 68 program currently utilizes FCC Form 730 to transmit information from test labs and manufacturers to the Commission. In the *NPRM*, we sought comment on whether we could utilize that form to transmit test data to the Commission from TCB candidates during the transition period. Although commenters support the use of a common format for recording and transmitting information among TCBs and the Commission, they do not support the use of FCC Form 730 for this purpose. We agree that FCC Form 730 is not the optimal format for use among TCBs and the Commission, intend to develop an electronic filing system and common database to fulfill that purpose. In the mean time, however, we find that it would be a waste of resources to create an interim solution. Thus, we determine that we will utilize FCC Form 730 as the initial information transmission format for the purposes of implementing the TCB program. We will, however, update this requirement pursuant to further TCB program implementation activities.

#### **Mutual Recognition Agreements (MRAs)**

##### *United States/European Community MRA*

36. The Office of the United States Trade Representative and the Department of Commerce have participated in negotiations over the past several years to develop a mutual recognition agreement for product approvals with the European Community (EC). The Commission has also participated in these negotiations, as have industry representatives from

both the United States and Europe. These negotiations culminated on June 21, 1997 when the US/EC MRA was finalized by the United States Trade Representative and a representative of the European Community. The Agreement was signed on May 18, 1998, and entered into force on December 1, 1998.

37. The US/EC MRA addresses conformity assessment activities in six industrial sectors: telecommunications equipment, electromagnetic compatibility, electrical safety, recreational craft, pharmaceutical good manufacturing practice, and medical devices. The Commission's regulations apply directly to two industry sectors, telecommunications equipment and electromagnetic compatibility ("EMC"), among the six specifically addressed by the US/EC MRA. The telecommunications sector addresses terminal equipment covered by part 68 of the rules, and transmitters covered by part 2 and other parts of the Commission's rules. The EMC sector applies to equipment addressed by parts 15 and 18 of the Commission's rules.<sup>14</sup>

38. Under the US/EC MRA, products can be tested and certified in the United States for conformance with EC member states' technical requirements. The certified products may be shipped directly to Europe without any further testing or certification. In return, the MRA obligates the United States to permit parties in Europe to test and authorize equipment based on the United States technical requirements. The US/EC MRA thereby promotes bilateral market access and competition in the provision of telecommunications products and electronic equipment. The US/EC MRA also will reduce industry burdens and delays caused by testing and approval requirements for products marketed in the United States and Europe.

39. The US/EC MRA provides a 24 month transitional period that will be used to implement the regulatory or legislative changes necessary for both parties to implement the US/EC MRA. The period began on the effective date of the MRA, which is December 1, 1998. At the end of the transition period, the parties should be prepared for full mutual recognition of product certifications and registrations. To ensure parity between U.S. and EC manufacturers, we will not permit parties in an EC country to test and approve products to U.S. requirements until that country permits U.S. parties to test and approve products to its requirements.

<sup>14</sup> See 47 CFR 2, 15, 18, and 68.

*Asia-Pacific Economic Cooperation (APEC) MRA*

40. The Office of the United States Trade Representative, at the request of the United States telecommunication industry, has negotiated a Mutual Recognition Arrangement (MRA) for Conformity Assessment for Telecommunication products in the Asia-Pacific Economic Cooperation (APEC), which is intended to facilitate trade in telecommunications and radio equipment among the APEC economies. APEC is a trade cooperative of twenty-one economies along the Pacific Rim. Commission staff and representatives of the United States telecommunications industry have been participating in a Task Force Group under the Telecom Working Group of APEC, which was established in March, 1997 to facilitate the development of the APEC Telecom MRA.

41. The text of the model APEC Telecom MRA was finalized on April 30, 1998 and was endorsed at the APEC Ministerial Meeting on June 5, 1998. Unlike the US/EC MRA, the APEC Telecom MRA is a voluntary model agreement. To enact the agreement, each APEC member economy must adopt the agreement with each of its APEC trade partners, such as the United States, through a bilateral exchange of letters. Participation in the APEC Telecom MRA is voluntary; however, if a member economy chooses to participate, the model text becomes the governing document for conformity assessment between the participating member economies. The MRA is expected to take effect on July 1, 1999, although individual parties may agree to apply it bilaterally before that date. The key elements of the APEC Telecom MRA text are substantially similar to the key elements of the US/EC MRA text, with the following exceptions: the APEC Telecom MRA has specific designation procedures for conformity assessment bodies (CABs); when parties agree to participate in activities with one another, the transition period will normally be twelve months from the date of mutual agreement; and implementation occurs in two phases—the first for accepting test results and the second for accepting product approvals. As in the case of the US/EC MRA, we will not permit parties in an APEC member economy to test and approve products to U.S. requirements unless that member economy permits parties in the U.S. to test and approve products to its requirements. We adopt the tentative conclusion in the NPRM that the rules proposed in this proceeding to implement the US/EC

MRA are sufficient to implement the APEC Telecom MRA.

*Other MRAs*

42. We anticipate that the United States may develop or participate in additional mutual recognition agreements that involve other regions of the world. For example, the Interamerican Telecommunications Committee (CITEL) of the Organization of American States is considering developing an MRA for the Americas region.

*Designation of TCBs for Equipment Imported Into the United States*

43. The NPRM proposed to amend our rules as required to permit parties in MRA partner economies to certify radio frequency devices for conformance with parts 2, 15, 18 and other rule parts and to test and certify telecommunications equipment for conformance with part 68. We proposed that these privileges should only be granted subject to the terms and conditions specified in the MRA. No parties disagreed with this proposal. Accordingly, we are amending parts 2 and 68 of our rules to allow parties in MRA partner economies to certify equipment under applicable MRA terms and conditions.

44. In accordance with the US/EC and APEC MRAs, the United States and each MRA partner will identify a "Designating Authority" in its territory. A Designating Authority is a body with power to designate, monitor, suspend, remove suspension of or withdraw conformity assessment bodies (CABs) in accordance with the MRAs. The Designating Authorities must meet the requirements of ISO/IEC Guide 61. Designating Authorities will in turn designate CABs, also within each country's territory, that will be empowered to approve products for conformity with the technical requirements of countries to which the equipment is exported. As used in the APEC and US/EC MRAs, "conformity assessment body" is a general term that refers to a body, which may include a third party testing laboratory or a certification body, that performs conformity assessment to specific technical regulations. Consequently, the MRAs cover two types of product approvals under the Commission's rules: certification, which is approval granted by a certification body, such as a TCB, and declaration of conformity, which requires product testing by an accredited testing laboratory.<sup>15</sup> The

<sup>15</sup> See 47 CFR 2.948(d). Laboratories that perform testing for a declaration of conformity must be Guide 25 accredited. The accreditation of

MRAs state that the designation of CABs is based on international standards, specifically ISO/IEC Guides 65 and 25.

45. Because CABs in exporting countries will be certifying equipment for import into the United States, we expect that those CABs will follow all relevant Commission requirements for certification, including those requirements adopted in the *Report and Order*. Thus, CABs will follow the implementation guidelines discussed. The MRAs contain provisions to remove the designation of foreign certifiers that do not comply with the applicable requirements. Those provisions are discussed below.

*Designation of TCBs for Equipment Exported From the United States*

46. The US/EC and APEC MRAs identify the Designating Authorities for the United States as NIST and the Federal Communications Commission. NIST will designate conformity assessment bodies, such as TCBs, in the United States for equipment that will be exported through its National Voluntary Conformity Assessment System Evaluation (NVCASE) program. NIST will oversee the United States conformity assessment bodies on an ongoing basis to ensure that they are performing in a satisfactory manner. We stated in the NPRM that it would be unnecessary for the Commission to play a direct role in designating or supervising TCBs with respect to equipment being exported. However, the Commission would provide assistance and guidance to NIST as may be necessary. For example, if questions arise as to the performance of a United States-based CAB, the Commission would make its expertise in testing and measurements available as needed to resolve such matters.

47. We adopt the approach described in the NPRM for designating conformity assessment bodies, such as TCBs, in the United States for equipment that will be exported to countries pursuant to MRAs. TCBs designated to certify equipment for export to a specific country shall meet the qualification criteria specified in the relevant MRA. We conclude that NIST has sufficient resources and experience to assume responsibility for designating and overseeing the performance of TCBs certifying equipment for export, in

laboratories located outside the U.S. is acceptable only if (1) there is an MRA between that country and the U.S., and the laboratory is covered by the agreement; (2) there is an agreement between accrediting bodies that permits similar accreditation of U.S. facilities to perform testing for products marketed in that country; or (3) the country already accepts the accreditation of U.S. laboratories.

conformance with MRA obligations. Thus, the Commission will not perform designation and oversight functions for TCBS certifying equipment for export, but will provide assistance and guidance to NIST as necessary.

48. We received several comments on the MRA provisions for equipment being exported from the United States. Some of the concerns raised are already addressed by provisions of the MRAs. For example, the EC requirements for telecommunications equipment are covered by three separate directives—EMC, Low Voltage and Telephone Terminal Equipment (TTE) Directives. Each directive has distinct conformity assessment requirements. Under the EMC Directive most equipment is subject to supplier's declaration, except that when standards are not harmonized within the EC or the equipment is too large for remote testing, the supplier must use what is called the Technical Construction File (TCF) route to market, requiring the use of a CAB called a Competent Body. NIST will be able to designate a U.S. entity to serve as a Competent Body, provided the entity is accredited to Guide 25 and meets the appropriate technical requirements in the EMC Directive. Radio transmitters and telephone terminal equipment subject to the TTE Directive, which is the most frequently used route to market, must be approved by a CAB called a Notified Body, which is accredited to Guide 65. In either case, NIST will accredit and designate the U.S. TCBS to the appropriate directives. Under the MRAs, parties are to accept test results and product certifications prepared by CABs in other countries. The APEC MRA, for example, clarifies that an importing party is to accept test reports on terms no less favorable than those it accords to those produced by its own CABs and that re-testing or duplicate testing is to be avoided. Because technical standards vary by country, a U.S. CAB may be found qualified to certify equipment intended for export to some countries but not others. The US/EC MRA, for example, does not require that CABs in this country be capable of approving equipment to all of the EC member states requirements, and we find no basis for imposing such a requirement. We expect that CABs will be able to provide certification for multiple countries because manufacturers will expect this level of service from CABs.

#### *Administration of the MRAs*

49. The US/EC MRA provides for oversight of implementation by a Joint Committee and Joint Sectorial Committees ("JSC"). The MRA provides

that Commission representatives will participate in both committees for the United States with regard to telecommunications equipment and electromagnetic compatibility sectors. The APEC MRA has similar provisions for a Joint Committee consisting of representatives of each party, with subcommittees including persons from the business/private sector. We conclude that Commission participation in the Joint Committees and JSCs will be important to ensure the successful administration and implementation of the US/EC and APEC MRAs. For example, the Commission may serve as an independent authority to evaluate claims of performance deficiencies by United States TCBS or the noncompliance of specific equipment with European technical requirements.

50. With regard to ensuring the ongoing compliance of TCBS, the US/EC MRA provides that if a particular TCB does not appear to be performing satisfactorily, the Commission may request that the noncompliant TCB take corrective actions. The Commission may also present appropriate evidence to the JSCs and/or Joint Committee and request removal of the TCB from the list of designated Certification Bodies. The APEC MRA also has provisions for contesting a TCB's technical competence, and provides a framework to limit or remove the recognition of TCBS when necessary. The Commission shall consult with the Office of the United States Trade Representative (USTR), as necessary, concerning any disputes that arise under an MRA.<sup>16</sup>

#### **Global Mobile Personal Communications by Satellite (GMPCS)**

51. The NPRM proposed to adopt an interim equipment authorization procedure for GMPCS terminals prior to full implementation of the GMPCS Arrangements. The Commission will be undertaking a separate proceeding to propose rules to implement fully the GMPCS Arrangements. Because one GMPCS operator was providing service prior to the NPRM and another system was scheduled to commence service before final rules implementing the Arrangements could be adopted, we proposed a set of interim standards

<sup>16</sup>See the Telecommunications Trade Act of 1988 (Section 1371–1382 of the Omnibus Trade and Competitiveness Act of 1988). Section 1377 requires the USTR to conduct a review to determine whether any act, policy, or practice of a foreign country that has entered into a telecommunications-related agreement with the U.S. (1) is not in compliance with the terms of the agreement; or (2) otherwise denies, within the context of the agreement, mutually advantageous market opportunities to telecommunications products and services of U.S. firms in that country.

under which applicants could request equipment certification. We believe that certification of GMPCS terminals will be a major benefit to the global satellite industry. A Commission equipment authorization, and the subsequent placement of the "GMPCS-MoU ITU Registry" mark on the terminals, would potentially be recognized by many foreign countries as sufficient to allow the equipment to transit borders more easily and without additional type approvals, equipment testing, or imposition of fees or delay for the user.

52. The NPRM proposed a voluntary equipment authorization procedure that would apply to GMPCS terminals as defined by the 1996 World Telecommunications Policy Forum held under the auspices of the ITU. The terminals would be certified in accordance with the requirements in parts 1, 2 and 25 of the rules.<sup>17</sup> In addition, we proposed that terminals operating in the 1610–1626.5 MHz band would also have to meet the out-of-band emission limits recommended for implementation by the year 2000 by the National Telecommunications and Information Administration (NTIA) in their September 1997 petition for rule making.<sup>18</sup>

53. A number of parties expressed concern about the out-of-band emission limits proposed. LSC, Raytheon and the GPS Council state that the proposed NTIA limits are not stringent enough to protect GPS and GLONASS. However, AMSC and CCI state that the NTIA limits are too stringent. CCI objects to the fact that they have not been adopted through a rule making. Moreover, MCHI believes that the Commission should wait to approve equipment until final standards are adopted, since there may be difficulties in recalling or retrofitting noncompliant equipment if the final standards adopted are more stringent than the interim ones. TIA in their comments, and Globalstar/Airtouch, Iridium, MCHI, Motorola and ORBCOMM in their reply comments, all state that the issue of out-of-band limits should be addressed in a separate rule-making proceeding.

54. In addition to uniform support expressed for the Commission's intention to rapidly implement the GMPCS-MoU Arrangements, we also received comments concerning other issues related to the interim GMPCS equipment certification. Primary among these was an indication by several

<sup>17</sup>See 47 CFR, 1, 2 and 25. Part 25 contains the technical requirements for satellite communications. Part 1 contains the requirements for RF safety, and part 2 contains the equipment authorization requirements.

<sup>18</sup>See RM-9165.

parties that the Commission was limiting the interim authorization procedure to "Big Leos"<sup>19</sup> in the *NPRM*. Final Analysis, ICO, Lockheed, ORBCOMM and Iridium all state that the interim authorization procedure should apply to other mobile satellite terminals.

55. In the *NPRM*, we specifically proposed to apply an interim procedure for certifying all GMPCS-related terminal equipment where we have authorized service and which demonstrates compliance with the Commission's relevant parts 1 and 25 standards, including emission limits for "Little Leos"<sup>20</sup> contained in 25.202(f). In light of the comments, we adopt the voluntary interim procedures for all GMPCS terminal equipment.

56. For terminals operating in the 1610–1626.5 MHz band, we proposed to add a requirement that the out-of-band emission limit of -70 dBW/MHz averaged over any 20 millisecond period for wide band emissions occurring between 1559–1605 MHz and -80 dBW/700 Hz for narrow band emissions occurring between 1559–1605 MHz would also need to be met. We find that, for the following reasons, use of the proposed out-of-band emission standards for terminals operating in the 1610–1626.5 MHz band will facilitate the authorization process for this equipment. First, the International Telecommunication Union's Radio Sector (ITU-R) Study Group WP 8D has adopted the proposed wideband standard as a recommendation for suppression of spurious emissions for MSS systems with mobile earth terminals. Similarly, the European Commission/CEPT adopted a European Testing and Standards Institute (ETSI) standard late last year for both CDMA and TDMA-type Mobile Satellite Service (MSS) systems based on this ITU-R recommendation. Second, NTIA proposed both the wide and narrowband standards cited in its recent petition for rule making concerning out-of-band emissions standards for protection of radionavigation devices. By using the most stringent requirement currently under review, we will ensure that MCH's concern over the recall or retrofit of non-compliant equipment in the future is minimized. Since the Commission will consider the NTIA petition for rule making in conjunction with full implementation of the GMPCS

Arrangements, any further concerns about the proposed NTIA out-of-band emission limits are best addressed in the future, separate proceeding.

57. In adopting this standard for voluntary interim certification, we are not prejudging the standards that we will ultimately adopt in our future GMPCS proceeding. Rather, we are establishing here a voluntary certification process designed to facilitate the circulation of GMPCS terminals across borders, aiding system operators, manufacturers and users of GMPCS service. If the standards we adopt in the GMPCS proceeding are more stringent than the ones used for interim certification, we will require the terminals to meet the stricter standards, in accordance with any associated implementation provisions adopted in that proceeding. In order to be used, the terminals must be operated with a satellite system or service provider authorized to provide mobile satellite service in the United States. Subsequent to receiving a blanket authorization under part 25 of the rules, terminals may be authorized under part 2 of the rules.

58. Accordingly, we amend part 25 of the rules to allow for the voluntary equipment authorization of all GMPCS terminals meeting the requirements set forth in our *NPRM*. Authorizations granted under this interim provision will be conditioned on the equipment meeting all final standards eventually adopted for GMPCS-related equipment.

59. Accordingly, *It is ordered* that parts 0, 2, 15, 25 and 68 of the Commission's Rules and Regulations *are amended* as specified in the Rule Changes attachment and are effective May 3, 1999. This action is taken pursuant to sections 4(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 301, 302, 303(e), 303(f), 303(r), 304 and 307.

60. *It is further ordered* that, pursuant to Section 5(c)(1) of the Communications Act of 1934, as amended, 47 U.S.C. 155(c)(1), authority is delegated to the copy Chief, Office of Engineering and Technology (OET) and the Chief, Common Carrier Bureau (CCB) to develop specific methods that will be used by the National Institute for Standards and Technology (NIST) to accredit TCBS, consistent with the qualification criteria herein, to enter into a memorandum of understanding with NIST on the accreditation process for TCBS, to designate and withdraw the designation of TCBS, and to develop procedures that TCBS will use for performing post-market surveillance.

### Final Regulatory Flexibility Analysis

61. As required by the Regulatory Flexibility Act (RFA),<sup>21</sup> an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Notice of Proposed Rule Making* in GEN Docket 98–68.<sup>22</sup> The Commission sought written public comment on the proposals in the *NPRM*, including comment on the IRFA. The comments received are discussed below. This Final Regulatory Flexibility Analysis (FRFA) conforms to the RFA.<sup>23</sup>

#### *Need for, and Objectives of, This Report and Order*

62. The Commission is amending parts 2, 15, 25 and 68 of the rules to provide the option of private sector approval of equipment that currently requires an approval by the Commission. We are also adopting rule changes to implement a Mutual Recognition Agreement (MRA) for product approvals with the European Community (EC), the Asia Pacific Economic Cooperation (APEC) and other foreign trade parties. These actions will eliminate the need for manufacturers to wait for approval from the Commission before marketing equipment in the United States, thereby reducing the time needed to bring a product to market. We are also adopting an interim procedure to issue equipment approvals for Global Mobile Personal Communication for Satellite (GMPCS) terminals prior to domestic implementation of the GMPCS–MoU Arrangements.<sup>24</sup><sup>25</sup> That action will benefit manufacturers of GMPCS terminals by allowing greater worldwide acceptance of their products.

#### *Summary of Significant Issues Raised by Public Comments in Response to the IRFA*

63. Several parties commented on the IRFA. ACIL, Acme, ICS and Retlif noted

<sup>21</sup> 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).

<sup>22</sup> See Notice of Proposed Rule Making in GEN Docket 98–68, 13 FCC Rcd 10683, 10711 (1998), 63 FR 31685, June 10, 1998.

<sup>23</sup> See 5 U.S.C. 604.

<sup>24</sup> "Global Mobile Personal Communications by Satellite" (GMPCS) service is defined in the 1996 Final Report of the World Telecommunications Policy Forum as: "any satellite system, (i.e., fixed or mobile, broadband or narrow-band, global or regional, geostationary or non-geostationary, existing or planned) providing telecommunication services directly to end users from a constellation of satellites."

<sup>25</sup> The GMPCS MoU and Arrangements are intended to allow the worldwide transport and use of GMPCS equipment. They are described in more detail in the *NPRM*.

<sup>19</sup> "Big Leo" systems provide voice and data Mobile-Satellite Service via a constellation of one or more non-geostationary orbit satellites operating in the band of 1610–1626.5 MHz.

<sup>20</sup> "Little Leo" systems provide data-only Mobile-Satellite Service via a constellation of non-geostationary orbit satellites operating below 1 GHz.

that the IRFA only focuses on the costs to small manufacturers and not to small test laboratories. Acme stated that small testing laboratories may not have the resources to become TCBs and may be forced to exit the testing business. Retlif stated that the rules will add another assessment fee to test laboratories who wish to become TCBs or subcontract with TCBs. SEA does not believe the benefits of the rules described in the IRFA outweigh the increased expenses and paperwork burdens that will fall on RF equipment manufacturers.<sup>26</sup> However, in its reply comments, TIA disagreed with SEA, stating that the increased number of TCBs would benefit small companies because of their global reach. TIA further stated that the vast majority of its 900 members are small and medium companies that support the Commission's proposed changes.

*Description and Estimate of the Number of Small Entities to Which Rules Will Apply*

64. Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), generally defines the term "small business" as having the same meaning as the term "small business concern" under the Small Business Act, 15 U.S.C. 632. 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"). This standard also applies in determining whether an entity is a small business for purposes of the RFA.

65. Regulatory Flexibility Analyses need only address the impact of rules on small entities *directly regulated* by those rules. See *Mid-Tex Electric Cooperative, Inc. v. FERC*, 773 F.2d 327, 342-43 (D.C. Cir. 1985). The Commission's equipment authorization rules directly regulate only manufacturers of equipment, which must satisfy the Commission's product approval requirements, and not test laboratories. Therefore, we disagree with ACIL,

<sup>26</sup> See SEA Regulatory Flexibility comments at 3. The four benefits to manufacturers we listed in the IRFA are (1) providing manufacturers with alternatives where they could possibly obtain certification faster than available from the Commission; (2) providing the option of obtaining certification from a facility in a more convenient location; (3) reducing the number of applications filed with the Commission, thereby enabling the Commission to redirect resources to enforcement of the rules; and (4) allowing equipment to be certified in other countries is a necessary step for concluding mutual recognition agreements.

Acme, ICS and Retlif that the IRFA should have addressed the impact of the rules on small test laboratories.

66. The Commission has not developed a definition of small entities applicable to RF Equipment Manufacturers. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to manufacturers of "Radio and Television Broadcasting and Communications Equipment." According to the SBA's regulation, an RF manufacturer must have 750 or fewer employees in order to qualify as a small business.<sup>27</sup> Census Bureau data indicates that there are 858 companies in the United States that manufacture radio and television broadcasting and communications equipment, and that 778 of these firms have fewer than 750 employees and would be classified as small entities.<sup>28</sup> We believe that many of the companies that manufacture RF equipment may qualify as small entities.

67. The Commission has not developed a definition of small manufacturers of telephone terminal equipment. The closest applicable definition under SBA rules is for manufacturers of telephone and telegraph apparatus (SIC 3661), which defines a small manufacturer as one having 1,000 or fewer employees.<sup>29</sup> According to 1992 Census Bureau data, there were 479 such manufacturers, and of those, 436 had 999 or fewer employees, and 7 had between 1,000 and 1,499 employees.<sup>30</sup> We estimate that there are fewer than 443 small manufacturers of terminal equipment that may be affected by the proposed rules.

*Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

68. We are allowing designated Telecommunication Certification Bodies (TCBs) in the United States to issue equipment approvals. Applicants for equipment authorization may apply either to the FCC or to a TCB, and they will be required to submit the same application data and exhibits to either that the rules currently require. Therefore, there will be no increase in the paperwork burden on manufacturers.

<sup>27</sup> See 13 CFR 121.201, Standard Industrial Classification (SIC) Code 3663.

<sup>28</sup> See U.S. Department of Commerce, 1992 Census of Transportation, Communications and Utilities (issued May 1995), SIC category 3663.

<sup>29</sup> 13 CFR 121.201, SIC 3661.

<sup>30</sup> 1992 Economic Census, Industry and Employment Size of Firm, Table 1D (data prepared by U.S. Census Bureau under contract to the U.S. Small Business Administration).

69. We are adopting changes to implement mutual recognition agreements with the European Community and the Asia Pacific Economic Cooperation that will permit certain equipment currently required to be authorized by the FCC to be authorized instead by TCBs in Europe or Asia. As with TCBs in the United States, applicants would be required to submit to a foreign TCB the same application data and exhibits they now submit to the Commission.

70. We are requiring that TCBs submit a copy of certain parts of each approved application to the FCC. Applications for equipment authorization under part 2 of the rules will be sent and stored electronically using the new OET electronic filing system. Paper copies of part 68 applications will be required, since there is not yet an electronic filing system for those applications.

71. We are also allowing a voluntary equipment authorization for mobile transmitters used in the Global Mobile Personal Communications by Satellite (GMPCS) service. This will require manufacturers who want to use the voluntary procedure to file an application and technical exhibits with the FCC and wait for an approval before the equipment can be marketed. While using the procedure would require an additional filing with the FCC, it will ultimately reduce the burden on manufacturers. Under the terms of the GMPCS-MoU and Arrangements, the single approval obtained in the United States could eliminate the need to obtain approvals from multiple other countries.

*Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

72. Certain equipment that uses radio frequencies or is connected to the public switched telecommunications network must be approved by the Commission before it can be marketed. Allowing parties other than the Commission to certify equipment will have the following benefits:

(a) It will provide manufacturers with alternatives where they could possibly obtain certification faster than available from the Commission.

(b) Manufacturers will have the option of obtaining certification from a facility in a more convenient location.

(c) It will reduce the number of applications filed with the Commission, which will enable the Commission to redirect resources to enforcement of the rules. This will ensure a "level playing field" for all manufacturers.

(d) Allowing equipment to be certified by parties located in other countries is

an essential and necessary step for concluding mutual recognition agreements (MRAs). MRAs benefit manufacturers by improving access to foreign markets.

73. As previously stated, SEA argued that these four benefits do not outweigh the significant increased expenses and greater paperwork burden that will fall on RF equipment manufacturers as a result of the rules. TIA disagreed with SEA, stating that the increased number of TCBs would benefit small companies because of their global reach, and that the vast majority of its members are small and medium companies that support the changes proposed in the *NPRM*.

74. The Report and Order allows parties other than the Commission to certify equipment, but it does not change the information required to obtain a grant of certification. Therefore, there will not be an increase in the paperwork burden on manufacturers. SEA does not provide any data to justify its claim of significantly higher expenses to manufacturers. Further, the Commission will continue to grant certifications, and these manufacturers have the option to use a TCB, but are not required to do so. The Commission will not regulate the fees that TCBs can charge. However, as we stated in the Report and Order, we expect that competition between TCBs should encourage them to process applications at a reasonable expense.

75. *Report to Congress*: The Commission shall send a copy of this Final Regulatory Flexibility Analysis, along with this Report and Order, in a report to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 801(a)(1)(A), and the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects

##### 47 CFR Part 0

Reporting and recordkeeping requirements.

##### 47 CFR Part 2

Radio, Reporting and recordkeeping requirements.

##### 47 CFR Part 15

Communications equipment.

##### 47 CFR Part 25 and 68

Communications equipment, report and recordkeeping requirements.

Federal Communications Commission.

**Magalie Roman Salas,**  
*Secretary.*

#### Rule Changes

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR parts 0, 2, 15, 25 and 68 as follows:

#### PART 0—COMMISSION ORGANIZATION

1. The authority citation for part 0 continues to read as follows:

**Authority:** Sec. 5, 48 Stat. 1068, as amended; 47 U.S.C. 155, 225 unless otherwise noted.

2. Section 0.241 is amended by adding paragraph (g) to read as follows:

##### § 0.241 Authority delegated.

\* \* \* \* \*

(g) The Chief of the Office of Engineering and Technology is delegated authority to enter into agreements with the National Institute of Standards and Technology to perform accreditation of Telecommunication Certification Bodies (TCBs) pursuant to §§ 2.960 and 2.962 of this chapter. In addition, the Chief is delegated authority to develop specific methods that will be used to accredit TCBs, to designate TCBs, to make determinations regarding the continued acceptability of individual TCBs, and to develop procedures that TCBs will use for performing post-market surveillance.

3. Section 0.291 is amended by adding paragraph (i) to read as follows:

##### § 0.291 Authority delegated.

\* \* \* \* \*

(i) The Chief, Common Carrier Bureau, is delegated authority to enter into agreements with the National Institute of Standards and Technology to perform accreditation of Telecommunication Certification Bodies (TCBs) pursuant to §§ 68.160 and 68.162 of this chapter. In addition, the Chief is delegated authority to develop specific methods that will be used to accredit TCBs, to designate TCBs, to make determinations regarding the continued acceptability of individual TCBs and to develop procedures that TCBs will use for performing post-market surveillance.

#### PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

4. The authority citation for part 2 continues to read as follows:

**Authority:** 47 U.S.C. 154, 302, 303, 307 and 336, unless otherwise noted.

5. Section 2.960 is added to read as follows:

#### § 2.960 Designation of Telecommunication Certification Bodies (TCBs).

(a) The Commission may designate Telecommunication Certification Bodies (TCBs) to approve equipment as required under this part. Certification of equipment by a TCB shall be based on an application with all the information specified in this part. The TCB shall process the application to determine whether the product meets the Commission's requirements and shall issue a written grant of equipment authorization. The grant shall identify the TCB and the source of authority for issuing it.

(b) The Federal Communications Commission shall designate TCBs in the United States to approve equipment subject to certification under the Commission's rules. TCBs shall be accredited by the National Institute of Standards and Technology (NIST) under its National Voluntary Conformity Assessment Evaluation (NVCASE) program, or other recognized programs based on ISO/IEC Guide 65, to comply with the Commission's qualification criteria for TCBs. NIST may, in accordance with its procedures, allow other appropriately qualified accrediting bodies to accredit TCBs and testing laboratories. TCBs shall comply with the requirements in § 2.962 of this part.

(c) In accordance with the terms of an effective bilateral or multilateral mutual recognition agreement or arrangement (MRA) to which the United States is a party, bodies outside the United States shall be permitted to authorize equipment in lieu of the Commission. A body in an MRA partner economy may authorize equipment to U.S. requirements only if that economy permits bodies in the United States to authorize equipment to its requirements. The authority designating these telecommunication certification bodies shall meet the following criteria.

(1) The organization accrediting the prospective telecommunication certification body shall be capable of meeting the requirements and conditions of ISO/IEC Guide 61.

(2) The organization assessing the telecommunication certification body shall appoint a team of qualified experts to perform the assessment covering all of the elements within the scope of accreditation. For assessment of telecommunications equipment, the areas of expertise to be used during the assessment shall include, but not be limited to, electromagnetic compatibility and telecommunications equipment (wired and wireless).

6. Section 2.962 is added to read as follows:

**§ 2.962 Requirements for Telecommunication Certification Bodies.**

(a) Telecommunication certification bodies (TCBs) designated by the Commission, or designated by another authority pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement to which the United States is a party, shall comply with the following requirements.

(b) *Certification methodology.* (1) The certification system shall be based on type testing as identified in sub-clause 1.2(a) of ISO/IEC Guide 65.

(2) Certification shall normally be based on testing no more than one unmodified representative sample of each product type for which certification is sought. Additional samples may be requested if clearly warranted, such as when certain tests are likely to render a sample inoperative.

(c) *Criteria for Designation.* (1) To be designated as a TCB under this section, an entity shall, by means of accreditation, meet all the appropriate specifications in ISO/IEC Guide 65 for the scope of equipment it will certify. The accreditation shall specify the group of equipment to be certified and the applicable regulations for product evaluation.

(2) The TCB shall demonstrate expert knowledge of the regulations for each product with respect to which the body seeks designation. Such expertise shall include familiarity with all applicable technical regulations, administrative provisions or requirements, as well as the policies and procedures used in the application thereof.

(3) The TCB shall have the technical expertise and capability to test the equipment it will certify and shall also be accredited in accordance with ISO/IEC Guide 25 to demonstrate it is competent to perform such tests.

(4) The TCB shall demonstrate an ability to recognize situations where interpretations of the regulations or test procedures may be necessary. The appropriate key certification and laboratory personnel shall demonstrate a knowledge of how to obtain current and correct technical regulation interpretations. The competence of the telecommunication certification body shall be demonstrated by assessment. The general competence, efficiency, experience, familiarity with technical regulations and products included in those technical regulations, as well as compliance with applicable parts of the ISO/IEC Guides 25 and 65, shall be taken into consideration.

(5) A TCB shall participate in any consultative activities, identified by the

Commission or NIST, to facilitate a common understanding and interpretation of applicable regulations.

(6) The Commission will provide public notice of the specific methods that will be used to accredit TCBs, consistent with these qualification criteria.

(d) *Sub-contractors.* (1) In accordance with the provisions of sub-clause 4.4 of ISO/IEC Guide 65, the testing of a product, or a portion thereof, may be performed by a sub-contractor of a designated TCB, provided the laboratory has been assessed by the TCB as competent and in compliance with the applicable provisions of ISO/IEC Guide 65 and other relevant standards and guides.

(2) When a subcontractor is used, the TCB shall be responsible for the test results and shall maintain appropriate oversight of the subcontractor to ensure reliability of the test results. Such oversight shall include periodic audits of products that have been tested.

(e) *Designation of TCBs.* (1) The Commission will designate as a TCB any organization that meets the qualification criteria and is accredited by NIST or its recognized accreditor.

(2) The Commission will withdraw the designation of a TCB if the TCB's accreditation by NIST or its recognized accreditor is withdrawn, if the Commission determines there is just cause for withdrawing the designation, or if the TCB requests that it no longer hold the designation. The Commission will provide a TCB with 30 days notice of its intention to withdraw the designation and provide the TCB with an opportunity to respond.

(3) A list of designated TCBs will be published by the Commission.

(f) *Scope of responsibility.* (1) TCBs shall certify equipment in accordance with the Commission's rules and policies.

(2) A TCB shall accept test data from any source, subject to the requirements in ISO/IEC Guide 65, and shall not unnecessarily repeat tests.

(3) TCBs may establish and assess fees for processing certification applications and other tasks as required by the Commission.

(4) A TCB may rescind a grant of certification within 30 days of grant for administrative errors. After that time, a grant can only be revoked by the Commission through the procedures in § 2.939 of this part. A TCB shall notify both the applicant and the Commission when a grant is rescinded.

(5) A TCB may not:

(i) Grant a waiver of the rules, or certify equipment for which the Commission rules or requirements do

not exist or for which the application of the rules or requirements is unclear.

(ii) Take enforcement actions; or  
(iii) Authorize a transfer of control of a grantee.

(6) All TCB actions are subject to Commission review.

(g) *Post-certification requirements.* (1) A TCB shall supply an electronic copy of each approved application form and grant of certification to the Commission.

(2) In accordance with ISO/IEC Guide 65, a TCB is required to conduct appropriate post-market surveillance activities. These activities shall be based on type testing a few samples of the total number of product types which the certification body has certified. Other types of surveillance activities of a product that has been certified are permitted, provided they are no more onerous than testing type. The Commission may at any time request a list of products certified by the certification body and may request and receive copies of product evaluation reports. The Commission may also request that a TCB perform post-market surveillance, under Commission guidelines, of a specific product it has certified.

(3) If during post market surveillance of a certified product, a certification body determines that a product fails to comply with the applicable technical regulations, the certification body shall immediately notify the grantee and the Commission. A follow-up report shall also be provided within thirty days of the action taken by the grantee to correct the situation.

(4) Where concerns arise, the TCB shall provide a copy of the application file within 30 calendar days upon request by the Commission to the TCB and the manufacturer. Where appropriate, the file should be accompanied by a request for confidentiality for any material that qualifies as trade secrets. If the application file is not provided within 30 calendar days, a statement shall be provided to the Commission as to why it cannot be provided.

(h) In case of a dispute with respect to designation or recognition of a TCB and the testing or certification of products by a TCB, the Commission will be the final arbiter. Manufacturers and designated TCBs will be afforded at least 30 days to comment before a decision is reached. In the case of a TCB designated or recognized, or a product certified pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement (MRA) to which the United States is a party, the Commission may limit or withdraw its recognition of a TCB

designated by an MRA party and revoke the certification of products using testing or certification provided by such a TCB. The Commission shall consult with the Office of the United States Trade Representative (USTR), as necessary, concerning any disputes arising under an MRA for compliance with the Telecommunications Trade Act of 1988 (Section 1371-1382 of the

Omnibus Trade and Competitiveness Act of 1988).

**PART 15—RADIO FREQUENCY DEVICES**

7. The authority citation for part 15 continues to read as follows:

**Authority:** 47 U.S.C. 154, 302, 303, 304, 307 and 544A.

8. Section 15.101, is amended by revising paragraph (a) to read as follows:

**§ 15.101 Equipment authorization of unintentional radiators.**

(a) Except as otherwise exempted in §§ 15.23, 15.103, and 15.113, unintentional radiators shall be authorized prior to the initiation of marketing, as follows:

Type of device	Equipment authorization required
TV broadcast receiver .....	Verification.
FM broadcast receiver .....	Verification.
CB receiver .....	Declaration of Conformity or Certification.
Superregenerative receiver .....	Declaration of Conformity or Certification.
Scanning receiver .....	Certification.
All other receivers subject to part 15 .....	Declaration of Conformity or Certification.
TV interface device .....	Declaration of Conformity or Certification.
Cable system terminal device .....	Declaration of Conformity.
Stand-alone cable input selector switch .....	Verification.
Class B personal computers and peripherals .....	Declaration of Conformity or Certification. <sup>1</sup>
CPU boards and internal power supplies used with Class B personal computers .....	Declaration of Conformity or Certification. <sup>1</sup>
Class B personal computers assembled using authorized CPU boards or power supplies .....	Declaration of Conformity.
Class B external switching power supplies .....	Verification.
Other Class B digital devices and peripherals .....	Verification.
Class A digital devices, peripherals and external switching power supplies .....	Verification.
All other devices .....	Verification.

**Note to table:** Where the above table indicates more than one category of authorization for a device, the party responsible for compliance has the option to select the type of authorization.

<sup>1</sup> Applications for this equipment will no longer be accepted by the Commission once domestic Telecommunication Certification Bodies are available to certificate the equipment. See § 2.960 of this chapter.

\* \* \* \* \*

**PART 25—SATELLITE COMMUNICATIONS**

9. The authority citation for part 25 continues to read as follows:

**Authority:** 47 U.S.C. 701-744. Interprets or applies sec. 303, 47 U.S.C. 303. 47 U.S.C. sections 154, 301, 302, 303, 307, 309 and 332, unless otherwise noted.

10. Section 25.200 is added to read as follows:

**§ 25.200 Interim equipment authorization.**

(a) For purposes of this section, a "GMPCS system" is defined as "any satellite system, (i.e., fixed or mobile, broadband or narrow-band, global or regional, geostationary or non-geostationary, existing or planned) providing telecommunication services directly to end users from a constellation of satellites."

(b) Subsequent to receiving a blanket authorization under this part, terminals used in conjunction with GMPCS systems, as defined under § 25.200 (a) of this part, may also obtain an equipment authorization from the Commission in accordance with the certification procedure for use under this part. The certification procedure is found in part 2, subpart J of this chapter.

(c) In order to be granted certification, a transmitter shall comply with the

technical specifications in this part. In addition, mobile earth satellite terminals for use in the band of 1610-1626.5 MHz shall meet a specific out-of-band emissions limit. Emissions in the band 1559-1605 MHz shall be limited to -70 dBW/MHz averaged over any 20 millisecond period for wideband signals, and a standard of -80 dBW across within the measurement bandwidth of 700 Hz or less for narrowband signals.

(d) Licensees and manufacturers are subject to the radiofrequency radiation exposure requirements specified in §§ 1.1307(b), 2.1091 and 2.1093 of this chapter, as appropriate. Applications for equipment authorization of mobile or portable devices operating under this section shall contain a statement confirming compliance with these requirements for both fundamental emissions and unwanted emissions. Technical information showing the basis for this statement shall be submitted to the Commission upon request.

(e) Equipment authorizations issued pursuant to this section will be conditioned on the equipment meeting all relevant technical requirements that are adopted by the Commission in implementing the GMPCS Arrangements.

**PART 68—CONNECTION OF TERMINAL EQUIPMENT TO THE TELEPHONE NETWORK**

11. The authority citation for part 68 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303.

12. Section 68.160 is added to read as follows:

**§ 68.160 Designation of Telecommunication Certification Bodies (TCBs).**

(a) The Commission may designate Telecommunication Certification Bodies (TCBs) to approve equipment as required under this part. Certification of equipment by a TCB shall be based on an application with all the information specified in this part. The TCB shall process the application to determine whether the product meets the Commission's requirements and shall issue a written grant of equipment authorization. The grant shall identify the TCB and the source of authority for issuing it.

(b) The Federal Communications Commission shall designate TCBs in the United States to approve equipment subject to certification under the Commission's rules. TCBs shall be accredited by the National Institute of Standards and Technology (NIST) under its National Voluntary Conformity Assessment Evaluation (NVCASE)

program or other recognized programs based on ISO/IEC Guide 65, to comply with the Commission's qualification criteria for TCBs. NIST may, in accordance with its procedures, allow other appropriately qualified accrediting bodies to accredit TCBs and testing laboratories. TCBs shall comply with the requirements in § 68.162 of this part.

(c) In accordance with the terms of an effective bilateral or multilateral mutual recognition agreement or arrangement (MRA) to which the United States is a party, bodies outside the United States shall be permitted to authorize equipment in lieu of the Commission. A body in an MRA partner economy may authorize equipment to U.S.

requirements only if that economy permits bodies in the United States to authorize equipment to its requirements. The authority designating these telecommunication certification bodies shall meet the following criteria.

(1) The organization accrediting the prospective telecommunication certification body shall be capable of meeting the requirements and conditions of ISO/IEC Guide 61.

(2) The organization assessing the telecommunication certification body shall appoint a team of qualified experts to perform the assessment covering all of the elements within the scope of accreditation. For assessment of telecommunications equipment, the areas of expertise to be used during the assessment shall include, but not be limited to, electromagnetic compatibility and telecommunications equipment (wired and wireless).

13. Section 68.162 is added to read as follows:

**§ 68.162 Requirements for Telecommunication Certification Bodies.**

(a) Telecommunication certification bodies (TCBs) designated by the Commission, or designated by another authority pursuant to an effective mutual recognition agreement or arrangement to which the United States is a party, shall comply with the following requirements.

(b) *Certification methodology.* (1) The certification system shall be based on type testing as identified in sub-clause 1.2(a) of ISO/IEC Guide 65.

(2) Certification shall normally be based on testing no more than one unmodified representative sample of each product type for which certification is sought. Additional samples may be requested if clearly warranted, such as when certain tests are likely to render a sample inoperative.

(c) *Criteria for designation.* (1) To be designated as a TCB under this section,

an entity shall, by means of accreditation, meet all the appropriate specifications in ISO/IEC Guide 65 for the scope of equipment it will certify. The accreditation shall specify the group of equipment to be certified and the applicable regulations for product evaluation.

(2) The TCB shall demonstrate expert knowledge of the regulations for each product with respect to which the body seeks designation. Such expertise shall include familiarity with all applicable technical regulations, administrative provisions or requirements, as well as the policies and procedures used in the application thereof.

(3) The TCB shall have the technical expertise and capability to test the equipment it will certify and shall also be accredited in accordance with ISO/IEC Guide 25 to demonstrate it is competent to perform such tests.

(4) The TCB shall demonstrate an ability to recognize situations where interpretations of the regulations or test procedures may be necessary. The appropriate key certification and laboratory personnel shall demonstrate a knowledge of how to obtain current and correct technical regulation interpretations. The competence of the telecommunication certification body shall be demonstrated by assessment. The general competence, efficiency, experience, familiarity with technical regulations and products included in those technical regulations, as well as compliance with applicable parts of the ISO/IEC Guides 25 and 65, shall be taken into consideration.

(5) A TCB shall participate in any consultative activities, identified by the Commission or NIST, to facilitate a common understanding and interpretation of applicable regulations.

(6) The Commission will provide public notice of specific elements of these qualification criteria that will be used to accredit TCBs.

(d) *Sub-contractors.* (1) In accordance with the provisions of sub-clause 4.4 of ISO/IEC Guide 65, the testing of a product, or a portion thereof, may be performed by a sub-contractor of a designated TCB, provided the laboratory has been assessed by the TCB as competent and in compliance with the applicable provisions of ISO/IEC Guide 65 and other relevant standards and guides.

(2) When a subcontractor is used, the TCB shall be responsible for the test results and shall maintain appropriate oversight of the subcontractor to ensure reliability of the test results. Such oversight shall include periodic audits of products that have been tested.

(e) *Designation of TCBs.* (1) The Commission will designate as a TCB any organization that meets the qualification criteria and is accredited by NIST or its recognized accreditor.

(2) The Commission will withdraw the designation of a TCB if the TCB's accreditation by NIST or its recognized accreditor is withdrawn, if the Commission determines there is just cause for withdrawing the designation, or if the TCB requests that it no longer hold the designation. The Commission will provide a TCB with 30 days notice of its intention to withdraw the designation and provide the TCB with an opportunity to respond.

(3) A list of designated TCBs will be published by the Commission.

(f) *Scope of responsibility.* (1) TCBs shall certify equipment in accordance with the Commission's rules and policies.

(2) A TCB shall accept test data from any source, subject to the requirements in ISO/IEC Guide 65, and shall not unnecessarily repeat tests.

(3) TCBs may establish and assess fees for processing certification applications and other tasks as required by the Commission.

(4) A TCB may rescind a grant of certification within 30 days of grant for administrative errors. After that time, a grant can only be revoked by the Commission. A TCB shall notify both the applicant and the Commission when a grant is rescinded.

(5) A TCB may not:

(i) Grant a waiver of the rules, or certify equipment for which the Commission rules or requirements do not exist or for which the application of the rules or requirements is unclear.

(ii) Take enforcement actions.

(6) All TCB actions are subject to Commission review.

(g) *Post-certification requirements.* (1) A TCB shall supply a copy of each approved application form and grant of certification to the Commission.

(2) In accordance with ISO/IEC Guide 65, a TCB is required to conduct appropriate surveillance activities. These activities shall be based on type testing a few samples of the total number of product types which the certification body has certified. Other types of surveillance activities of a product that has been certified are permitted, provided they are no more onerous than testing type. The Commission may at any time request a list of products certified by the certification body and may request and receive copies of product evaluation reports. The Commission may also request that a TCB perform post-market surveillance, under Commission

guidelines, of a specific product it has certified.

(3) If during post market surveillance of a certified product, a certification body determines that a product fails to comply with the applicable technical regulations, the certification body shall immediately notify the grantee and the Commission. A follow-up report shall also be provided within thirty days of the action taken by the grantee to correct the situation.

(4) Where concerns arise, the TCB shall provide a copy of the application file within 30 calendar days upon request by the Commission to the TCB and the manufacturer. Where appropriate, the file should be accompanied by a request for confidentiality for any material that qualifies as trade secrets. If the application file is not provided within 30 calendar days, a statement shall be provided to the Commission as to why it cannot be provided.

(h) In case of a dispute with respect to designation or recognition of a TCB and the testing or certification of products by a TCB, the Commission will be the final arbiter. Manufacturers and designated TCBs will be afforded at least 30 days to comment before a decision is reached. In the case of a TCB designated or recognized, or a product certified pursuant to an effective bilateral or multilateral mutual recognition agreement or arrangement (MRA) to which the United States is a party, the Commission may limit or withdraw its recognition of a TCB designated by an MRA party and revoke the certification of products using testing or certification provided by such a TCB. The Commission shall consult with the Office of the United States Trade Representative (USTR), as necessary, concerning any disputes arising under an MRA for compliance with under the Telecommunications Trade Act of 1988 (Section 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988).

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## FEDERAL COMMUNICATIONS COMMISSION

### 47 CFR Part 64

[CC Docket No. 96-61; FCC 98-347]

### Implementation of the Rate Integration Requirement of the Communications Act, Petitions for Forbearance

AGENCY: Federal Communications Commission.

**ACTION:** Final rule; petition for reconsideration.

**SUMMARY:** By this Memorandum Opinion and Order (Order), the Commission reaffirms its earlier determination that the rate integration requirement of the Communications Act apply to interstate, interexchange services offered by commercial mobile radio service (CMRS) providers, and therefore denied the petitions for reconsideration of that determination. The Commission clarified that CMRS traffic within a major trading area (MTA) (intra-MTA traffic) is not "interexchange" traffic and thus not subject to the rate integration requirements of section 254(g). The Commission denied the petitions seeking forbearance from the application of rate integration to CMRS providers. This carries out the intent of Congress that providers of interstate, interexchange services offer such services at integrated rates.

**EFFECTIVE DATE:** March 4, 1999.

**FOR FURTHER INFORMATION CONTACT:** Douglas L. Slotten, Attorney, Common Carrier Bureau, Competitive Pricing Division, at (202) 418-1572 or via the Internet at [dslotten@fcc.gov](mailto:dslotten@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a summary of the Commission's *Memorandum Opinion and Order in the matter of Implementation of Section 254(g) of the Communications Act of 1934, as Amended, Petitions for Forbearance*, CC Docket No. 96-61, adopted December 31, 1998, and released December 31, 1998. The complete text of this *Order* is available for inspection and copying during normal business hours in the Commission's Reference Center, Room 239, 1919 M Street N.W., Washington, DC. The *Order* is available through the Internet at [http://www.fcc.gov/Bureaus/Common\\_Carrier/orders/1998/fcc98347.wp](http://www.fcc.gov/Bureaus/Common_Carrier/orders/1998/fcc98347.wp). The complete text may be purchased from the Commission's duplicating contractor, International Transcription Service, Inc. (ITS, Inc.), at 1231 20th Street N.W., Washington, DC 20036, (202) 857-3800.

## SYNOPSIS OF MEMORANDUM OPINION AND ORDER

### I. Introduction

1. We address seven petitions for reconsideration or, in the alternative, petitions for forbearance, of the Commission's *Rate Integration Reconsideration Order*, Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-

61, First Memorandum Opinion and Order on Reconsideration, 12 FCC Rcd 11,812 (1997), 62 FR 46447 (September 3, 1997) (*Rate Integration Reconsideration Order*), in which the Commission found that the rate integration requirements of section 254(g) of the Communications Act of 1934, as amended ("Act"), apply to the interstate, interexchange services of Commercial Mobile Radio Service ("CMRS") providers. The petitioners request that the Commission reconsider that determination. In the alternative, if the Commission finds that section 254(g) applies to CMRS providers, the petitioners request that the Commission forbear from applying section 254(g) to the interstate, interexchange services offered by CMRS providers pursuant to section 10 of the Act.

2. We also state our intent to issue a Further Notice seeking comment on issues relating to airtime and roaming charges associated with interstate, interexchange calls for which a separate charge is stated; wide-area CMRS calling plans; and the affiliation requirements that should be applicable to services subject to the rate integration requirement. Pending further rulemaking, we keep in place the *Order* adopted by the Commission on October 2, 1997, in which the Commission stayed the application of the requirement that providers of interstate, interexchange services integrate rates across affiliates, as well as application of rate integration requirements with respect to wide-area rate plans offered by CMRS providers. *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, *Order*, 12 FCC Rcd 15,739 (1997) (*Rate Integration Stay Order*).

### II. Petitions for Reconsideration

3. We decline to reconsider our determination that the rate integration requirement of section 254(g) applies to CMRS providers. Section 254(g) requires that "[a] provider of interstate interexchange services shall provide its services to subscribers in a state at rates no higher than provided to subscribers in any other state." The language of section 254(g) on its face unambiguously applies to all providers of interstate, interexchange services. Thus, section 254 (g) applies to the interstate, interexchange services offered by CMRS providers. If Congress had intended to exempt CMRS providers, it presumably would have done so expressly as it did in other sections of the Act. Thus, we reaffirm our earlier determinations that the rate

integration language of section 254(g) applies to all providers of interstate, interexchange services, including CMRS providers. We conclude that any reference to the existing rate integration policy by Congress or by this Commission merely identified the overarching policy under consideration, and was not intended to exempt from application of that policy any carrier or class of carriers, as the petitioning parties suggest.

4. Because the language of the statute is unambiguous and plainly applies to CMRS providers, we need not examine the legislative history of section 254(g). Assuming, *arguendo*, some ambiguity in the statutory language, thus requiring an examination of the legislative history, we find nothing in that legislative history that unambiguously indicates that CMRS providers are exempted from section 254(g). The language referenced by the CMRS providers could readily be read as identifying the policy to be applied to all providers of interstate, interexchange services as reasonably as it could be read to suggest the codification of rate integration as applied to the wireline industry.

5. Similarly, we reject the argument raised by AirTouch that Congress did not intend rate integration to apply to CMRS providers because rate integration is unnecessary to achieve the policy goals underlying section 254(g). AirTouch states that rate integration is designed to enable subscribers in rural and offshore areas to obtain some of the benefits of rate decreases created by competitive pressures on access charges and long-distance rates in more urban areas, and to protect customers in those areas from bearing the full burden of higher local exchange costs. AirTouch appears to conflate rate integration with rate averaging. Rate averaging, which is also required by section 254(g), does have the described effect of protecting customers in high cost local exchange areas from bearing the full burden of those costs. Rate integration, on the other hand, generally focuses on the distance-sensitive aspects of the rate structures for interexchange services. It protects noncontiguous parts of the United States, such as Alaska and Hawaii, from being discriminated against because they are not part of the contiguous 48 states. AirTouch's focus on exchange cost differences is, therefore, misplaced and we disagree with its interpretation of the statute.

6. Although CMRS providers may be characterized as providers of exchange and exchange access services, that characterization does not preclude a finding that some of a CMRS provider's service offerings are interstate,

interexchange services. While CMRS providers do not pay access charges for originating or terminating local exchange calls, CMRS providers do pay access charges when an interexchange call originates or terminates on landline facilities. Similarly, that, in some instances, CMRS providers are regulated in a manner different from other carriers, does not compel a conclusion that the interstate, interexchange services of CMRS providers are not subject to the rate integration requirements of section 254(g).

7. We also reject the argument that applying section 254(g) to CMRS providers is inconsistent with section 332 of the Act because it allegedly undermines the distinct deregulatory paradigm applicable to CMRS providers. Bell Atlantic Mobile asserts that the price regulation required by section 254(g) is precisely that which the Commission and Congress have deemed unnecessary and harmful to the public interest in the CMRS context. Section 332(c), however, expressly provides that sections 201 and 202 of the Act shall continue to apply to CMRS providers. Section 201(b) requires just and reasonable rates and 202(a) prohibits rates that are unreasonably discriminatory. These requirements necessarily imply some degree of regulatory concern with prices; section 332 cannot, therefore, be read to bar every form of oversight over CMRS rates. Furthermore, the rate integration policy codified in section 254(g) derived from section 202(a) the requirement that rates not be unreasonably discriminatory. Finally, we note that other provisions of Title II of the Act apply to CMRS providers. For example, the interconnection requirements of section 251(a) clearly apply to CMRS providers; CMRS providers are as capable as any other carrier of invoking the protections of section 253; and, CMRS providers are among the providers of interstate services who are required to make universal service contributions pursuant to section 254(d). Thus, we conclude that the application of section 254(g) to CMRS providers is not inconsistent with section 332.

8. We find unpersuasive the argument that, because we held that CMRS rates did not have to be integrated with the rates of affiliated long-distance providers, we did not intend rate integration to apply to CMRS providers. Rather, that decision addresses the issue of how rate integration should be applied to different interstate, interexchange services, and was consistent with the long-standing Commission practice of applying rate

integration on a service-by-service basis. That decision does not address the question of whether rate integration should apply to CMRS providers at all. Similarly, CMRS providers' exemption from the equal access requirements applicable to incumbent LECs does not, as some CMRS providers suggest, address whether CMRS providers provide interstate, interexchange services and thus whether rate integration should apply to CMRS providers.

9. Several petitioners allege that the Commission gave inadequate notice to permit application of section 254(g) to CMRS providers. As we stated in the *Rate Integration Stay Order*, we do not agree that inadequate notice was given to hold that the rate integration requirements of section 254(g) apply to CMRS providers. The language of section 254(g) applies to providers of interexchange telecommunications services with no exceptions enumerated. Elsewhere in the Act, as we noted above, when Congress wanted to exempt CMRS providers from a requirement of the Act, it did so expressly. The words of the statute clearly encompass CMRS providers and legally obligate them to integrate their interstate, interexchange services. Our rule, implementing section 254(g), merely reiterated the precise terms of the statute. Further, we note that in *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Notice of Proposed Rulemaking, CC Docket No. 96-61, 11 FCC Rcd 7141 (1996), 61 FR 14717 (April 3, 1996), we stated that an interexchange call includes all means of connecting two points, "wireline or wireless." Specific notice of our intent to apply the plain language of the statute was not required. We, therefore, find no relevant lack of notice regarding the application of rate integration requirements to providers of CMRS services.

10. Our conclusion that adequate notice was given of the application of section 254(g) to CMRS providers is not altered by the fact that no party commented on the application of rate integration to CMRS providers. As noted above, section 254(g), by its own terms, applies to providers of interexchange services. CMRS providers, therefore, should have been on notice that the rulemaking proceeding could affect their interests. Although rate integration had not previously been applied to CMRS providers, the CMRS industry had been subject to the rate regulation of section 202(a) of the Act and, thus, the industry should have been alert to the broad scope of section 254(g), which has its origins in section 202(a).

Moreover, section 254(g) was enacted as part of the 1996 Act; therefore, the application of that section to the CMRS industry does not represent a change in Commission policy requiring more specific notice. Finally, we conclude that because we only codified the language of section 254(g), we find no issue concerning the adequacy of the record to support adoption of the rule.

11. In any event, we find that the present reconsideration record supports the conclusion that section 254(g) applies to CMRS providers. We note that we stayed application of the affiliation requirement and application of rate integration to wide-area plans, the two cases in which we believe we would benefit from a fuller record. We continue to believe a fuller record on these two issues would be beneficial and, therefore, will seek further comment on those issues to develop a better record in a separate proceeding.

12. AirTouch notes that CMRS carriers are not mentioned in the regulatory flexibility analysis assessing the administrative burden of regulations on industry, and asserts that this reflects a lack of intent that section 254(g) be applied to CMRS providers. While the Final Regulatory Flexibility Act analysis in the *Rate Integration Order, Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996), 61 FR 42558 (August 16, 1996) (*Rate Integration Order*), did not assess the administrative burden of regulations on CMRS providers, as AirTouch indicates, the omission does not evidence a lack of intent to apply section 254(g) to CMRS providers. We have prepared a Supplemental Final Regulatory Flexibility Act analysis to redress our inadvertent oversight. No party has claimed that the omission caused material harm. Indeed, in the *Rate Integration Stay Order*, we stayed application of the rate integration requirement to wide-area plans and across affiliates. Accordingly, those requirements had no impact on small entities.

13. We conclude that treating intra-MTA (major trading area) calls as not being subject to rate integration is consistent with the definition of "telephone exchange service." The Act defines "telephone exchange service" as "service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area \* \* \* and which is covered by the exchange service charge, or \* \* \* comparable service provided

through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. 153(47). In *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15998-16000 (1996), 61 FR 45476 (August 29, 1996) (*Local Competition Order*), *Order on Reconsideration*, 11 FCC Rcd 13042 (1996), 61 FR 52706 (October 8, 1998), *vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998), we concluded that cellular, broadband PCS, and covered SMR providers fall within at least the second part of this definition because they provide "comparable service" to telephone exchange service. Our determination was based on the finding that, as a general matter, CMRS carriers provide local, two-way switched voice service as a principal part of their business. Cellular and PCS providers, however, are not LECs, as that term is defined in section 3(26) of the Act. Treating intra-MTA CMRS calls as local also is consistent with our conclusion in the *Local Competition Order*, 11 FCC Rcd 16,014, that MTAs defined the area in which reciprocal compensation applies to interconnections between incumbent LECs and CMRS providers. Because of the mobility of CMRS customers, the MTA, rather than a smaller area, such as the CMRS provider's license area or a wireline exchange area, reflects the minimum area in which customers may be expected to travel and within which they would expect not to pay toll charges. Pursuant to this approach, calls within an MTA that would be interstate will not be treated as interexchange.

14. We provide two further clarifications that follow from the finding that traffic that originates and terminates within an MTA does not constitute interexchange service. First, we clarify that when a customer is roaming, a call within the MTA of the roamed upon CMRS provider is not "interexchange." This clarification ensures that intra-MTA calls are not "interexchange" service, thus triggering rate integration, regardless of the location of the customer. Second, we clarify that when a CMRS provider performs only an exchange access function, and an unaffiliated interexchange carrier transports and bills for the call to a destination in a different state outside the MTA, that

exchange access function is not "interstate, interexchange" for purposes of section 254(g). We conclude that this clarification is necessary to ensure that our treatment here is akin to our treatment of incumbent LEC access charges, which are not required to be integrated.

15. Several CMRS providers seek clarification or reconsideration of the application of rate integration to roaming and airtime charges. We plan to seek additional comment on these issues in a Further Notice. Two additional sets of issues remain: (1) The treatment of wide-area calling plans; and, (2) the affiliation requirements applicable to CMRS providers for purposes of determining compliance with rate integration. We will resolve these issues on the basis of the more complete record developed in response to the Further Notice.

### III. Petitions for Forbearance

16. The petitions for forbearance generally request that we forbear from applying the rate integration provisions of section 254(g) to interstate, interexchange services offered by CMRS providers, if the Commission concludes that section 254(g) applies to those services. Section 10(a) of the Act sets forth a three-part standard to be applied in addressing petitions for forbearance: a carrier may petition the Commission for forbearance from any statutory provision or regulation, and the Commission shall grant such petition if it determines that: (1) Enforcement of the requirement is not necessary to ensure that rates are just and reasonable, and are not unjustly and unreasonably discriminatory; (2) the regulation is not necessary to protect consumers; and (3) forbearance is consistent with the public interest. Section 10(b) further provides that the Commission "shall consider whether forbearance from enforcing the regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services." As fully discussed below, we conclude that the petitioners have not met the standard for the grant of forbearance and, for this reason, we must deny their petitions.

17. We conclude that the petitioners have not met their burden with respect to the first and second prongs of the forbearance standard. We are concerned that, without rate integration, CMRS providers would, when consistent with their economic interests, discriminate against the offshore points. Our concerns are not eliminated by the CMRS providers' claims that CMRS rates are falling, or that PCS rates are

lower than cellular rates. Similarly, CMRS providers' few cited anecdotal instances of the offering of rates that comply with the rate integration requirement of section 254(g) do not ensure that such rates will be offered by all CMRS providers in the future. Moreover, although CMRS providers contend generally that rate integration would interfere with competition, resulting in less consumer choice, we find no specific persuasive arguments on this record to support those contentions.

18. Specifically, we find that the petitioners have not shown that, in the absence of rate integration, CMRS rates will be just and reasonable and not unjustly or unreasonably discriminatory. Indeed, we conclude that rate integration is necessary to ensure that nondiscriminatory charges and practices are offered with respect to CMRS services to and from the offshore points. Moreover, as noted by Alaska, even if rate integrated service plans are available in all parts of the United States, nothing in the record suggests that the existence of the rate integration requirement is not a significant cause of that condition. We also agree that there is no evidence to show that rate integration is not necessary for the protection of consumers. Alaska notes, for example, that Bell Atlantic Mobile's argument that consumers benefit from its plan offering one long-distance rate is misplaced because Bell Atlantic Mobile does not offer service to subscribers in Alaska and Hawaii. Thus, although the cost to a Bell Atlantic Mobile customer calling Alaska or Hawaii might be the same as the cost of a call elsewhere in the continental United States, that fact does not protect the interests of consumers in Alaska or Hawaii because they generally would not be paying the long distance charges.

19. We also agree with Hawaii and Alaska that a broad grant of forbearance would not be consistent with the public interest, as required by the third prong of the forbearance standard. The public interest here, as reflected by the inclusion of CMRS providers in section 254(g), is the integration of offshore points into the interexchange rate patterns of CMRS services to prevent discrimination against those locations. Therefore, in order to satisfy the public interest, CMRS providers must explain how the benefits of section 254(g) can be attained if we forbear from applying the rate integration requirement of section 254(g) to the interstate, interexchange services of CMRS providers. We conclude that the petitioners have not made the required demonstration.

20. The argument against forbearance is particularly compelling with respect to separately-stated long distance charges. Many CMRS providers offer service plans that include a toll charge assessed for a long-distance call that is separate from the airtime charge. When the CMRS provider provides the link to the distant location, either through its own facilities or through the resale of a long-distance provider's service, and bills separately for that service, we find that the CMRS provider is providing an interexchange service. If that call terminates in a state different from the state in which the call originates, the service is an interstate, interexchange service covered by the rate integration requirement of section 254(g).

21. We conclude that it would not be consistent with just and reasonable rates, the protection of consumers, and the public interest to forbear from applying the rate integration requirement of section 254(g) to separately-stated toll charges for interstate, interexchange services provided by CMRS providers. For separately stated CMRS toll charges, we do not see how the policy considerations regarding rate integration differ materially from those in the non-CMRS context. Applying rate integration of separately-stated toll charges appears to be at the heart of the congressional policy of section 254(g), which was enacted despite the existence of multiple interexchange carriers.

22. Pursuant to section 10(b), we also have considered whether forbearance from enforcing the rate integration requirement of section 254(g) will promote competitive market conditions. Although CMRS providers contend that rate integration would interfere with competition, we find no persuasive record evidence to support that contention or, conversely, that competitive conditions will be promoted in the absence of rate integration. Moreover, we agree that forbearance from rate integration cannot be justified on competitive conditions alone. Hawaii correctly notes we have previously rejected this argument. Prior to the enactment of section 254(g), we already had determined that all IXCs were non-dominant in the domestic market and had found that most major segments of the interexchange market were subject to substantial competition. Nothing suggests that Congress was unaware of the state of competition in the interexchange market in enacting section 254(g). Indeed, we find that Congress's enactment of section 254(g), even after the Commission's determination that major segments of the interexchange market were subject

to substantial competition, establishes the importance Congress placed on a nationwide policy of rate integration that was applicable to all providers of interstate, interexchange services.

23. Contrary to the assertions of several CMRS providers, our finding in *Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services*, Second Report and Order, GN Docket No. 93-252, 9 FCC Rcd 1411 (1994), 59 FR 18493 (April 14, 1994) (*CMRS Forbearance Order*), that there was sufficient competition in the CMRS market to justify forbearance from, *inter alia*, the tariffing requirements of section 203-205, do not require forbearance with respect to section 254(g). The *CMRS Forbearance Order*, adopted pursuant to section 332, primarily addressed the tariff filing requirement and its competitive implications. The rate integration requirement of section 254(g) creates a substantive pricing requirement which raises different competitive considerations than do tariff requirements. Moreover, section 332(c), by its terms, prohibits forbearance from application of section 202(a) to the CMRS industry. We note that 254(g) has its origins in section 202(a). Accordingly, we find that our forbearance in the tariffing context has no relevance to the question of forbearance here.

24. In sum, we conclude that the petitioners have not demonstrated that forbearance from applying the rate integration requirements of section 254(g) is consistent with just and reasonable or not unjustly or unreasonably discriminatory rates in the CMRS context, the protection of consumers, and the public interest. Similarly, we have not found that forbearance from enforcing the rate integration requirement of section 254(g) would promote competitive market conditions. Accordingly, we cannot grant the forbearance requests. In a separate proceeding, we will seek further comment on ways in which the rate integration requirement of section 254(g) should be applied to CMRS offerings. The expanded record evidence about the nature of CMRS services and the ownership arrangements within the industry will permit us to more fully evaluate rate integration in the CMRS context, develop rules specific to CMRS services, or, if appropriate, forbear in some instances.

25. The forbearance petitions generally sought forbearance from the application of rate integration to all interstate, interexchange services

offered by CMRS providers. In addition, several CMRS providers argue that, if we do not forbear totally from applying rate integration to interstate, interexchange offerings of CMRS providers, we should apply rate integration only to services for which the long-distance charges are separately billed. We conclude that the present record does not establish that the forbearance standard of section 10 of the Act has been met with respect to this matter. For example, the record does not establish that forbearance would be consistent with the public interest. In addition, the record does not provide sufficient information to determine whether certain types of airtime or roaming charges, or some wide-area calling plans, fall within the definition of interexchange services to which rate integration would apply; and, how different affiliation requirements would affect the CMRS industry. We seek comment on these issues in a separate rulemaking proceeding that will permit us to develop rules specific to CMRS services. Accordingly, we deny the remaining requests of the petitions for forbearance as inconsistent with just and reasonable rates or not unjustly or reasonably discriminatory rates; the protection of consumers; and the public interest.

#### IV. Ordering Clauses

26. Accordingly, *It is ordered*, that the Petitions for Reconsideration filed by AirTouch Communications, Cellular Telecommunications Industry Association, PrimeCo Personal Communications, L.P., Personal Communications Industry Association, Telephone and Data Systems, Inc., BellSouth Corporation, and Bell Atlantic Mobile, Inc. *Are denied to the extent indicated herein.*

27. *It is further ordered* that the Petitions for Forbearance filed by AirTouch Communications, Cellular Telecommunications Industry Association, PrimeCo Personal Communications, L.P., Personal Communications Industry Association, Telephone and Data Systems, Inc., BellSouth Corporation, and Bell Atlantic Mobile, Inc. *Are denied.*

28. *It is further ordered* that the Commission's Office of Public Affairs, Reference Operations Division, SHALL SEND a copy of this Memorandum Opinion and Order, including the Supplemental Final Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

#### List of Subjects in 47 CFR Part 64

Communications common carriers.

Federal Communications Commission.

**Magalie Roman Salas,**  
*Secretary.*

#### Supplemental Final Regulatory Flexibility Act Analysis

29. As required by the Regulatory Flexibility Act (RFA), the Commission incorporated an Initial Regulatory Flexibility Analysis (IRFA) in the *Rate Integration and Rate Averaging Notice* in this docket. The Commission sought written public comment on the proposals in the *Rate Integration and Rate Averaging Notice*, including comment on the IRFA. The Commission prepared a Final Regulatory Flexibility Analysis (FRFA) of the possible significant economic impact the *Rate Integration Order* might have on small entities. The FRFA did not, however, analyze the possible significant economic impact the *Rate Integration Order* might have on CMRS providers that were small entities. The Commission has prepared this supplemental FRFA of the possible significant economic impact the *Rate Integration Order* might have on CMRS providers that are small entities, in conformance with the RFA.

##### A. Need for and Objectives of Rules

30. In the 1996 Act, Congress directed the Commission to develop rules implementing the provisions of section 254(g) within six months of its enactment. The Commission adopted rules implementing the provisions of section 254(g) in the *Rate Integration Order*. The objective of these rules is to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers.

##### B. Summary of Significant Issues Raised by the Public Comments to the IRFA

31. The IRFA solicited comment on alternatives to our proposed rules that would minimize the impact on small entities consistent with the objectives of this proceeding. No comments were submitted directly in response to the IRFA. We have, however, kept small entities in mind as we considered the more general comments filed in this proceeding, as discussed below.

##### C. Description and Estimate of Number of Small Entities to Which the Rules Will Apply

32. The RFA directs agencies to provide a description of and, where

feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act. A small business concern is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

##### (a) Cellular Radio Telephone Service

33. The Commission has not developed a definition of small entities applicable to cellular licenses. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the 1992 census, which is the most recent information available, only 12 radiotelephone firms out of a total of 1,178 such firms which operated during 1992 had 1,000 or more employees. Therefore, even if all 12 of these large firms were cellular telephone companies, all of the remainder were small businesses under the SBA's definition. We assume that, for purposes of our evaluations and conclusions in this Supplemental FRFA, all of the current cellular licensees are small entities, as that term is defined by the SBA. Although there are 1,758 cellular licenses, we do not know the number of cellular licensees, since a cellular licensee may own several licenses.

##### (b) Broadband Personal Communications Service

34. The broadband PCS spectrum is divided into six frequency blocks designated A through F. Pursuant to § 24.720(b) of the Commission's Rules, the Commission has defined "small entity" for Block C and Block F licensees as firms that had average gross revenues of less than \$40 million in the three previous calendar years. This regulation defining "small entity" in the context of broadband PCS auctions has been approved by the SBA.

35. The Commission has auctioned broadband PCS licenses in all of its spectrum blocks A through F. We do not have sufficient data to determine how many small businesses under the Commission's definition bid successfully for licenses in Blocks A and B. As of now, there are 90 non-defaulting winning bidders that qualify as small entities in the Block C auction

and 93 non-defaulting winning bidders that qualify as small entities in the D, E, and F Block auctions. Based on this information, we conclude that the number of broadband PCS licensees that would be affected by the evaluations and conclusions in this Supplemental FRFA includes the 183 non-defaulting winning bidders that qualify as small entities in the C, D, E, and F Block broadband PCS auctions.

(c) *Specialized Mobile Radio*

36. Pursuant to Section 90.814(b)(1) of the Commission's Rules, the Commission has defined "small entity" for geographic area 800 MHz and 900 MHz SMR licenses as firms that had average gross revenues of no more than \$15 million in the three previous calendar years. This regulation defining "small entity" in the context of 800 MHz and 900 MHz SMR has been approved by the SBA.

37. The section 254(g) requirements apply to SMR providers in the 800 MHz and 900 MHz bands. We do not know how many firms provide 800 MHz or 900 MHz geographic area SMR service, nor how many of these providers have annual revenues no more than \$15 million.

38. The Commission recently held auctions for geographic area licenses in the 900 MHz SMR band. There were 60 winning bidders who qualified as small entities under the Commission's definition in the 900 MHz auction. Based on this information, we conclude that the number of geographic area SMR licensees affected by section 254(g) includes these 60 small entities.

39. A total of 525 licenses were auctioned for the upper 200 channels in the 800 MHz geographic area SMR auction. There were 62 qualifying bidders, of which 52 were small businesses. The Commission has not yet determined how many licenses will be awarded for the lower 230 channels in the 800 MHz geographic area SMR auction. There is no basis to estimate, moreover, how many small entities within the SBA's definition will win these lower channel licenses. Given the facts that nearly all radiotelephone companies have fewer than 1,000 employees and that no reliable estimate of the number of prospective 800 MHz SMR licensees can be made, we assume, for purposes of our evaluations and conclusions in this Supplemental FRFA, that all of the licenses for the lower 230 channels will be awarded to small entities, as that term is defined by the SBA.

(d) *220 MHz Service*

The Commission has classified providers of 220 MHz service into Phase I and Phase II licensees. There are

approximately 2,800 non-nationwide Phase I licensees and 4 nationwide licensees currently authorized to operate in the 220 MHz band. The Commission recently conducted the Phase II auction. There were 54 qualified bidders, of which 47 were small businesses.

41. At this time, however, there is no basis upon which to estimate definitively the number of phase I 220 MHz service licensees that are small businesses. To estimate the number of such entities that are small businesses, we apply the definition of a small entity under SBA rules applicable to radiotelephone companies. This definition provides that a small entity is a radiotelephone company employing no more than 1,500 persons. According to the 1992 Census, which is the most recent information available, only 12 out of a total 1,178 radiotelephone firms which operated during 1992 had 1,000 or more employees—and these may or may not be small entities, depending on whether they employed more or less than 1,500 employees. But 1,166 radiotelephone firms had fewer than 1,000 employees and therefore, under the SBA definition, are small entities. However, we do not know how many of these 1,166 firms are likely to be involved in the phase I 220 MHz service.

(e) *Mobile Satellite Services (MSS)*

42. The Commission has not developed a definition of small entities applicable to licensees in the international services. Therefore, the applicable definition of small entity is the definition under the SBA rules applicable to Communications Services, Not Elsewhere Classified (NEC). This definition provides that a small entity is expressed as one with \$11.0 million or less in annual receipts. According to the Census Bureau, there were a total of 848 communications services, NEC in operation in 1992, and a total of 775 had annual receipts of less than \$9.999 million.

43. Mobile Satellite Services or Mobile Satellite Earth Stations are intended to be used while in motion or during halts at unspecified points. These stations operate as part of a network that includes a fixed hub or stations. The stations that are capable of transmitting while a platform is moving are included under Section 20.7(c) of the Commission's Rules as mobile services within the meaning of Sections 3(27) and 332 of the Communications Act. Those MSS services are treated as CMRS if they connect to the Public Switched Network (PSN) and also satisfy other criteria of Section 332. Facilities provided through a

transportable platform that cannot move when the communications service is offered are excluded from Section 20.7(c).

44. The MSS networks may provide a variety of land, maritime and aeronautical voice and data services. There are eight mobile satellite licensees. At this time, we are unable to make a precise estimate of the number of small businesses that are mobile satellite earth station licensees.

(f) *Paging Service*

45. The Commission has adopted a two-tier definition of small businesses in the context of auctioning licenses in the paging service. A small business is defined as either: (1) An entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$3 million; or (2) an entity that, together with affiliates and controlling principals, has average gross revenues for the three preceding calendar years of not more than \$15 million. The SBA has approved this definition for paging companies.

46. The Commission estimates that the total current number of paging carriers is approximately 600. In addition, the Commission anticipates that a total of 16,630 non-nationwide geographic area licenses will be granted or auctioned. The geographic area licenses will consist of 2,550 Major Trading Area (MTA) licenses and 14,080 Economic Area (EA) licenses. In addition to the 47 Rand McNally MTAs, the Commission is licensing Alaska as a separate MTA and adding three MTAs for the U.S. territories, for a total of 51 MTAs. No auctions of paging licenses have been held yet, and there is no basis to determine the number of licenses that will be awarded to small entities. Given the fact that no reliable estimate of the number of paging licensees can be made, we assume, for purposes of this Supplemental FRFA, that all of the current licensees and the 16,630 geographic area paging licensees either are or will consist of small entities, as that term is defined by the SBA.

(g) *Narrowband PCS*

47. The Commission has auctioned nationwide and regional licenses for narrowband PCS. The Commission does not have sufficient information to determine whether any of these licensees are small businesses within the SBA-approved definition. At present, there have been no auctions held for the MTA and Basic Trading Area (BTA) narrowband PCS licenses. The Commission anticipates a total of 561 MTA licensees and 2,958 BTA licensees will be awarded in the auctions. Those auctions, however, have

not yet been scheduled. Given that nearly all radiotelephone companies have fewer than 1,500 employees and that no reliable estimate of the number of prospective MTA and BTA narrowband licensees can be made, we assume, that all of the licensees will be awarded to small entities, as that term is defined by the SBA.

(h) *Air-Ground Radiotelephone Service*

48. The Commission has not adopted a definition of small business specific to the Air-Ground Radiotelephone Service, which is defined in Section 22.99 of the Commission's rules. Accordingly, we will use the SBA's definition applicable to radiotelephone companies, i.e., an entity employing no more than 1,500 persons. There are approximately 100 licensees in the Air-Ground Radiotelephone Service, and we estimate that almost all of them qualify as small under the SBA definition.

*D. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements*

49. In the *Rate Integration Order*, and the *Rate Integration Reconsideration Order*, we determined that section 254(g) applied to interstate, interexchange services offered by CMRS providers. We expect that those orders impose no significant new reporting or recordkeeping requirements on CMRS providers. Those orders, however, require CMRS providers to comply with the rate averaging and rate integration requirement of section 254(g) in their service offerings. CMRS providers, however, do not file tariffs except on some international routes.

*E. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered*

50. Section 254(g) reflects a congressional determination that the country's higher-cost, lower-volume markets should share in the technological advances and increased competition characteristic of the nation's telecommunications industry as a whole, and that interexchange rates should be provided throughout the nation on a geographically averaged and rate-integrated basis. We have decided that the statutory objectives of section 254(g) require us to apply our rules to all providers of interexchange service, including small ones. We have chosen, however, to allow carriers to offer private line service and temporary promotions on a de-averaged basis. In so doing, we have minimized the impact our rules might otherwise have had, and enable carriers to use such devices to enter new markets.

51. In addition, the Commission considered reducing the burdens on small carriers by exempting them from compliance through forbearance. However, we do not believe that forbearing at this time would be consistent with the Congressional goals that underlie Section 254(g). We could also have reduced burdens on small carriers by establishing cost-support mechanisms. However, the present record does not justify any such cost-support mechanisms. Accordingly, we decline to adopt these alternative measures for small carriers.

*F. Report to Congress*

52. The Commission will send a copy of this order, including the supplemental FRFA, in a report to be sent to Congress pursuant to the Small Business Regulatory Enforcement Fairness Act of 1996. A summary of this Memorandum Opinion and Order and this Supplemental FRFA will also be published in the **Federal Register**, and will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

[FR Doc. 99-2407 Filed 2-1-99; 8:45 am]

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**INTERNATIONAL DEVELOPMENT COOPERATION AGENCY**

**U.S. Agency For International Development**

**48 CFR Parts 705, 706, 709, 716, 722, 731, 732, 745, 747, and 752**

[AIDAR Notice 98-3]

RIN 0412-AA39

**Miscellaneous Amendments to Acquisition Regulations**

**AGENCY:** U.S. Agency for International Development (USAID), IDCA.

**ACITON:** Final rule.

**SUMMARY:** The USAID Acquisition Regulation (AIDAR) is being amended to bring its organizational conflicts of interest coverage into conformance with the FAR; to implement the August 19, 1997 revisions to Office of Federal Contract Compliance Programs (OFCCP) regulations (41 CFR Parts 60-1, 60-60) and corresponding amendments to FAR Subpart 22.8 contained in Federal Acquisition Circular 97-10, effective in February 1999; to allow for advances to for-profit organizations who award grants under their contracts; to clarify the application of USAID's salary policy to fixed-price contracts; and to update corresponding clauses in Part 752, as

needed. The AIDAR is also being amended to incorporate provisions of various Contract Information Bulletins (CIBs) issued in the past few years that established contracting policies or procedures, and to make administrative changes or corrections.

**EFFECTIVE DATE:** March 4, 1999.

**FOR ADDITIONAL INFORMATION CONTACT:** M/OP/P, Ms. Diane M. Howard, (202) 712-0206.

**SUPPLEMENTARY INFORMATION:** The specific changes being made to the USAID Acquisition Regulation (AIDAR) in this amendment are:

A. Contract Information Bulletin 91-3 provided the written authorization of the Procurement Executive, as the Head of the Agency and as required by FAR 5.502(a), to USAID Contracting Officers to place advertisements and notices in newspapers and periodicals. We are formally incorporating that authorization into the AIDAR at new section 705.502.

B. In January 1997, FAC 90-45 removed the Conflict of Interest clauses at FAR sections 52.209-7 and 52.209-8. Because AIDAR sections 709.507-2 and 752.209-71 make reference to these FAR clauses, both sections are amended to remove the references and to reflect the current FAR language.

C. USAID decided to codify an award fee clause in the AIDAR, in accordance with FAR 16.406(e), rather than establish a procedure for review and approval of individual clauses. Already in use through CIB 97-12, the new clause at 752.216-70 is purposefully minimalist and resembles FAR 52.216-8, Fixed Fee, rather than FAR 52.216-10, Incentive Fee. This approach gives Contracting Officers the flexibility to design their own award fee evaluation methods and specify the implementation details elsewhere in the contract schedule.

D. In CIB 97-26, USAID implemented on an interim basis the revisions in EEO compliance procedures made by the Department of Labor to their regulations (41 CFR Ch. 60) in 1997 (62 FR 44173). On December 18, 1998, the FAR Councils published FAC 97-10 (63 FR 70264), containing a Final Rule at Item III entitled "Office of Federal Contract Compliance Programs National Pre-Award Registry" to implement the DOL changes into the FAR. AIDAR Subpart 722.8 is revised to reflect the FAR revisions in 48 CFR 22.8 (i.e., for other than construction contracts, the increase in the threshold for OFCCP verification from \$1,000,000 to \$10 million and the availability of OFCCP's National Pre-Award Registry), and to clarify and simplify the internal Agency procedures

for verifying compliance at any dollar level.

E. The applicability of USAID's salary policy, found in Chapter 302 of the Agency's internal Automated Directives System (ADS), to salaries under fixed price-type contracts (including but not limited to time-and-materials, labor-hour, or USAID's indefinite quantity contracts) is ambiguous. We are amending sections 731.205-6 and 731.371 to clarify that the salary approval policies in ADS 302, which are being revised to clarify their applicability under different kinds of contract types, will determine the allowability of employee compensation in USAID contracts. ADS 302 will specify that the approval requirements only apply when an individual's salary must be used in order to determine the contract cost or price.

F. Under certain circumstances, USAID programs may authorize contractors to award and administer small value grants under their contracts. The current AIDAR language in section 732.402 requires special approval for for-profit firms to receive advances, but does not take into consideration the cash flow implications to the contractor in a grants-under-contracts arrangement. We are amending 732.402 to allow for-profit contractors to receive advances for immediate disbursement to grantees, subject to the terms of this section. We are also adding a new paragraph to section 732.406-73 to ensure that contracting officers include a FAR payment clause in addition to the USAID Letter of Credit clause (in AIDAR 752.232-70), in the event that the Letter of Credit is revoked and an alternate payment clause is needed.

G. AIDAR 752.245-71 was written when most of USAID's overseas programs used funds already obligated in bilateral project agreements in which both USAID and the cooperating country agreed that non-expendable property purchased with project funds would be titled to and turned over to the cooperating country at the end of the project. However, in recent years, an increasing number of our programs are being carried out without a formal agreement between USAID and the cooperating country, rendering the prescription for the clause inappropriate since there is no underlying agreement to turn the property over to the cooperating country. We are adding a new Part 745 and amending the prescription to AIDAR clause 745.245-71 to clarify when this clause is to be used, and when the applicable FAR clauses, as prescribed in FAR 45.106, are to be used. The revised clause

prescription was already implemented through CIB 96-26.

H. USAID processed a class deviation to FAR clause 752.247-64, Preference for Privately Owned U.S.-Flag Commercial Vessels, and implemented it through Contract Information Bulletin 96-28. The deviation provides for the use of an alternate prescription and clause in certain circumstances, as described in the clause prescription. We are amending the AIDAR to add a new Part 747 and clause at section 752.247-70 to implement this deviation.

I. Section 752.7003, Documentation for Payment, is amended to reflect changes the Agency has made in processing contractor invoices involving electronic vouchering and the use of Contract Line Items (CLINS).

J. CIB 97-27 implemented a new AIDAR clause requiring contractors to submit Development Experience Documents, as defined in ADS 540, produced in the course of contract performance to the Center for Development Information and Evaluation (PPC/CDIE/DI) in the Bureau for Policy and Program Coordination. This submission requirement was previously included in the various versions of the "Reports" clause (AIDAR 752.7026 and subsequent revisions issued through CIBs), but because of changes we are making to progress reporting requirements, we believe that this submission requirement should be a stand-alone requirement and therefore are adding a new clause to the AIDAR.

K. Sections 752.7018 and 752.7019, both related to USAID's participant training program, are amended to update the language to incorporate changes to the policies and procedures in the program.

The changes being made by this notice are not considered "significant" under FAR 1.301 or FAR 1.501, and public comments have not been solicited. This Notice will not have an impact on a substantial number of small entities nor does it establish a new collection of information as contemplated by the Regulatory Flexibility Act and the Paperwork Reduction Act. Because of the nature and subject matter of this Notice, use of the proposed rule/public comment approach was not considered necessary. We decided to issue as a final rule; however, we welcome public comment on the material covered by this Notice or any other part of the AIDAR at anytime. Comments or questions may be addressed as specified in the **FOR FURTHER INFORMATION CONTACT** section of the Preamble.

## List of Subjects, in 48 CFR Parts 705, 706, 709, 716, 722, 731, 732, 745, 747, and 752.

Government procurement.

For the reasons set out in the Preamble, 48 CFR Chapter 7 is amended as set forth below.

1. The authority citations in Parts 705, 706, 709, 716, 722, 731, 732, and 752 continue to read as follows:

**Authority:** Sec. 621, Pub. L. 87-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

### PART 705—PUBLICIZING CONTRACT ACTIONS

#### 705.502 [Added]

2. New section 705.502 is added to read as follows:

#### 705.502 Authority.

(a) The Procurement Executive, acting as head of the Agency under the authority of 702.170-13(c)(4), hereby authorizes USAID contracting officers to place paid advertisements and notices in newspapers and periodicals. Contracting officers shall document the contract file to reflect consideration of the requirements of (48 CFR) FAR 5.101(b)(4).

### PART 706—COMPETITION REQUIREMENTS

#### 706.501 [Amended]

3. Section 706.501 is amended by removing "(or equivalent)" in the second sentence and "or equivalent" in the fourth sentence.

### PART 709—CONTRACTOR QUALIFICATIONS

#### 709.503 [Amended]

4. The second sentence in section 709.503 is amended by revising "had" to read "has" and by revising "acitivites" to read "activities".

#### 709.507-2 [Amended]

5. Section 709.507-2 is amended by revising paragraph (c) to read as follows:

#### 709.507-2 Contract clause.

\* \* \* \* \*

(c) In order to avoid problems from organizational conflicts of interest that may be discovered after award of a contract, the clause found at 752.209-71 shall be inserted in all contracts whenever the solicitation or resulting contract or both include a provision in accordance with (48 CFR) FAR 9.507-1, or a clause in accordance with (48 CFR) FAR 9.507-2, establishing a restraint on the contractor's eligibility for future contracts.

**PART 716—TYPES OF CONTRACTS****716.406 [Added]**

6. A new section 716.406 is added to read as follows:

**716.406 Contract clauses.**

The Contracting Officer shall include the clause at 752.216-70, Award Fee, in solicitations and contracts when an award-fee contract is contemplated.

**PART 722—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITION****722.8 [Revised]**

7. Subpart 722.8 is revised to read as follows:

**Subpart 722.8—Equal Employment Opportunity****722.805-70 Procedures.**

(a) The procedures in this section apply, as appropriate, for all contracts excluding construction, which shall be handled in accordance with (48 CFR) FAR 22.804-2. Contracting officers are responsible for ensuring that the requirements of (48 CFR) FAR 22.8 and related clauses are met before awarding any contracts or consenting to subcontracts subject to these requirements.

(b) Representations and Certifications. The first step in ensuring compliance with these requirements is to obtain all necessary representations and certifications (Reps and Certs) required by FAR 22.810. The contracting officer must review the Reps and Certs to determine whether they have been completed and signed as required, and are acceptable.

(1) If any of these Reps and Certs are incomplete or unsigned, the contracting officer must request that the offeror(s) complete and sign them, as necessary, unless the initial evaluation of the offeror's proposal results in the contracting officer's concluding that the offeror would not, in any event, be within a competitive range determined in accordance with (48 CFR) FAR 15.306(c), or would not be selected if award is to be made without discussions. A request as described in this paragraph (b)(1) constitutes either a clarification per (48 CFR) FAR 15.306(a) ("resolving minor or clerical errors", paragraph (a)(2)), or a communication before establishment of competitive range per (48 CFR) FAR 15.306(b), not a discussion per (48 CFR) FAR 15.306(d).

(2) If completed and signed Reps and Certs raise questions concerning the offeror's compliance with EEO requirements, or if the contracting

officer has information from any other source which calls into question the offeror's eligibility for award based on this section and (48 CFR) FAR 22.8, the contracting officer must refer the matter to the cognizant regional Department of Labor Office of Federal Contract Compliance Programs (OFCCP) regardless of the estimated value of the contract; only OFCCP may make a determination of non-compliance with EEO requirements.

(c) OFCCP's National Preaward Registry. If the Reps and Certs are complete, signed, and deemed acceptable, and the contracting officer has no reason to doubt their accuracy, the contracting officer must then consult the OFCCP's National Preaward Registry at the internet website in 48 CFR 22.805(a)(4) (i) to see if the offeror is listed.

(1) If the conditions stated in FAR 22.805(a) (4) are met (including the contract file documentation requirement in paragraph (a)(4)(iii)), then the Contracting Officer does not need to take any further action in verifying the offeror's compliance with the requirements of this subpart and (48 CFR) FAR 22.8.

(2) If the offeror does not appear in the National Preaward Registry, and the estimated amount of the contract or subcontract is expected to be under \$10 million then the contracting officer may rely on the Reps and Certs as sufficient verification of the offeror's compliance.

(3) If the offeror does not appear in the National Preaward Registry and the estimated amount of the contract or subcontract is \$10 million or more, then the contracting officer must request a preaward clearance from the appropriate OFCCP regional office, in accordance with 48 CFR 22.805(a). If the initial contact with OFCCP is by telephone, the contracting officer and OFCCP are to mutually determine what information is to be included in the written verification request. The contracting officer may need to provide the following information in addition to the items listed in FAR 22.805(a)(5), if so requested by the OFCCP regional office:

(i) Name, title, address, and telephone number of a contract person for the prospective contractor;

(ii) A description of the type of organization (university, nonprofit, etc.) and its ownership (private, foreign, state, etc.).

(iii) Names and addresses of the organizations in a joint venture (if any).

(iv) Type of procurement (new contract—RFP or IFB, amendment, etc.) and the period of the contract.

(v) Copy of approved Reps and Certs.

(d) In the event that OFCCP reports that the offeror is not in compliance, negotiations with the offeror shall be terminated.

(e) documentation for the contract file. Every contract file must contain completed and signed Reps and Certs. The file must clearly show these documents have been reviewed and accepted by the contracting officer. If the Reps and Certs were revised to make them acceptable (see paragraph (b) of this section), the file must also document what changes were required and why, and verify that the changes were made. The contracting officer shall also document the OFCCP National Preaward Registry review (see paragraph (c)(1) of this section), and, if the Registry does not include the offeror:

(1) For contracts or modifications over \$10,000 but less than \$10 million, the file must contain a statement from the contracting officer that the contractor is considered in compliance with EEO requirements, and giving the basis for this statement (see paragraph (c)(2) of this section). This statement may be in a separate memorandum to the file or in the memorandum of negotiation.

(2) For contracts or modifications of \$10 million or more, the file must document all communications with OFCCP regarding the offeror's compliance. Such documentation includes copies of any written correspondence and a record of telephone conversations, specifying the name, address, and telephone number of the person contacted, a summary of the information presented, and any advice given by OFCCP.

(f) Documentation in the event of non-compliance. In the event OFCCP determines that a prospective contractor is not in compliance, a copy of OFCCP's written determination, and a summary of resultant action taken (termination of negotiations, notification of offeror and cognizant technical officer, negotiation with next offeror in competitive range, resolicitation, etc.) will be placed in the contract file for any contract which may result, together with other records related to unsuccessful offers, and retained for at least six months following award.

**PART 731—CONTRACT COST PRINCIPLES AND PROCEDURES****731.205-6 [Amended]**

8. Section 731.205-6 is amended by adding a new paragraph (b) and removing and reserving paragraph (d), to read as follows:

**731.205-6 Compensation for personal services.**

\* \* \* \*

(b) *Reasonableness.* ADS Chapter 302.5.3 states USAID policy regarding personnel compensation exceeding the maximum annual rate for an Executive Service level ES-6. Consistent with this policy, any employee's or consultant's base salary plus overseas recruitment incentive, if any (see 731.205-70), subject to this policy will be allowable under USAID-direct contracts only if approved in accordance with the essential procedures in ADS chapter E302.5.3. USAID policies on compensation of third country national or cooperating country national employees are set forth in AIDAR 722.170.

\* \* \* \*

**731.371 [Amended]**

9. Section 731.371 is amended by revising paragraph (b)(1) to read as follows:

**731.371 Compensation for personal services.**

\* \* \* \*

(b) Salaries and wages. (1) ADS Chapter 302.5.3 states USAID policy regarding personnel compensation exceeding the maximum annual rate for an Executive Service level ES-6. Consistent with this policy, any employee's or consultant's base salary plus overseas recruitment incentive, if any (see 731.205-70), subject to this policy will be allowable under USAID-direct contracts only if approved in accordance with the essential procedures in ADS chapter E302.5.3.

\* \* \* \*

**PART 732—CONTRACT FINANCING****732.402 [Amended]**

10. Section 732.402 is amended by revising paragraph (e)(1) to read as follows:

**732.402 General.**

\* \* \* \*

(e)(1)(i) Except as provided in (e)(1)(ii) of this section, all U.S. Dollar advances to for-profit organizations require the approval of the Procurement Executive; all such approvals are subject to prior consultation with the Agency's Chief Financial Officer.

(ii) Approval of the Procurement Executive is not required if advance payments are limited exclusively to monies advanced for immediate (within seven days) disbursement to grantees, as provided for in a contract. Prior consultation with the AID/W or Mission

Controller is required for including such provision for advances in a contract.

\* \* \* \*

**732.406-73 [Amended]**

11. Section 732.406-73 is amended by designating the existing text as paragraph (a) and adding paragraph (b) to read as follows:

**732.406-73 LOC contract clause.**

\* \* \* \*

(b) Contracting offices shall ensure that an appropriate (48 CFR) FAR payment clause is also included in the contract, in the event that the LOC is revoked pursuant to 732.406-74.

12. A new Part 745 is added to read as follows:

**PART 745—GOVERNMENT PROPERTY****Subpart 745.1—General****745.106 Contract clauses.**

**Authority:** Sec. 621, Pub. L. 787-195, 75 Stat. 445, (22 U.S.C. 2381) as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

**Subpart 745.1—General****745.106 Contract clauses.**

(a) The contracting officer shall insert the clause at 752.245-71 in all contracts under which the contractor will acquire property for use overseas and the contract funds were obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

(b) The contracting officer shall insert the applicable clause as required in (48 CFR) FAR 45.106 in all contracts under which the contractor will acquire property with funds not already obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

13. A new Part 747 is added to read as follows:

**PART 747—TRANSPORTATION****Subpart 747.5—Ocean Transportation by U.S.-Flag Vessels****747.507 Contract clauses.**

**Authority:** Sec. 621, Pub. L. 98-195, 75 Stat. 445 (22 U.S.C. 2381), as amended; E.O. 12163, Sept. 29, 1979, 44 FR 56673; 3 CFR 1979 Comp., p. 435.

**Subpart 747.5—Ocean Transportation by U.S.-Flag Vessels****747.507 Contract clauses.**

Contracting officers shall insert the clause at 752.247-70 in solicitations and contracts solely for ocean transportation services, and in solicitations and contracts for goods and ocean

transportation services when the ocean transportation will be fixed at the time the contract is awarded. Contracting Officers shall use (48 CFR) FAR 52.247-64 as prescribed in (48 CFR) FAR 27.507(a) in other situations.

**PART 752—SOLICITATION PROVISIONS AND CONTRACT CLAUSES****752.204-2 [Amended]**

14. Section 752.204-2 is amended by removing "704.405" in the first paragraph and replacing it with "704.404".

**752.209-71 [Amended]**

15. Section 752.209-71 is amended by revising the introductory text to read as follows:

**752.209-71 Organizational conflicts of interest discovered after award.**

As prescribed in 709.507-2, include the following clause in any solicitation containing a provision in accordance with (48 CFR) FAR 9.507-1, or a clause in accordance with (48 CFR) FAR 9.507-2, establishing a restraint on the contractor's eligibility for future contracts.

\* \* \* \*

**752.216-70 [Added]**

16. Section 752.216-70 is added to read as follows:

**752.216-70 Award fee.**

As prescribed in 716.406, insert the following clause in solicitations and contracts in which an award-fee contract is contemplated.

**Award Fee (May 1997)**

(a) The Government shall pay the Contractor for performing this contract such base fee and such additional fee as may be awarded, as provided in the Schedule.

(b) Payment of the base fee and award fee shall be made as specified in the Schedule; provided, that after payment of 85 percent of the base fee and potential award fee, the Contracting Officer may withhold further payment of the base fee and award fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total base fee and potential award fee or \$100,000, whichever is less. The Contracting Officer shall release 75 percent of all fee withholds under this contract after receipt of the certified final indirect cost rate proposal covering the year of physical completion of this contract, provided the Contractor has satisfied all other contract terms and conditions, including the submission of the final patent and royalty reports, and is not delinquent in submitting final vouchers on prior years' settlements. The Contracting Officer may release up to 90 percent of the fee withholds under this contract based on

the Contractor's past performance related to the submission and settlement of final indirect cost rate proposals.

(c) Award fee determinations made by the Government under this contract are not subject to the Disputes clause.  
(End of clause)

**752.245-71 [Amended]**

17. Section 752.245-71 is amended by revising the prescription to read as follows:

**752.245-71 Title to and care of property.**

As prescribed in 745.106(a), the following clause shall be included in all contracts when the contractor will acquire property under the contract for use overseas and the contract funds were obligated under a Strategic Objective agreement (or similar agreement) with the cooperating country.

\* \* \* \* \*

**752.247-70 [Added]**

18. A new section 752.247-70 is added to read as follows:

**752.247-70 Preference for privately owned U.S.-flag commercial vessels.**

As prescribed in 747.507, insert the following clause:

**Preference for Privately Owned U.S.-Flag Commercial Vessels (Oct. 1996)**

(a) Under the provisions of the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)) at least 50 percent of the gross tonnage of equipment, materials, or commodities financed by USAID, or furnished without provision for reimbursement, or at least 75 percent of the gross tonnage of cargo moving under P.L. 480 financed by the U.S. Department of Agriculture, that may be transported in ocean vessels (computed separately for dry bulk carriers, dry cargo

liners, and tankers) shall be transported in privately owned U.S.-flag commercial vessels.

(b) In accordance with USAID regulations and consistent with the regulations of the Maritime Administration, USAID applies Cargo Preference requirements on the basis of programs or activities that generally include more than one contract. Thus, the amount of cargo fixed on privately owned U.S.-flag vessels under this contract may be more or less than the required 50 or 75 percent, depending on current compliance with Cargo Preference requirements. If freight under the contract is fixed on a U.S. flag vessel, Alternate I of this clause shall apply.

(c)(1) The contractor shall submit one legible copy of a rated on-board ocean bill of lading for each shipment to both the Division of National Cargo, Office of Cargo Preference, Maritime Administration, U.S. Department of Transportation, Washington, DC 20590, and the Transportation Division, Office of Procurement, USAID, Washington, DC 20523-7900.

(2) The contractor shall furnish these bill of lading copies within 20 working days of the date of loading for shipments originating in the United States, or within 30 working days for shipments originating outside the United States. Each bill of lading copy shall contain the following information:

- (i) Sponsoring U.S. Government agency.
- (ii) Name of vessel.
- (iii) Vessel flag registry.
- (iv) Date of loading.
- (v) Port of loading.
- (vi) Port of final discharge.
- (vii) Description of commodity.
- (viii) Gross weight in pounds and cubic feet if available.
- (ix) Total ocean freight revenue in U.S. dollars.

*Alternate I*

(d) If freight is fixed on a U.S. flag vessel, except as provided in paragraph (e) of this clause, the contractor shall use privately owned U.S. flag commercial vessels, and no

others, in the ocean transportation of any supplies to be furnished under this contract.

(e) If such vessels are not available, or not available at rates that are fair and reasonable for privately owned U.S. flag commercial vessels, the Contractor shall notify the contracting officer and request either authorization to ship in foreign-flag vessels or designation of available U.S.-flag vessels. If the Contractor is authorized in writing by the Contracting Officer to ship the supplies in foreign-flag vessels, the contract price shall be equitably adjusted to reflect the difference in costs of shipping the suppliers in privately owned U.S.-flag commercial vessels and foreign-flag vessels.

**752.7003 [Amended]**

19. The clause in section 752.7003 is amended by revising the introductory paragraph, the date in the clause heading, paragraph (a), and paragraph (d) to read as follows:

**752.7003 Documentation for payment.**

The following clause is required in all USAID direct contracts, excluding fixed price contracts:

**Documentation for Payment (Nov. 1998)**

(a) Claims for reimbursement or payment under this contract must be submitted to the Paying Office indicated in the schedule of this contract. The cognizant technical officer (CTO) is the authorized representative of the Government to approve vouchers under this contract. The Contractor must submit either paper or fax versions of the SF-1034—Public Voucher for Purchases and Services Other Than Personal. Each voucher shall be identified by the appropriate USAID contract number, in the amount of dollar expenditures made during the period covered.

(1) The SF 1034 provides space to report by line item for products or services provided. The form provides for the information to be reported with the following elements:

**TOTAL EXPENDITURES**

[Document Number: XXX-X-XX-XXXX-XX]

Line item No.	Description	Amt. vouchered to date	Amt. vouchered this period
001 .....	Product/Service Desc. for Line Item 001 .....	\$XXXX.XX	\$ XXXX.XX
002 .....	Product/Service Desc. for Line Item 002 .....	XXXX.XX	XXXX.XX
<b>Total</b> .....	.....	XXXX.XX	XXXX.XX

(2) The fiscal report shall include the following certification signed by an authorized representative of the Contractor:

The undersigned hereby certifies to the best of my knowledge and belief that the fiscal report and any attachments have been prepared from the books and records of the Contractor in accordance with the terms of this contract and are correct: the sum claimed under this contract is proper and due, and all the costs of contract performance (except as herewith reported in writing) have been paid, or to the extent allowed under the applicable

payment clause, will be paid currently by the Contractor when due in the ordinary course of business; the work reflected by these costs has been performed, and the quantities and amounts involved are consistent with the requirements of this Contract; all required Contracting Officer approvals have been obtained; and appropriate refund to USAID will be made promptly upon request in the event of disallowance of costs not reimbursable under the terms of this contract.  
BY: \_\_\_\_\_

TITLE: \_\_\_\_\_  
DATE: \_\_\_\_\_  
\* \* \* \* \*

(d) The Contractor agrees that all approvals of the Mission Director and the Contracting Officer which are required by the provisions of this contract shall be preserved and made available as part of the Contractor's records which are required to be presented and made available by the clause of this contract entitled "Audit and Records—Negotiation".

**752.7005 [Added]**

20. A new section 752.7005 is added to read as follows:

**752.7005 Submission requirements for development experience documents.**

The following clause shall be included in all USAID professional/technical contracts in which development experience documents are likely to be produced.

**Submission Requirements for Development Experience Documents (Oct. 1997)**

(a) Contract Reports and Information/Intellectual Products.

(1) The Contractor shall submit to the Development Experience Information Division of the Center for Development Information and Evaluation (PPC/DCIE/DI) in the Bureau for Policy and Program Coordination, copies of reports and information products which describe, communicate or organize program/project development assistance activities, methods, technologies, management, research, results and experience as outlined in the Agency's ADS Chapter 540, section E540.5.2b(3). Information may be obtained from the Cognizant Technical Officer (CTO). These reports include: assessments, evaluations, studies, development experience documents, technical reports and annual reports. The Contractor shall also submit to PPC/CDIE/DI copies of information products including training materials, publications, databases, computer software programs, videos and other intellectual deliverable materials required under the Contract Schedule. Time-sensitive materials such as newsletters, brochures, bulletins or periodic reports covering periods of less than a year are not to be submitted.

(2) Upon contract completion, the contractor shall submit to PPC/CDIE/DI an index of all reports and information/intellectual products referenced in paragraph (a)(1) of this clause.

**(b) Submission requirements.**

(1) *Distribution.* (i) The contractor shall submit contract reports and information/intellectual products (referenced in paragraph (a)(1) of this clause) in electronic format and hard copy (one copy) to U.S. Agency for International Development PPC/CDIE/DI, Attn: ACQUISITIONS, Washington D.C. 20523 at the same time submission is made to the CTO.

(ii) The contractor shall submit the reports index referenced in paragraph (a)(2) of this clause and any reports referenced in paragraph (a)(1) of this clause that have not been previously submitted to PPC/CDIE/DI, within 30 days after completion of the contract to the address cited in paragraph (b)(1)(i) of this clause.

(2) *Format.* (i) Descriptive information is required for all Contractor products submitted. The title page of all reports and information products shall include the contract number(s), contractor name(s), name of the USAID cognizant technical office, the publication or issuance date of the document, document title, author name(s), and strategic objective or activity title and associated

number. In addition, all materials submitted in accordance with this clause shall have attached on a separate cover sheet the name, organization, address, telephone number, fax number, and Internet address of the submitting party.

(ii) The hard copy report shall be prepared using non-glossy paper (preferably recycled and white or off-white) using black ink. Elaborate art work, multicolor printing and expensive bindings are not to be used. Whenever possible, pages shall be printed on both sides.

(iii) The electronic document submitted shall consist of only one electronic file which comprises the complete and final equivalent of the hard copy submitted.

(iv) Acceptable software formats for electronic documents include WordPerfect, Microsoft Word, ASCII, and Portable Document Format (PDF). Submission in Portable Document format is encouraged.

(v) The electronic document submission shall include the following descriptive information:

(A) Name and version of the application software used to create the file, e.g., WordPerfect Version 6.1 or ASCII or PDF.

(B) The format for any graphic and/or image file submitted, e.g., TIFF-compatible.

(C) Any other necessary information, e.g. special backup or data compression routines, software used for storing/retrieving submitted data, or program installation instructions.

**752.7018 [Revised]**

21. Section 752.7018 is revised to read as follows:

**752.7018 Health and accident coverage for USAID participant trainees.**

For use in any USAID contract under which USAID participants are trained.

**Health and Accident Coverage for USAID Participant Trainees (Jan. 1999)**

(a) In accordance with the requirements of USAID Automated Directive System (ADS) 253.5.6b, the Contractor shall enroll all non-U.S. trainees (hereinafter referred to as "participants"), whose training in the U.S. is financed by USAID under this contract, in USAID's Health and Accident Coverage (HAC) program. Sponsored trainees enrolled in third-country or in-country training events are not eligible for USAID's HAC program, but the Contractor may obtain alternative local medical and accident insurance at contract expense, provided the cost is consistent with the cost principles in FAR 31.2

(b) When enrollment in the HAC program is required per paragraph (a) of this clause, the Contractor must enroll each participant in the HAC program through one of two designated contractors prior to the initiation of travel by the participant. USAID has developed an Agency-wide database training management system, the Training Results and Information Network ("TraiNet"), which is the preferred system for managing USAID's participant training program, including enrollment in the HAC program. However, until such time as the USAID sponsoring unit (as defined in ADS 253) has given the

Contractor access to USAID's "TraiNet" software for trainee tracking and HAC enrollment, the Contractor must fill out and mail the Participant Data Form (PDF) (Form USAID 1381-4) to USAID. The Contractor can obtain information regarding each HAC program contractor, including contact information, and a supply of the PDF forms and instructions for completing and submitting them, by contacting the data base contractor serving the Global Center for Human Capacity Development (G/HCD).

(c) The Contractor must ensure that HAC enrollment begins immediately upon the participant's departure for the United States for the purpose of participating in a training program financed by USAID, and that enrollment continues in full force and effect until the participant returns to his/her country of origin, or is released from USAID's responsibility, whichever is the sooner.

(1) The HAC insurance provider, not the Contractor, shall be responsible for paying all reasonable and necessary medical reimbursement charges not otherwise covered by student health service or other insurance programs, subject to the availability of funds for such purposes, in accordance with the standards of coverage established by USAID under its HAC program and by the HAC providers' contracts.

(2) After HAC enrollment, upon receipt of HAC services invoice from the selected HAC provider, the Contractor shall submit payment directly to the HAC provider.

(3) The Contractor is responsible for ensuring that participants and any stakeholders (as defined in ADS 253) are advised that USAID is not responsible for any medical claims in excess of the coverages provided by the HAC program, or for medical claims not eligible for coverage under the HAC program, or not otherwise covered in this section.

(d) The Contractor, to the extent that it is an educational institution with a mandatory student health service program, shall also enroll participants in that institution's student health service program. Medical costs which are covered under the institution's student health service shall not be eligible for payment under USAID's HAC program.

(e) If the Contractor has a mandatory, non-waivable health and accident insurance program for students, the costs of such insurance will be allowable under this contract. Any claims eligible under such insurance will not be payable under USAID's HAC plan or under this contract. Even though the participant is covered by the Contractor's mandatory, non-waivable health and accident insurance program, the participant MUST be enrolled in USAID's more comprehensive HAC program.

(f) Medical conditions pre-existing to the participant's sponsorship for training by USAID, discovered during the required pre-departure medical examination, are grounds for ineligibility for sponsorship unless specifically waived by the sponsoring unit, and covered through a separate insurance policy maintained by the participant or his employer, or a letter of guarantee from the participant or the employer (which thereby

assumes liability for any related charges that might materialize. See ADS 253).

**752.7019 [Revised]**

22. Section 752.7019 is revised to read as follows:

**752.7019 Participant training.**

For use in any USAID direct contract involving training of USAID participants.

**Participant Training (Jan. 1999)**

(a) *Definitions.*

(1) Participant training is the training of any foreign national outside of his or her home country, using USAID funds.

(2) A Participant is any foreign national being trained under this contract outside of his or her country.

(b) *Applicable regulations.* Participant training conducted under this contract shall comply with the policies and essential procedures pertaining to training-related services contained in USAID Automated Directive System (ADS) Ch. 253 "Training for Development Impact". Any exceptions to ADS 253 requirements are specified as such within this contract. The current version of Chapter 253 may be obtained directly from the USAID website at <http://www.info.usaid.gov/pubs/ads/200>.

(c) The contractor shall be reimbursed for the reasonable and allocable costs incurred in providing training to participants in the United States or other approved location

provided such costs do not exceed the limitations in, or have been waived in accordance with, ADS 253.5.5.

**Note:** Academic rates are available through a special website monitored by the United States Information Agency. The website for academic programs is: <http://www.iie.org/fulbright/posts/restrict>. U.S.-based participants receive the standardized U.S. travel per diem rates maintained by GSA for short-term training (website:<http://policyworks.gov>).

Dated: January 13, 1999.

**Kathryn Y. Cunningham,**

*Acting Procurement Executive.*

[FR Doc. 99-2032 Filed 2-1-99; 8:45 am]

BILLING CODE 6116-01-M

# Proposed Rules

Federal Register

Vol. 64, No. 21

Tuesday, February 2, 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.

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[REG-113744-98]

RIN 1545-AW69

#### Passive Foreign Investment Companies; Definition of Marketable Stock

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

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** This document contains proposed regulations relating to the new mark to market election for stock of a passive foreign investment company (PFIC). The proposed regulations interpret changes made by the Taxpayer Relief Act of 1997. The proposed regulations affect persons holding PFIC stock that is regularly traded on certain U.S. or foreign exchanges or markets or holding stock in certain PFICs comparable to U.S. regulated investment companies (RICs). The proposed regulations also reserve treatment of and request comments on making the mark to market election for options on marketable stock.

**DATES:** Written comments or requests for a public hearing must be received by May 3, 1999.

**ADDRESSES:** Send submissions to CC:DOM:CORP:R (REG-113744-98), room 5226, Internal Revenue Service, POB 7604, Ben Franklin Station, Washington, DC 20044. In the alternative, submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 5 p.m. to: CC:DOM:CORP:R (REG-110524-98), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Alternatively, taxpayers may submit comments electronically via the Internet by selecting the "Tax Regs" option on the IRS Home Page, or by submitting comments directly to the IRS Internet site at:

[http://www.irs.ustreas.gov/prod/tax\\_regs/comments.html](http://www.irs.ustreas.gov/prod/tax_regs/comments.html).

#### FOR FURTHER INFORMATION CONTACT:

Concerning the proposed regulations, Robert Laudeman, (202) 622-3840; concerning submissions, LaNita VanDyke, (202) 622-7190 (not toll-free numbers).

#### SUPPLEMENTARY INFORMATION:

##### Background

This notice contains proposed amendments to the Income Tax Regulations (26 CFR Part 1) regarding the taxation of U.S. holders of PFIC stock.

Since the enactment of the Tax Reform Act of 1986, U.S. holders of PFIC stock have been subject to two alternative sets of inclusion rules: the interest charge rules under section 1291 of the Internal Revenue Code and the qualified electing fund (QEF) rules under section 1293.

The interest charge rules apply to shareholders of PFICs that are not QEFs or for which a QEF election is unavailable. Under the interest charge rules, the PFIC shareholders pay tax and an interest charge that is attributable to the value of deferral on receipt of certain distributions and on disposition of the PFIC stock. By contrast, PFIC shareholders who make a QEF election include currently in gross income their respective shares of the PFIC's total earnings, with a separate election to defer payment of tax, subject to an interest charge, on income not currently received.

Congress recognized that the interest charge rules are a substantial source of complexity for PFIC shareholders and that some shareholders would prefer the current inclusion method afforded by the QEF election, but are unable to make the election because they cannot obtain the necessary information from the PFIC. Congress accordingly enacted new section 1296 in the Tax Reform Act of 1997 to provide PFIC shareholders with an alternative method to include income currently with respect to their interests in a PFIC by allowing PFIC shareholders to elect to mark to market PFIC stock that qualifies as marketable stock.

In general, a PFIC shareholder who elects under section 1296 to mark to market the marketable stock of a PFIC includes in income each year an amount equal to the excess, if any, of the fair market value of the PFIC stock as of the

close of the taxable year over the shareholder's adjusted basis in such stock.

A shareholder is also generally allowed a deduction for the excess, if any, of the adjusted basis of the PFIC stock over the fair market value as of the close of the taxable year. Deductions under this rule, however, are allowable only to the extent of any net mark to market gains with respect to the stock included by the shareholder for prior taxable years.

Section 1296(e)(1) defines *marketable stock* as including several categories of stock. First, section 1296(e)(1)(A) states that marketable stock includes any stock which is regularly traded on (i) a national securities exchange which is registered with the Securities and Exchange Commission (SEC) or the national market system established pursuant to section 11A of the Securities Exchange Act of 1934, or (ii) any exchange or other market which the Secretary determines has rules adequate to carry out the purposes of the PFIC provisions. With respect to (ii) above, the conference report specifies that "PFIC stock is considered marketable if it is regularly traded on any exchange or market that the Secretary of the Treasury determines has rules sufficient to ensure that the market price represents a legitimate and sound fair market value." H.R. Conf. Rep. No. 2014, 105th Cong., 1st Sess. 625 (1997). Second, section 1296(e)(1)(B) states that, to the extent provided in regulations, stock in any foreign corporation which is comparable to a RIC and which offers for sale or has outstanding any stock of which it is the issuer and which is redeemable at its net asset value will be marketable stock. Third, section 1296(e)(1)(C) states that, to the extent provided in regulations, any option on stock described in section 1296(e)(1)(A) or (B) will constitute marketable stock.

Section 1296(e)(2) provides that in the case of any RIC which is offering for sale or has outstanding any stock of which it is the issuer and which is redeemable at net asset value, all stock in a PFIC which it owns directly or indirectly shall be treated as marketable stock for purposes of section 1296. Section 1296(e)(2) further provides that except as provided in regulations, similar treatment as marketable stock shall apply in the case of any other RIC which

publishes net asset valuations at least annually.

The proposed regulations define marketable stock for purposes of section 1296. Specifically, the proposed regulations define regularly traded and list attributes that a foreign exchange or market must have in order for PFIC stock traded on such an exchange or market to be eligible for the market election. The definition of regularly traded and the attributes required of foreign exchanges or markets are intended to ensure that the prices of PFIC shares listed on the exchange or market represent legitimate and sound fair market values. The proposed regulations also list the attributes that a foreign corporation must satisfy to be comparable to a RIC, and thus for its stock to be marketable stock. The attributes are intended to ensure that the foreign corporation is an investment vehicle similar in relevant respects to a U.S. mutual fund and that its representations of net asset value represent a legitimate fair market value.

#### Explanation of Provisions

##### *Regularly Traded*

Under the proposed regulations, the class of PFIC stock held by the shareholder must be traded, other than in de minimis quantities, on at least 15 days during each calendar quarter. The proposed regulations also include an anti-abuse rule to prevent persons from manipulating the number of trades in order to meet this test.

##### *Exchange or Other Market*

The proposed regulations require that a foreign exchange or market be regulated or supervised by a governmental authority of the country in which the market is located. This requirement will help to ensure that the prices of the stock listed by the exchange are legitimate and sound fair market values. Because the degree of governmental regulation or supervision for each foreign exchange or market may vary by exchange or market or country, the proposed regulations also list additional characteristics that the foreign exchange or market must have for stock that is regularly traded on the exchange or market to be considered marketable stock for purposes of section 1296.

First, the exchange must have trading volume, listing, financial disclosure and other requirements, designed to prevent fraud, perfect the mechanism of a free and open market, and protect investors. See section 6 of the Securities Exchange Act of 1934, 15 U.S.C. 78f. There must be actual enforcement of these

requirements by the exchange and government of the country in which the exchange is located.

Second, the rules of the exchange must ensure active trading of listed stocks.

Finally, the IRS and Treasury Department invite comments on whether PFIC stock that is regularly traded on any other type of exchange or market, such as an over-the-counter market, should be considered marketable stock. Additional comments are requested about what features those exchanges or markets should have to ensure that the stock prices quoted on such markets are legitimate and sound fair market values.

##### *Stock in Certain PFICs*

The proposed regulations provide that stock in certain PFICs will be *marketable stock* if the PFIC is a corporation described in section 1296(e)(1)(B) (foreign corporations comparable to RICs) and if the PFIC offers for sale or has outstanding stock of which it is the issuer and which is redeemable at its net asset value. A PFIC will be a corporation described in section 1296(e)(1)(B) if the PFIC satisfies the conditions listed in the proposed regulations and described below, with respect to the class of shares held by the electing taxpayer. These conditions are intended to describe PFICs that are comparable to U.S. RICs in relevant respects and to implement the intent of the statute by ensuring that the net asset valuations of such companies represent legitimate and sound fair market values for the companies' stock.

First, the class of stock held by an electing shareholder must be held by one hundred or more unrelated shareholders. The relationships set forth in section 267(b) are used to define related shareholders that are excluded from satisfying this test. This condition is consistent with the requirements for RICs under section 851(a) and § 1.851-1 of the income tax regulations.

Second, the applicable class of shares of the foreign corporation must be regularly available for purchase by the general public at its net asset value in initial amounts not greater than \$10,000 (U.S.). The IRS and Treasury Department invite comments on whether \$10,000 is the appropriate ceiling to ensure that the shares of the company will be widely available to the general public. The IRS and Treasury Department also invite comments on whether and under what conditions the regulations should allow shares of a foreign corporation to be purchased at amounts different from their net asset value, such as for a price that includes

a sales load. Additional comments are requested about whether the regulations should cover foreign corporations that otherwise qualify but are closed to new investors.

Third, the proposed regulations require that quotations for the class of shares of the foreign corporation be determined and published on a daily basis in a widely-available medium, such as a newspaper of general circulation. This requirement approximates the practice of U.S. RICs and is intended to ensure that shareholders and prospective purchasers have regular access to publicly available price information.

Fourth, financial statements of the foreign corporation prepared by independent auditors that include balance sheets (statements of assets, liabilities, and net assets) and statements of income and expenses, must be prepared and made available to the public no less frequently than annually. This requirement approximates the requirements imposed on U.S. mutual funds by the SEC and is intended to ensure that shareholders and prospective purchasers have regular access to financial information for the foreign corporation.

Fifth, the foreign corporation must be supervised or regulated as an investment company by a foreign government or an agency or instrumentality thereof. This condition is intended to approximate the SEC's regulation of U.S. RICs while taking into account the variety of regulatory regimes used by different governments.

Sixth, the foreign corporation may not have any senior securities authorized or outstanding, including any debt other than de minimis amounts. This requirement is similar to the requirement imposed on U.S. RICs by the SEC.

Finally, the foreign corporation must meet the PFIC income and asset tests in sections 1297(a)(1) and (2) with the requisite percentages increased from 75 percent to 90 percent and from 50 percent to 90 percent respectively. This condition is intended to approximate the characteristic of U.S. RICs as passive investment vehicles.

The proposed regulations also include an anti-abuse rule to prevent a foreign corporation from improperly manipulating its net asset valuations to reduce the U.S. tax under section 1296 of one or more shareholders of the corporation.

##### *Options on Marketable Stock*

The proposed regulations reserve the paragraph for defining how and when options on marketable stock, as defined

by these regulations, will be eligible for mark to market treatment. The IRS and Treasury Department invite comments regarding the conditions under which the regulations should define options on marketable stock to be marketable stock.

#### *Special Rules for RICs*

The proposed regulations clarify that shares in a PFIC that are owned directly or indirectly by a U.S. RIC, which is offering for sale or has outstanding any stock of which it is the issuer and which is redeemable at net asset value, shall be treated as marketable stock for purposes of section 1296. The IRS and Treasury Department invite comments regarding situations where PFIC stock held by other U.S. RICs that publish asset valuations at least annually should not be treated as marketable stock for purposes of section 1296.

#### **Proposed Effective Date**

The regulations are proposed to be applicable for shareholders whose taxable years end on or after the date these regulations are published as final regulations in the **Federal Register**. In addition, it is proposed that shareholders may elect to apply these regulations to taxable years beginning after December 31, 1997.

#### **Special Analyses**

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

#### **Comments and Requests for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any written comments (a signed original and eight (8) copies) that are submitted timely to the IRS. The IRS and Treasury Department request comments on the clarity of the proposed rules and how they can be made easier to understand. All comments will be available for public inspection and copying. A public

hearing may be scheduled if requested by any person that timely submits comments. If a public hearing is scheduled, notice of the date, time, and place for the hearing will be published in the **Federal Register**.

#### **Drafting Information**

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

#### **List of Subjects in 26 CFR Part 1**

Income taxes, Reporting and recordkeeping requirements.

#### **Proposed Amendments to the Regulations**

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

#### **PART 1—INCOME TAXES**

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

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

Section 1.1296(e)–1 also issued under 26 U.S.C. 1296(e). \* \* \*

**Par. 2.** Section 1.1296(e)–1 is added to read as follows:

##### **§ 1.1296(e)–1 Definition of marketable stock.**

(a) *General rule.* For purposes of section 1296, the term *marketable stock* means—

(1) Passive foreign investment company (PFIC) stock that is regularly traded, as defined in paragraph (b) of this section, on a qualified exchange or other market, as defined in paragraph (c) of this section;

(2) Stock in certain PFICs, as described in paragraph (d) of this section; and

(3) Options on stock that is described in paragraph (a)(1) or (2) of this section, to the extent provided in paragraph (e) of this section.

(b) *Regularly traded*—(1) *General rule.* For purposes of paragraph (a)(1) of this section, a class of stock that is traded on one or more qualified exchanges or other markets, as defined in paragraph (c) of this section, is considered to be regularly traded on such exchanges or markets for any calendar year during which such class of stock is traded, other than in de minimis quantities, on at least 15 days during each calendar quarter.

(2) *Anti-abuse rule.* Trades that have as one of their principal purposes the meeting of the trading requirement of

paragraph (b)(1) of this section shall be disregarded. Further, a class of stock shall not be treated as meeting the trading requirement of paragraph (b)(1) of this section if there is a pattern of trades conducted to meet the requirement of that paragraph.

(c) *Qualified exchange or other market*—(1) *General rule.* For purposes of paragraph (a)(1) of this section, the term *qualified exchange or other market* means, for any taxable year—

(i) A national securities exchange which is registered with the Securities and Exchange Commission or the national market system established pursuant to section 11A of the Securities Exchange Act of 1934 (15 U.S.C. 78f); or

(ii) A foreign securities exchange that is regulated or supervised by a governmental authority of the country in which the market is located and which has the following characteristics—

(A) The exchange has trading volume, listing, financial disclosure, and other requirements designed to prevent fraudulent and manipulative acts and practices, to remove impediments to and perfect the mechanism of a free and open market, and to protect investors; and the laws of the country in which the exchange is located and the rules of the exchange ensure that such requirements are actually enforced; and

(B) The rules of the exchange ensure active trading of listed stocks.

(2) *Exchange with multiple tiers.* If an exchange in a foreign country has more than one tier or market level on which stock may be separately listed or traded, each such tier shall be treated as a separate exchange.

(d) *Stock in certain PFICs*—(1) *General rule.* Except as provided in paragraph (d)(2) of this section, a foreign corporation will be a corporation described in section 1296(e)(1)(B), and paragraph (a)(2) of this section, if the foreign corporation offers for sale or has outstanding stock of which it is the issuer and which is redeemable at its net asset value and if the foreign corporation satisfies the following conditions with respect to the class of shares held by the electing taxpayer—

(i) The foreign corporation has one hundred or more shareholders with respect to the class, other than shareholders who are related under section 267(b);

(ii) The class of shares of the foreign corporation is readily available for purchase by the general public at its net asset value by new investors in initial amounts not greater than \$10,000 (U.S.);

(iii) Quotations for the class of shares of the foreign corporation are

determined and published on a daily basis in a widely-available medium, such as a newspaper of general circulation;

(iv) No less frequently than annually, independent auditors must prepare financial statements of the foreign corporation that include balance sheets (statements of assets, liabilities, and net assets) and statements of income and expenses, and those statements must be made available to the public;

(v) The foreign corporation is supervised or regulated as an investment company by a foreign government or an agency or instrumentality thereof;

(vi) The foreign corporation has no senior securities authorized or outstanding, including any debt other than in de minimis amounts;

(vii) Ninety percent or more of the gross income of the foreign corporation for its taxable year is passive income, as defined in section 1297(a)(1) and the regulations thereunder; and

(viii) The average percentage of assets held by the foreign corporation during its taxable year which produce passive income or which are held for the production of passive income, as defined in section 1297(a)(2) and the regulations thereunder, is at least 90 percent.

(2) *Anti-abuse rule.* If a foreign corporation undertakes any action with a principal purpose of manipulating the net asset value of a class of its shares in order to reduce the United States tax under section 1296 of one or more of its shareholders, the class of shares will not qualify as marketable stock for purposes of paragraph (d)(1) of this section.

(e) [Reserved]

(f) *Special rules for regulated investment companies (RICs)*—(1) *General rule.* In the case of any RIC which is offering for sale or has outstanding any stock of which it is the issuer and which is redeemable at net asset value, its stock in any passive foreign investment company which it owns directly or indirectly, as defined in sections 958(a) (1) and (2), shall be treated as marketable stock owned by that RIC for purposes of section 1296.

(2) [Reserved]

(g) *Effective date.* This section applies to shareholders whose taxable year ends on or after the date these regulations are published as final regulations in the **Federal Register** for stock in a foreign corporation whose taxable year ends with or within the shareholder's taxable year. In addition, shareholders may elect to apply these regulations to any taxable year beginning after December 31, 1997, for stock in a foreign corporation whose taxable year ends

with or within the shareholder's taxable year.

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

[FR Doc. 99-1666 Filed 2-1-99; 8:45 am]

BILLING CODE 4830-01-U

## DEPARTMENT OF THE TREASURY

### Internal Revenue Service

#### 26 CFR Part 1

[INTL-941-86]

RIN 1545-AI33

#### Withdrawal of Guidance Under Section 1291 Relating to Mark to Market Elections for RICs

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

**ACTION:** Partial withdrawal of proposed regulations.

**SUMMARY:** This document withdraws § 1.1291-8 of the notice of proposed rulemaking that was published in the **Federal Register** on April 1, 1992, providing guidance under the passive foreign investment company (PFIC) rules relating to the mark to market election for regulated investment companies (RICs) that are shareholders of PFICs.

**DATES:** Section 1.1291-8 of the proposed regulations published at 57 FR 11024 (April 1, 1992) is withdrawn February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Robert Laudeman of the Office of Associate Chief Counsel (International), Internal Revenue Service, 1111 Constitution Ave., NW., Washington, DC 20224. Telephone (202) 622-3840, not a toll-free number.

#### SUPPLEMENTARY INFORMATION:

##### Background

On April 1, 1992 (57 FR 11024), the IRS issued proposed regulations providing, in part, an election under which certain RICs could mark to market their stock in certain PFICs. In the Taxpayer Relief Act of 1997 Congress enacted section 1296(e)(2) of the Internal Revenue Code, which allows certain RICs to elect to mark to market their PFIC stock. Accordingly, the IRS is withdrawing proposed regulations § 1.1291-8. Future guidance will be issued providing rules for all PFIC shareholders, including RICs, on how to mark to market certain PFIC stock.

#### Drafting Information

The principal author of this withdrawal notice is Robert Laudeman, Office of the Associate Chief Counsel (International). However, other personnel from the IRS and Treasury Department participated in developing the withdrawal notice.

#### List of Subjects in Part 1

Income taxes, Reporting and recordkeeping requirements.

#### Partial Withdrawal of Proposed Amendments to the Regulations

Accordingly, under the authority of 26 U.S.C. 7805, § 1.1291-8 of the proposed amendments to 26 CFR part 1 published at 57 FR 11024, April 1, 1992, is withdrawn.

**Robert E. Wenzel,**

*Deputy Commissioner of Internal Revenue.*

[FR Doc. 99-1665 Filed 2-1-99; 8:45 am]

BILLING CODE 4830-01-U

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[PA112-4084; FRL-6229-2]

#### Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Nitrogen Oxides Allowance Requirements

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA is proposing to approve a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. This revision implements Pennsylvania's portion of the Ozone Transport Commission's (OTC) September 27, 1994 Memorandum of Understanding (MOU) including a regional nitrogen oxides (NO<sub>x</sub>) cap and trade program that will significantly reduce NO<sub>x</sub> emissions generated within the Ozone Transport Region (OTR). The intended effect of this action is to propose approval of Pennsylvania's regulations implementing Phase II of the OTC's MOU to reduce nitrogen oxides.

**DATES:** Written comments must be received on or before March 4, 1999.

**ADDRESSES:** Written comments may be mailed to David L. Arnold, Chief, Ozone & Mobile Sources Branch, Mailcode 3AP21, U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103. Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air

Protection Division, EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103 and Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, PA 17105.

**FOR FURTHER INFORMATION CONTACT:** Cristina Fernandez, (215) 814-2178, or by e-mail at fernandez.cristina@epa.gov. While information may be requested via e-mail, comments must be submitted in writing to the above Region III address.

**SUPPLEMENTARY INFORMATION:** On December 19, 1997, the Pennsylvania Department of Environmental Protection (PADEP) submitted a revision to its State Implementation Plan (SIP). The revision consists of amendments to Title 25 of the Pennsylvania Code including Chapter 121.01—Definitions and Chapter 123—NO<sub>x</sub> Allowance Requirements.

### I. Background

The Ozone Transport Commission (OTC) adopted a Memorandum of Understanding (MOU) on September 27, 1994, committing the signatory states to the development and proposal of a two phase region-wide reduction in nitrogen oxides (NO<sub>x</sub>) emissions by 1999 and 2003, respectively. As reasonably available control technology (RACT) to reduce NO<sub>x</sub> emissions was required to be implemented by May of 1995, the MOU refers to the reduction in NO<sub>x</sub> emissions to be achieved by 1999 as Phase II; and the reduction in NO<sub>x</sub> emissions to be achieved by 2003 as Phase III. The OTC states include Maine, New Hampshire, Vermont, Massachusetts, Connecticut, Rhode Island, New York, New Jersey, Pennsylvania, Maryland, Delaware, the northern counties of Virginia and the District of Columbia. All of the OTC states, with the exception of the Commonwealth of Virginia, signed the September 27, 1994 MOU. The OTC MOU requires a reduction in ozone season NO<sub>x</sub> emissions from utility and large industrial combustion facilities<sup>2</sup> within the Ozone Transport Region (OTR) in order to further the effort to achieve the health-based National Ambient Air Quality Standard (NAAQS) for ozone. In the MOU, the OTC states agreed to propose regulations for the control of NO<sub>x</sub> emissions in accordance with the following guidelines:

1. The level of NO<sub>x</sub> required would be established from a 1990 baseline emissions level.

2. The reduction would vary by location, or zone, and would be implemented in two phases utilizing a region wide trading program.

3. The reduction would be determined based on the less stringent of each of the following:

a. By May 1, 1999, the affected facilities in the inner zone shall reduce their rate of NO<sub>x</sub> emissions by 65% from baseline, or emit NO<sub>x</sub> at a rate no greater than 0.20 pounds per million Btu. (This is a Phase II requirement.)

b. By May 1, 1999, the affected facilities in the outer zone shall reduce their rate of NO<sub>x</sub> emissions by 55% from baseline, or shall emit NO<sub>x</sub> at a rate no greater than 0.20 pounds per million Btu. (This is a Phase II requirement.)

c. By May 1, 2003, the affected facilities in the inner and outer zones shall reduce their rate of NO<sub>x</sub> emissions by 75% from baseline, or shall emit NO<sub>x</sub> at a rate no greater than 0.15 pounds per million Btu. (This is a Phase III requirement.)

d. By May 1, 2003, the affected facilities in the Northern zone shall reduce their rate of NO<sub>x</sub> emissions by 55% from baseline, or shall emit NO<sub>x</sub> at a rate no greater than 0.20 pounds per million Btu. (This is a Phase III requirement.)

A Task Force of representatives from the OTC states, organized through the Northeast States for Coordinated Air Use Management (NESCAUM) and the Mid-Atlantic Regional Air Management Association (MARAMA), was charged with the task of developing a Model Rule that would implement the program defined by the OTC MOU. During 1995 and 1996, the NESCAUM/MARAMA NO<sub>x</sub> Budget Task Force worked with EPA and developed a model rule as a template for OTC states to adopt their own rules to implement the OTC MOU. The model was issued May 1, 1996. The model rule was developed for the OTC states to implement the Phase II reductions called for in the MOU to be achieved by May 1, 1999. The model rule does not include the implementation of Phase III.

### II. Summary of SIP Revision

Pennsylvania's Chapters 121.01 Definitions and 123—Nitrogen Oxides Allowance Requirements are based upon and are consistent with the "NESCAUM/MARAMA NO<sub>x</sub> Budget Rule" issued in May 1, 1996. The model rule was developed by the states in the OTR using the EPA's economic incentive rules (59 FR 16690) which were published on April 7, 1994, as the general regulatory framework.

Pennsylvania Chapter 121.01 has been amended to include definitions for the terms used in Chapter 123—NO<sub>x</sub> Allowances Requirements. Chapter 123—NO<sub>x</sub> Allowances Requirements

and its Appendix A include reduction requirements to implement Phase II of the OTC's MOU. The regulations include provisions for a regional cap and trade program, and establish NO<sub>x</sub> emission allowances for each NO<sub>x</sub> control period beginning May 1, 1999 through the NO<sub>x</sub> control period ending September 30, 2002. The budgeted sources and their NO<sub>x</sub> allowances allocations are identified. Pennsylvania Chapter 123—NO<sub>x</sub> Allowances Requirements is divided into twenty sections: (1) Purpose; (2) Source NO<sub>x</sub> allowance requirements and NO<sub>x</sub> allowance control period; (3) General NO<sub>x</sub> allowance provisions; (4) Source authorized account representative requirements; (5) Allowance Tracking System (NATS) provisions; (6) NO<sub>x</sub> allowance transfer protocol; (7) NO<sub>x</sub> allowance transfer procedures; (8) Source emissions monitoring requirements; (9) Source emissions reporting requirements; (10) Source compliance requirements; (11) Failure to meet source compliance requirements; (12) Source operating permit provision requirements; (13) source recordkeeping requirements; (14) General NO<sub>x</sub> allocation provisions; (15) Initial NO<sub>x</sub> allowance NO<sub>x</sub> allocations; (16) Source opt-in provisions; (17) New NO<sub>x</sub> affected source provisions; (18) Emission reduction credit provisions; (19) Bonus NO<sub>x</sub> allowance awards; (20) Audit. Appendix A to Chapter 123 is where the budgeted sources and their NO<sub>x</sub> allowance allocations are identified.

### III. Proposed Action

EPA is proposing to approve the Pennsylvania SIP revision for Chapter 121.01—Definitions and Chapter 123—NO<sub>x</sub> Allowance Requirements, submitted on December 19, 1997 implementing Phase II of the OTC's MOU to reduce nitrogen oxides. EPA is soliciting public comments on the issues discussed in this document or on other relevant matters. These comments will be considered before taking final action. Interested parties may participate in the Federal rulemaking procedure by submitting written comments to the EPA Regional office listed in the ADDRESSES section of this document. A more detailed description of the state submittal and EPA's evaluation are included in a Technical Support Document (TSD) prepared in support of this rulemaking action. A copy of the TSD is available upon request from the EPA Regional Office listed in the ADDRESSES section of this document.

#### IV. Administrative Requirements

##### A. Executive Orders 12866

The Office of Management and Budget (OMB) has exempted this regulatory action from review under E.O. 12866, entitled "Regulatory Planning and Review."

##### B. Executive Order 12875

Under E.O. 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. If EPA complies by consulting, E.O. 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 written communications from the governments, and a statement supporting the need to issue the regulation. In addition, E.O. 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

Executive Order 13045, entitled "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) is "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 reasonably feasible alternatives considered by the Agency. This proposed rule is not subject to Executive Order 13045 because it is not an economically significant regulatory

action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

##### D. Executive Order 13084

Under E.O. 13084, EPA may not issue a regulation that is not required by statute, that significantly affects 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. If EPA complies by consulting, E.O. 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 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. This action does not involve or impose any requirements that affect Indian Tribes. 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 proposed 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 a flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255-66 (1976); 42 U.S.C. 7410(a)(2).

##### 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 the proposed approval 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 approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action to approve Pennsylvania's NO<sub>x</sub> Allowance Requirements regulations to implement Phase II of the OTC MOU.

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

Environmental protection, Air pollution control, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

**Authority:** 42 U.S.C. 7401 *et seq.*

Dated: January 22, 1999.

##### W. Michael McCabe,

*Regional Administrator, Region III.*

[FR Doc. 99-2445 Filed 2-1-99; 8:45 am]

BILLING CODE 6560-50-P

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs  
Administration****49 CFR Parts 192 and 195**

[Docket No. RSPA-98-3783; Notice 9]

RIN 2137-AB38

**Qualification of Pipeline Personnel****AGENCY:** Research and Special Programs  
Administration (RSPA), DOT.**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces the next meeting of the negotiated rulemaking committee on qualification of pipeline personnel. In January 1998 this committee concluded a negotiated rulemaking to develop a proposed rule on qualification of pipeline employees performing certain functions on pipelines subject to the pipeline safety

regulations. The advisory committee is composed of persons who represent the interests that would be affected by the rule, such as gas pipeline operators, hazardous liquid pipeline operators, representatives of state and federal governments, labor organizations, and other interested parties.

**DATES:** The Committee will meet from 1:00 pm to 5:00 pm on February 22, 1999, and from 9:00 am to 5:00 pm on February 23, 1999.

**ADDRESSES:** The Committee will meet at the American Gas Association, 1515 Wilson Boulevard, 11th floor, Arlington, Virginia.

**FOR FURTHER INFORMATION CONTACT:** Eben M. Wyman, (202) 366-0918, or by e-mail (eben.wyman@rspa.dot.gov) regarding the subject matter of this Notice; or the Dockets Unit, (202) 366-4453, for copies of this document or other material in the docket.

**SUPPLEMENTARY INFORMATION:** On October 27, 1999, OPS published a Notice of Proposed Rulemaking (NPRM), Qualification of Pipeline Personnel (63 FR 57269). The comment period ended on December 28, 1998. The negotiated rulemaking advisory committee that developed this NPRM will reconvene at this meeting to discuss comments received regarding the NPRM, and will work to prepare the final rule. This meeting is open to the public. RSPA expects this will be the final meeting of the advisory committee on operator personnel qualification.

Issued in Washington, DC on January 27, 1999.

**Richard B. Felder,**

*Associate Administrator for Pipeline Safety.*

[FR Doc. 99-2415 Filed 2-1-99; 8:45 am]

**BILLING CODE 4910-60-P**

# Notices

Federal Register

Vol. 64, No. 21

Tuesday, February 2, 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 Continental Grain Company of Chicago, Illinois, an exclusive license to U.S. Patent No. 5,807,546 issued on September 15, 1998, entitled "Livestock Mucosal Competitive Exclusion Culture to Reduce Enteropathogenic Bacteria." Notice of Availability was published in the **Federal Register** on August 7, 1997. **DATES:** Comments must be received on or before April 5, 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 Continental Grain Company 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. 99-2429 Filed 2-1-99; 8:45 am]

**BILLING CODE 3410-03-P**

## DEPARTMENT OF AGRICULTURE

### Forest Service

#### Duck-Sheriff Project, Allegheny National Forest

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice of intent to prepare an Environmental Impact Statement.

**SUMMARY:** In accordance with the National Environmental Policy Act, notice is hereby given that the Forest Service, Allegheny National Forest (ANF), will prepare an Environmental Impact Statement to disclose the environmental consequences of the proposed Duck-Sheriff project.

The purpose of this project is to move the ANF from the existing condition towards the desired future condition (DFC) as detailed in the Allegheny National Forest Land and Resource Management Plan (Forest Plan). The Forest Plan allocates land to management where wood production is one of the featured objectives (Management Area [MA] 3.0). Equally important, the Forest Plan allocates land to management that emphasizes wildlife and recreation (MA 6.1). The Duck-Sheriff project contains both of these management areas.

In order to move toward the DFC, the acres in early successional age class (0-20 year age) need to increase; healthy forested stands capable of producing high quality, high value sawtimber need to be maintained; and understories dominated by fern, grass or undesirable vegetation need to develop desirable seedlings. Project proposals include timber harvesting as a means for making desired changes to forest vegetation and satisfying the demonstrated public need for wood products. Management actions necessary to meet the purpose and need include: 1,364 acres of regeneration harvest to ensure future forests; herbicide, fertilizer, fencing, mechanical site preparation, and/or planting to ensure seedling establishment and growth in understories. An additional 1,842 acres of intermediate harvests are

planned to reduce the competition for light and nutrients, thereby improving the health, vigor, and growth of residual trees and to restore the understory within mature forests. Activities associated with these silvicultural practices include 3 miles of new road construction, 28 miles of road restoration, 9 miles of road betterment, and 7 acres of stone pit development to provide an adequate long-term transportation system.

Additional areas need to be designated for management of late successional values, riparian areas need protection and enhancement, sections of the North Country Trail need improvement, water borne recreation needs enhancement, wildlife habitat needs improvement, and interpretation of wildland heritage needs to be increased. Project proposals (management actions) were designed to address these needs.

During project analysis issues will be identified that focus on the management of the area. Alternatives will be developed to show various ways to address the issues. This process is driven by comments received from the public, other agencies, and internal Forest Service concerns. To assist in commenting, a scoping letter providing more detailed information on the project proposal has been prepared and is available to interested parties.

After analysis, the responsible official will select an alternative that maximizes net public benefits for the Duck-Sheriff Project area.

**DATES:** Comments, suggestions, and recommendations for achieving the purpose and need for the Duck-Sheriff Project are now being accepted. The public comment period will be for 30 days from the date this notice is published in the **Federal Register**. Comments and suggestions should be submitted in writing and postmarked by March 4, 1999 to ensure timely consideration.

**CONTACT PERSONS & ADDRESSES:** Submit written comments and suggestions concerning the proposed action to: "Duck-Sheriff Project", attention Sue Wingate—ID Team Leader, Bradford Ranger District, HC1 Box 88, Bradford, PA 16701. For further information, contact Sue Wingate @ (814) 362-4613. The responsible official for this project is John R. Schultz, District Ranger,

Bradford Ranger District, HC1 Box 88, Bradford, PA 16701.

**SUPPLEMENTARY INFORMATION:** The analysis of the Duck-Sheriff project is conducted under the guidance of the National Environmental Policy Act and the Allegheny National Forest Land and Resource Management Plan. Preliminary issues were developed based on past public involvement on other projects, known concerns of other agencies, interdisciplinary team identification of Forest Service concerns, and identified opportunities in the project area. The following issues will be carried forward in the project analysis. They will be modified as additional issues are identified during scoping: (1) Road management and new access; (2) deer densities and investments to restore desirable understory vegetation; (3) vegetation treatments along the North Country Trail; (4) uneven-aged timber management; and (5) old-growth forest and contiguous canopy.

Preliminary alternatives were developed to display management opportunities in response to the known issues. Management actions within the alternatives respond to the issues in different ways by varying the size and intensity of the treatments and projects proposed. The amount of even and uneven-aged management, wildlife, recreation development, road management, watershed rehabilitation and other activities differ within the alternatives. The combinations of proposed activities are likely to be adjusted after all comments are reviewed.

Comments considered beyond the scope of this project which will *not* be evaluated. This includes whether or not commercial timber harvest should occur on National Forest System lands; the validity of the science of silviculture and forest management; and whether or not to allow the use of herbicides on the Allegheny National Forest on a programmatic level.

#### Commenting

Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record on this proposed action and will be available for public inspection. In a recent legal opinion, the Forest Service's Office of General Council (OGC) has determined that names and addresses of people who respond to a Forest Service solicitation are not protected by the Privacy Act and can be released to the public. The Forest Service routinely gives notice of and requests comments on proposed land and resource management actions accompanied by

environmental documents, as well as on proposed rules and policies. Comments received in response to such solicitations, including names and addresses of those who comment, will be considered part of the public record and will be available for such inspection, upon request. Any person may request the agency to withhold a submission from the public record by showing how the Freedom of Information Act (FOIA) permits such confidentiality. The opinion states that such confidentiality may be granted in only very limited circumstances, such as to protect trade secrets.

The Draft EIS is expected to be filed with the Environmental Protection Agency and to be available for public review by May 15, 1999. At that time the Environmental Protection Agency will publish a notice of availability of the document in the Federal Register. A public comment period on the Draft EIS will be 45 days from the date the Environmental Protection Agency publishes the notice of availability in the Federal Register.

The Forest Service believes, at this early stage, it is important to give reviewers notice of several court rulings related to public participation in the environmental review process. First, reviewers of draft environmental impact statements must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519 553 (1978). Also, environmental objections that could be raised at the draft environmental impact statement stage but that are not raised until after completion of the final environmental impact statement may be waived or dismissed by the courts. *City of Angoon v. Hodel*, 803 F.2d 1016, 1022 (9th Cir. 1986) and *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980). Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final environmental impact statement.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft environmental impact statement should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the

adequacy of the draft environmental impact statement or the merits of the alternatives formulated and discussed in the statement. Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the procedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.

After the comment period ends on the Draft EIS, the comments will be analyzed and considered by the Forest Service in preparing the final environmental impact statement. The Final EIS is scheduled to be completed by September 15, 1999. The decision will be subject to appeal under 36 CFR 215.

Dated: January 27, 1999.

**John R. Schultz,**

*District Ranger.*

[FR Doc. 99-2377 Filed 2-1-99; 8:45 am]

BILLING CODE 3410-11-P

## DEPARTMENT OF AGRICULTURE

### Forest Service

**Douglas-Fir Beetle Project; Idaho Panhandle National Forests, Bonner, Kootenai, Shoshone Counties, Idaho and Pend Oreille County, Washington; Colville National Forest, Pend Oreille County, Washington**

**AGENCY:** Forest Service, USDA.

**ACTION:** Revision of notice of intent to prepare an environmental impact statement.

**SUMMARY:** The USDA Forest Service published in the **Federal Register**/Vol. 63, No. 221/, Tuesday, November 17, 1998, pages 63830 to 63833 two notices of intent to prepare an environmental impact statement (EIS) to disclose the potential environmental effects of proposed activities in forest stands infested with Douglas-fir beetles. This revision changes the designation of the responsible officials. Also the two EIS projects, Pend Oreille Priest Beetle (63830-63831) and Coeur d'Alene Beetle (63831-63833), published in the **Federal Register**, November 17, 1998 have been consolidated into one EIS designated, Douglas-fir Beetle Project. No other changes to the two published notices of intent are being made with this revision.

We are the responsible officials for this environmental impact statement and will decide which projects will be implemented. Addresses are: Idaho Panhandle National Forests, 3815 Schreiber Way, Coeur d'Alene, ID 83817-8363 and Colville National

Forest, 765 S. Main Street, Colville, WA 99114.

Dated: January 6, 1999.

**David J. Wright,**

*Forest Supervisor, Idaho Panhandle National Forests.*

Dated: January 6, 1999.

**Robert L. Vaught,**

*Forest Supervisor, Colville National Forest.*  
[FR Doc. 99-2387 Filed 2-1-99; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**Sawtooth Ridge Trail and Improvement Project, Okanogan and Wenatchee National Forests, Okanogan and Chelan Counties, Washington**

**AGENCY:** Forest Service, USDA.

**ACTION:** Cancellation of an environmental impact statement.

**SUMMARY:** On December 29, 1997, a Notice of Intent (NOI) to prepare an environmental impact statement (EIS) for the Sawtooth Ridge Trail and Improvement Project in the Sawtooth non-wilderness backcountry of the Okanogan and Wenatchee National Forests was published in the **Federal Register** (62 FR 67616). The Forest Service will not be conducting this environmental analysis for this proposed action; therefore, the NOI is hereby rescinded.

**FOR FURTHER INFORMATION CONTACT:** Direct questions regarding this cancellation to Jim Archambeault, Project Coordinator, Methow Valley Ranger District, P.O. Box 188, Twisp, Washington 98856, phone 509-997-9738.

Dated: January 20, 1999.

**Sam Gehr,**

*Forest Supervisor, Okanogan National Forest.*

Dated: January 25, 1999.

**Sonny O'Neal,**

*Forest Supervisor, Wenatchee National Forest.*

[FR Doc. 99-2378 Filed 2-1-99; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF AGRICULTURE**

**Forest Service**

**Committee of Scientists Meeting**

**AGENCY:** Forest Service, USDA.

**ACTION:** Notice.

**SUMMARY:** The Committee of Scientists is changing the date of a public teleconference call previously scheduled for February 4, 1999 (64 FR 3063, January 20, 1999). This telephone conference call will take place instead on Tuesday, February 9, beginning at noon (12:00 p.m.) and ending at 3:00 p.m. (eastern standard time). The purpose of the telephone conference call is for the Committee of Scientists to continue discussion of its report and recommendations to the Secretary of

Agriculture and the Chief of the Forest Service concerning improvements to the National Forest System land and resource management planning process. The public is invited to attend the teleconference call and may be provided an opportunity to comment on the Committee of Scientists' deliberations during the teleconference call, only at the request of the Committee.

**DATES:** The teleconference call will be held on Tuesday, February 9, from noon (12:00 p.m.) to 3:00 p.m. (eastern standard time).

**ADDRESSES:** The teleconference call will be held at the USDA Forest Service headquarters, Sidney R. Yates Federal Building, 201 14th Street, S.W., Washington, D.C., in the Chief's Conference Room on February 9. The teleconference call can be accessed at all Regional Offices of the Forest Service, which are listed in the table under **SUPPLEMENTARY INFORMATION.**

Written comments on improving land and resource management planning may be sent to the Committee of Scientists, P.O. Box 2140, Corvallis, OR 97339, or via the Internet at [www.cof.orst.edu/org/scicomm/](http://www.cof.orst.edu/org/scicomm/).

**FOR FURTHER INFORMATION CONTACT:** For additional information concerning the teleconference, contact Bob Cunningham, Designated Federal Official to the Committee of Scientists, by telephone (202) 205-1523.

**SUPPLEMENTARY INFORMATION:** The public may attend the teleconference at the following field locations:

**USDA FOREST SERVICE REGIONAL OFFICE LOCATIONS**

Region 1, Northern Region .....	Federal Building, 200 E Broadway .....	Missoula, MT.
Region 2, Rocky Mountain Region .....	740 Simms St .....	Golden, CO.
Region 3, Southwestern Region .....	Federal Building, 517 Gold Ave., SW .....	Albuquerque, NM.
Region 4, Intermountain Region .....	Federal Building, 324 25th St .....	Ogden, UT.
Region 5, Pacific Southwest Region .....	630 Sansome St .....	San Francisco, CA.
Region 6, Pacific Northwest Region .....	333 SW 1st Ave .....	Portland, OR.
Region 8, Southern Region .....	1720 Peachtree Rd. NW .....	Atlanta, GA.
Region 9, Eastern Region .....	310 W. Wisconsin Ave., Room 500 .....	Milwaukee, WI.
Region 10, Alaska Region (office will open early) .....	Federal Office Building, 709 W. 9th St .....	Juneau, AK.

The Committee of Scientists was chartered to provide scientific and technical advice to the Secretary of Agriculture and the Chief of the Forest Service on improvements that can be made to the National Forest System land and resource management planning process (62 FR 43691; August 15, 1997). Notice of the names of the appointed Committee members was published December 16, 1997 (62 FR 65795).

Dated: January 27, 1999.

**Gloria Manning,**

*Acting Deputy Chief for National Forest System.*

[FR Doc. 99-2386 Filed 2-1-99; 8:45 am]

BILLING CODE 3410-11-M

**DEPARTMENT OF AGRICULTURE**

**Natural Resources Conservation Service**

**Task Force on Agricultural Air Quality Meeting**

**AGENCY:** Natural Resources Conservation Service (NRCS), USDA.

**ACTION:** Notice of meeting.

**SUMMARY:** The reestablished Task Force on Agricultural Air Quality will meet for the first time to discuss the relationship between agricultural

production and air quality. Special emphasis will be placed on promoting a greater understanding of agriculture's impact on air quality and the role it plays in the local and national economy. The meeting is open to the public.

**DATES:** The meeting will convene Wednesday, March 3, 1999 at 9:00 a.m. and continue until 4:00 p.m. The meeting will resume Thursday, March 4, 1999 from 9:00 a.m. to 3:00 p.m. Written material and requests to make oral presentations should reach the Natural Resources Conservation Service on or before February 26, 1999.

**ADDRESSES:** The meeting will be held at the U.S. Department of Agriculture, 1400 Independence Avenue, SW, Washington, DC, telephone (202) 720-4525. Written material and requests to make oral presentations should be sent to George Bluhm, University of California, Land, Air, Water Resources, 151 Hoagland Hall, Davis, CA 95616-6827.

**FOR FURTHER INFORMATION:** Questions or comments should be directed to George Bluhm, Designated Federal Official, telephone (530) 752-1018, fax (530) 752-1552, email bluhm@crocker.ucdavis.edu.

**SUPPLEMENTARY INFORMATION:** Notice of this meeting is given under the Federal Advisory Committee Act, 5 U.S.C. App. 2. Additional information about the Task Force on Agricultural Air Quality, including any revised agendas for the March 3-4, 1999 meeting that may appear after this **Federal Register** Notice is published, may be found on the World Wide Web at <http://www.nhq.nrcs.usda.gov/faca/aaqtf.html>.

#### **Draft Agenda of the March 3-4, 1999 Meeting**

- A. *Introduction to the Task Force*
  - 1. Member introductions
  - 2. Task Force charge
  - 3. FACA rules
- B. *Plenary*
  - 1. Agricultural air quality issues
  - 2. Organization of the Task Force
- C. *Old business*
  - 1. Minutes of the August 18, 1998 AAQTF meeting
  - 2. Recommendations to the Secretary of Agriculture on the voluntary program and research priorities
  - 3. Subcommittee on Agricultural Burning report to the AAQTF
- D. *New business*
  - 1. EPA's draft implementation guidance for the revised ground-level ozone and particulate matter NAAQS and a regional haze program
- E. Set date and location for next meetings

#### **Procedural**

This meeting is open to the public. At the discretion of the Chair, members of the public may present oral presentations during the March 3-4, 1999 meeting. Persons wishing to make oral presentations should notify George Bluhm no later than February 26, 1999. If a person submitting material would like a copy distributed to each member of the committee in advance of the meeting, that person should submit 25 copies to George Bluhm no later than February 26, 1999.

#### **Information on Services For Individuals With Disabilities**

For information on facilities or services for individuals with disabilities or to request special assistance at the meeting, contact George Bluhm as soon as possible.

Dated: January 27, 1999.

#### **Lawrence E. Clark,**

*Deputy Chief for Science and Technology, Natural Resources Conservation Service.*

[FR Doc. 99-2362 Filed 2-1-99; 8:45 am]

BILLING CODE 3410-16-P

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#### **DEPARTMENT OF COMMERCE**

##### **Submission For OMB Review; Comment Request**

DOC has submitted to the Office of Management and Budget (OMB) for clearance the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35).

*Agency:* Bureau of the Census.

*Title:* 1999 Knowledge, Attitudes, and Perception Survey.

*Form Number(s):* KAP-1.

*Agency Approval Number:* Not available.

*Type of Request:* New collection.

*Burden:* 167 hours.

*Number of Respondents:* 1,000.

*Avg Hours Per Response:* 10 minutes.

*Needs and Uses:* The Census Bureau plans to conduct the 1999 Knowledge, Attitudes, and Perception (KAP) Survey to gather and benchmark useful and fundamental data about the public's perception of government information collection, our dissemination, and the use of the statistics collected. This research will be used by the Census Bureau to improve communications with the public, in general, and to reduce barriers to census or survey response. The information about the public's knowledge, attitudes, and perceptions will be evaluated and communications transformed to dispel

myths, appropriately address issues, and to increase awareness. A contractor will survey 1,000 residents of households in the United States through random-digit-dialed telephone interviews. The questionnaire will contain tested questions asked in earlier and similar Census Bureau sponsored surveys. Individuals will be asked their knowledge, opinions, and ideas about various government agencies and their programs, with emphasis on the Census Bureau and the decennial censuses and surveys.

*Affected Public:* Individuals or households.

*Frequency:* One-time collection.

*Respondent's Obligation:* Voluntary.

*Legal Authority:* Title 15, United States Code, Sections 1515, 1516, and 1516a.

*OMB Desk Officer:* Nancy Kirkendall, (202) 395-7313.

Copies of the above information collection proposal can be obtained by calling or writing Linda Engelmeier, DOC Forms Clearance Officer, (202) 482-3272, Department of Commerce, room 5327, 14th and Constitution Avenue, NW, Washington, DC 20230.

Written comments and recommendations for the proposed information collection should be sent within 30 days of publication of this notice to Nancy Kirkendall, OMB Desk Officer, room 10201, New Executive Office Building, Washington, DC 20503.

Dated: January 28, 1999.

#### **Linda Engelmeier,**

*Departmental Forms Clearance Officer, Office of the Chief Information Officer.*

[FR Doc. 99-2406 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-07-P

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#### **DEPARTMENT OF COMMERCE**

##### **Economic Development Administration**

##### **Notice of Petitions by Producing Firms for Determination of Eligibility To Apply for Trade Adjustment Assistance**

**AGENCY:** Economic Development Administration (EDA), Commerce.

**ACTION:** To give firms an opportunity to comment.

Petitions have been accepted for filing on the dates indicated from the firms listed below.

## LIST OF PETITION ACTION BY TRADE ADJUSTMENT ASSISTANCE FOR PERIOD 12/16/98-1/21/99

Firm name	Address	Date petition accepted	Product
Electro-Chem Etching Co., Inc .....	5706 Green Ash Dr., Houston, TX 77081 .....	12/28/98	Multi-Layered Printed Circuit Boards.
Corey Associates, Inc .....	P.O. Box E, Greentown, PA 18426 .....	12/31/98	Thermister Sensors; Electronic Cable Harness.
Tingstol Company .....	1600 Busse Road, Elk Grove Village, IL 60007 ...	12/31/98	Printed Circuit Boards.
Vivan Alexander, Inc .....	6165 Picard Lane, Maurice, LA 70555 .....	12/31/98	Gold Plated Decorative Boxes.
Burley Design Cooperative .....	4020 Steward Road, Eugene, OR 97402 .....	01/04/99	Bicycle Trailers.
Dowcraft Corporation .....	221 Lister Avenue .....	01/12/99	Metal Partitions; Metal Doors.
Hawaii Nurseries, Inc .....	P.O. Box 4142, Hilo, HI 96720 .....	01/15/99	Potted Plants and Foliage.
Tropical J'S, Inc .....	5 Sand Island Access Rd., Honolulu, HI 96819 ...	01/12/99	Outdoor Umbrellas and Awnings.
The Worcester Company, Inc .....	1 Greystone Avenue, N. Providence, RI 02911 ...	01/15/99	Woven Wool Fabric.
MRA Laboratories, Inc .....	96 Marshall Street, North Adams, MA 01247 .....	01/19/99	Ceramic Powder and Electrode Conductor Links.
Atlas Tool and Die Company, Inc .....	42 Marway Circle, Rochester, NY 14624 .....	01/14/99	Transmission Shafts, Cranks, Cranks and Torque Converters.
American Fittings, Inc .....	P.O. Box 1007, Travelers Rest, SC 29690 .....	01/21/99	Flanges and Fittings for Pipes and Tubing.

The petitions were submitted pursuant to Section 251 of the Trade Act of 1974 (19 U.S.C. 2341). Consequently, the United States Department of Commerce has initiated separate investigations to determine whether increased imports into the United States of articles like or directly competitive with those produced by each firm contributed importantly to total or partial separation of the firm's workers, or threat thereof, and to a decrease in sales or production of each petitioning firm.

Any party having a substantial interest in the proceedings may request a public hearing on the matter. A request for a hearing must be received by Trade Adjustment Assistance, Room 7315, Economic Development Administration, U.S. Department of Commerce, Washington, D.C. 20230, no later than the close of business of the tenth calendar day following the publication of this notice.

The Catalog of Federal Domestic Assistance official program number and title of the program under which these petitions are submitted is 11.313, Trade Adjustment Assistance.

Dated: January 25, 1999.

**Anthony J. Meyer,**

*Coordinator, Trade Adjustment and Technical Assistance.*

[FR Doc. 99-2379 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-24-M

## DEPARTMENT OF COMMERCE

### Bureau of Export Administration

#### Action Affecting Export Privileges; Francisco Javier Ferreiro-Parga; Order Denying Permission To Apply for or Use Export Licenses

On December 12, 1997, Francisco Ferreiro-Paraga (Ferreiro-Parga) was convicted in the United States District Court for the Southern District of Florida on, *inter alia*, one count of violating the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701-1706 (1991 & Supp. 1998)) (IEEPA). Ferreiro-Parga was convicted of knowingly, willfully, and unlawfully exporting and causing to be exported two containers of goods, to Ria Haina, Dominican Republic, under a false bill of lading, from where the containers of goods were transhipped to Havana, Cuba, without the required export license.

Section 11(h) of the Export Administration Act of 1979, as amended (currently codified at 50 U.S.C.A. app. §§ 2401-2420 (1991 & Supp. 1998)) (the Act),<sup>1</sup> provides that, at the discretion of the Secretary of Commerce,<sup>2</sup> no person

<sup>1</sup>The Act expired on August 20, 1994. Executive Order 12924 (3 C.F.R., 1994 Comp. 917 (1995)), extended by Presidential Notices of August 15, 1995 (3 C.F.R., 1995 Comp. 501 (1996)), August 14, 1996 (3 C.F.R., 1996 Comp. 298 (1997)), August 13, 1997 (3 C.F.R., 1997 Comp. 306 (1998)), and August 13, 1998 (63 Fed. Reg. 44121, August 17, 1998), continued the Export Administration Regulations in effect under the IEEPA.

<sup>2</sup>Pursuant to appropriate delegations of authority that are reflected in the Regulations, the Director, Office of Exporter Services, in consultation with the

Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any license previously issued to such a person.

Pursuant to Sections 766.25 and 750.8(a) of the Regulations, upon notification that a person has been convicted of violating the IEEPA, the Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, shall determine whether to deny that person permission to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act and the Regulations, and shall also determine whether to revoke any license previously issued to such a person.

Having received notice of Ferreiro-Parga's conviction for violating the IEEPA, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Ferreiro-Parga permission to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act and the Regulations, for a period of 10 years

Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act.

from the date of his conviction. The 10-year period ends on December 12, 2007. I have also decided to revoke all licenses issued pursuant to the Act in which Ferreiro-Parga had an interest at the time of his conviction.

Accordingly, it is hereby

*Ordered*

I. Until December 12, 2007, Francisco Javier Ferreiro-Parga, Plaza de Maria Pita 21, Piso 2d, La Coruna, Spain, may not, directly or indirectly, participate in any way, in any transaction involving any commodity, software or technology (hereinafter collectively referred to as "item") exported or to be exported from the United States, that is subject to the Regulations, or in any other activity subject to the Regulations, including but not limited to:

A. Applying for, obtaining, or using any license, License Exception, or export control document;

B. Carrying on negotiations concerning, or ordering, buying, receiving, using, selling, delivering, storing, disposing of, forwarding, transporting, financing, or otherwise servicing in any way, any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations; or

C. Benefiting in any way from any transaction involving any item exported or to be exported from the United States that is subject to the Regulations, or in any other activity subject to the Regulations.

II. No person may, directly or indirectly, do any of the following:

A. Export or reexport to or on behalf of the denied person any item subject to the Regulations;

B. Take any action that facilitates the acquisition or attempted acquisition by the denied person of the ownership, possession, or control of any item subject to the Regulations that has been or will be exported from the United States, including financing or other support activities related to a transaction whereby the denied person acquires or attempts to acquire such ownership, possession or control;

C. Take any action to acquire from or to facilitate the acquisition or attempted acquisition from the denied person of any item subject to the Regulations that has been exported from the United States;

D. Obtain from the denied person in the United States any item subject to the Regulations with knowledge or reason to know that the item will be, or is intended to be, exported from the United States; or

E. Engage in any transaction to service any item subject to the Regulations that has been or will be exported from the United States and which is owned, possessed or controlled by the denied person, or service any item, of whatever origin, that is owned, possessed or controlled by the denied person if such service involves the use of any item subject to the Regulations that has been or will be exported from the United States. For purposes of this paragraph, servicing means installation, maintenance, repair, modification or testing.

III. After notice and opportunity for comment as provided in Section 766.23 of the Regulations, any person, firm, corporation, or business organization related to Ferreiro-Parga by affiliation, ownership, control, or position of responsibility in the conduct of trade or related services may also be subject to the provisions of this Order.

IV. This Order does not prohibit any export, reexport, or other transaction subject to the Regulations where the only items involved that are subject to the Regulations are the foreign-produced direct product of U.S.-origin technology.

V. This Order is effective immediately and shall remain in effect until December 12, 2007.

VI. A copy of this Order shall be delivered to Ferreiro-Parga. This Order shall be published in the **Federal Register**.

Dated: January 25, 1999.

**Eileen M. Albanese,**

*Director, Office of Exporter Services.*

[FR Doc. 99-2434 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-DT-M

**DEPARTMENT OF COMMERCE**

**International Trade Administration**

[A-588-824]

**Certain Corrosion-Resistant Carbon Steel Flat Products From Japan: Notice of Initiation of Changed Circumstances Review of the Antidumping Duty Order, Preliminary Results of Changed Circumstances Review, and Intent To Revoke Order in Part**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of initiation and preliminary results of changed circumstances antidumping duty review, and intent to revoke order in part.

**SUMMARY:** In accordance with 19 CFR 351.216(b), Uchiyama America, Inc

("Uchiyama"), an interested party in this proceeding, requested a changed circumstances review. In response to Uchiyama's request, the Department of Commerce (the Department) is initiating a changed circumstances review and issuing a notice of intent to revoke in part the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. Interested parties are invited to comment on these preliminary results.

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Doreen Chen or Rick Johnson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-0408, (202) 482-3818, respectively.

**The Applicable Statute and Regulations**

Unless otherwise indicated, all citations to the statute are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act of 1930 (the Act) by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations as codified at 19 CFR part 351, 62 FR 27295 (May 19, 1997).

**SUPPLEMENTARY INFORMATION:**

**Background**

On December 11, 1998, Uchiyama requested that the Department revoke in part the antidumping duty order on certain corrosion-resistant carbon steel flat products from Japan. Specifically, Uchiyama requested that the Department revoke the order with respect to imports of the following subject merchandise: (1) widths ranging from 10 millimeters (0.394 inches) through 100 millimeters (3.94 inches); (2) thicknesses, including coatings, ranging from 0.11 millimeters (0.004 inches) through 0.60 millimeters (0.024 inches); and (3) a coating that is from 0.003 millimeters (0.00012 inches) through 0.005 millimeters (0.000196 inches) in thickness and that is comprised of either two evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum, followed by a layer consisting of chromate, or three evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum followed by a layer consisting of chromate, and finally a layer consisting of silicate. Uchiyama, a domestic manufacturer of rubber seals and metal inserts for ball bearings, is an importer of the products in question. On

January 19, 1999, Bethlehem Steel Corporation (Bethlehem), Inland Steel Industries, Inc. (Inland), LTV Steel Company (LTV), National Steel Corporation (National), and U.S. Steel Group, A Unit of USX Corporation (U.S. Steel), domestic interested parties in this case, submitted a letter indicating that they have no objection to the initiation of this changed circumstances review and no interest in maintaining the antidumping duty order on corrosion-resistant carbon steel flat products from Japan with respect to products having the dimensions indicated above. Based on the fact that this portion of this order is no longer of interest to domestic parties, we intend to partially revoke this order.

#### **Initiation of Changed Circumstances Antidumping Duty Review, and Intent To Revoke Order in Part**

Pursuant to sections 751(d)(1) and 782(h)(2) of the Act, the Department may partially revoke an antidumping or countervailing duty order based on a review under section 751(b) of the Act (*i.e.*, a changed circumstances review). Section 751(b)(1) of the Act requires a changed circumstances review to be conducted upon receipt of a request which shows changed circumstances sufficient to warrant a review. Section 351.222(g) of the Department's regulations provides that the Department will conduct a changed circumstances administrative review under 19 CFR 351.216, and may revoke an order (in whole or in part), if it determines that producers accounting for substantially all of the production of the domestic like product to which the order (or the part of the order to be revoked) pertains have expressed a lack of interest in the relief provided by the order, in whole or in part. In addition, in the event that the Department concludes that expedited action is warranted, 19 CFR 351.221(c)(3)(ii) permits the Department to combine the notices of initiation and preliminary results.

Therefore, in accordance with sections 751(d)(1) and 782(h)(2) of the Act, and 19 CFR 351.216 and 351.222(g), based on affirmative statements of no interest by Bethlehem, Inland, LTV, National, and U.S. Steel in continuing the order with respect to corrosion-resistant carbon steel flat products with (1) widths ranging from 10 millimeters (0.394 inches) through 100 millimeters (3.94 inches); (2) thicknesses, including coatings, ranging from 0.11 millimeters (0.004 inches) through 0.60 millimeters (0.024 inches); and (3) a coating that is from 0.003 millimeters (0.00012 inches) through

0.005 millimeters (0.000196 inches) in thickness and that is comprised of either two evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum, followed by a layer consisting of chromate, or three evenly applied layers, the first layer consisting of 99% zinc, 0.5% cobalt, and 0.5% molybdenum followed by a layer consisting of chromate, and finally a layer consisting of silicate, we are initiating this changed circumstances review. Furthermore, we determine that expedited action is warranted, and we preliminarily determine that the continued relief provided by the order with respect to corrosion-resistant carbon steel flat products within the width and thickness range mentioned above is no longer of interest to domestic interested parties. Because we have concluded that expedited action is warranted, we are combining these notices of initiation and preliminary results. Therefore, we are hereby notifying the public of our intent to revoke in part the antidumping duty order with respect to imports of corrosion-resistant carbon steel flat products of the above-mentioned width, thickness, coating range, and coating composition from Japan.

If final revocation in part occurs, we intend to instruct the U.S. Customs Service (Customs) to liquidate without regard to antidumping duties, and to refund any estimated antidumping duties collected for all entries of corrosion-resistant carbon steel flat products, with the dimensions indicated above, made on or after the date of publication in the **Federal Register** of the final results of this review in accordance with 19 CFR 351.222. We will also instruct Customs to pay interest on such refunds in accordance with section 778 of the Act. The current requirement for a cash deposit of estimated antidumping duties on corrosion-resistant carbon steel flat products, with the dimensions indicated above, will continue unless and until we publish a final determination to revoke in part.

#### **Public Comment**

Interested parties are invited to comment on these preliminary results. Parties who submit argument in this proceeding are requested to submit with the argument (1) a statement of the issue, and (2) a brief summary of the argument. Parties to the proceedings may request disclosure within 5 days of the date of publication of this notice and any interested party may request a hearing within 10 days of publication. Any hearing, if requested, will be held no later than 28 days after the date of

publication of this notice, or the first workday thereafter. Case briefs may be submitted by interested parties not later than 14 days after the date of publication of this notice. Rebuttal briefs and rebuttals to written comments, limited to the issues raised in those comments, may be filed not later than 21 days after the date of publication of this notice. All written comments shall be submitted in accordance with 19 CFR 351.303 and shall be served on all interested parties on the Department's service list in accordance with 19 CFR 351.303. Persons interested in attending the hearing should contact the Department for the date and time of the hearing. The Department will publish the final results of this changed circumstances review, including the results of its analysis of issues raised in any written comments. This notice is in accordance with sections 751(b)(1) of the Act and 19 CFR 351.216 and 351.222.

Dated: January 25, 1999.

**Richard W. Moreland,**

*Acting Assistant Secretary for Import Administration.*

[FR Doc. 99-2456 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-DS-P

## **DEPARTMENT OF COMMERCE**

### **International Trade Administration**

[A-533-815]

#### **Preliminary Determination of Sales at Less Than Fair Value and Preliminary Negative Critical Circumstances Determination: Elastic Rubber Tape from India**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Cynthia Thirumalai, Craig W. Matney, or Alysia Wilson, Office 1, Group I, AD/CVD Enforcement, Import Administration, U.S. Department of Commerce, Room 3099, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone (202) 482-4087, (202) 482-1778, or (202) 482-0108, respectively.

#### **The Applicable Statute**

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended ("the Act"), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act ("URAA"). In addition, unless otherwise indicated, all citations

to the Department of Commerce's ("the Department's") regulations are to the regulations at 19 CFR part 351 (April 1, 1998).

#### Preliminary Determination

We preliminarily determine that elastic rubber tape ("ERT") from India is being, or is likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 733 of the Act. The estimated margins of sales at LTFV are shown in the "Suspension of Liquidation" section of this notice.

#### Case History

Since the initiation of this investigation on September 8, 1998 (see *Notice of Initiation of Antidumping Duty Investigation: Elastic Rubber Tape from India*, 63 FR 49546 (September 16, 1998) ("Notice of Initiation")), the following events have occurred:

On October 15, 1998, the International Trade Commission ("ITC") published its preliminary determination that there is a reasonable indication that an industry in the United States is being materially injured, or threatened with material injury, by reason of imports from India of the subject merchandise (63 FR 55407).

On October 9, 1998, the Department issued the antidumping duty questionnaire to Garware Elastomerics Limited ("GEL"), the only producer/exporter of ERT in India. GEL submitted its responses to Section A on November 6, 1998, and then Sections B and C of the questionnaire on November 23, 1998. Also on November 23, 1998, the Department requested that GEL report the value and volume of its imports into the United States during the period of April through December 1998 in connection with the petitioners' allegation of critical circumstances. GEL submitted this information to the Department on December 9, 1998, and additional export data on December 29, 1998.

On December 17, 1998, the Department issued a supplemental questionnaire to GEL. GEL submitted part of its supplemental response on December 29, 1998, and the remainder on January 11, 1999.

On December 23, 1998, the Department received a timely allegation by Fulflex, Inc., Elastomer Technologies Group, Inc., and RM Engineered Products, Inc., (referred to hereinafter as "the petitioners") that GEL made sales in its home market below the cost of production. On the basis of the information contained in the petitioners' allegation, we initiated a sales-below-cost investigation (see

Memorandum to Susan Kuhbach, January 26, 1999).

#### Scope of the Investigation

For purposes of this investigation, the product covered is elastic rubber tape. Elastic rubber tape is defined as vulcanized, non-cellular rubber strips, of either natural or synthetic rubber, 0.006 inches to 0.100 inches (0.15 mm to 2.54 mm) in thickness and 1/8 inches to 1 5/8 inches (3 mm to 42 mm) in width. Such product is generally used in swim wear and underwear.

The merchandise subject to this investigation is classified in the Harmonized Tariff Schedule of the United States ("HTSUS") at subheading 4008.21.00. Although the HTSUS subheading is provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

#### Period of Investigation

The period of investigation ("POI") is July 1, 1997, through June 30, 1998.

#### Adverse Facts Available

On October 9, 1998, the Department issued a questionnaire to GEL requesting, among other things, the variable cost-of-manufacture data and total unit cost of manufacture for the U.S. and home market sales. GEL requested an extension for the due date of the questionnaire response. The Department granted the extension. However, GEL did not supply the variable cost data and total unit cost data in its response nor did it indicate that it was unable to compile this information within the deadline or otherwise. On December 17, 1998, the Department issued a supplemental questionnaire requesting this data and additional data. GEL requested an extension of this questionnaire deadline, which the Department granted. However, GEL did not submit the variable cost data and total unit cost data by the extended deadline. For more information, see Memo to the File, "Time Extension for Supplemental Questionnaire and Variable Cost of Manufacture Data," dated January 4, 1999 and Memo to the File "Missing Variable Cost of Manufacture Data," dated January 12, 1999.

Because GEL failed to respond to our requests for the variable cost-of-manufacture and total unit cost data as requested in the original and supplemental questionnaires, we are unable to calculate a difference-in-merchandise adjustment to use in our price-to-price comparison when there are no sales of identical products in the home market to compare to U.S. sales.

Accordingly, we must resort to facts available for this information. Section 776(a) of the Act states that (a) in general, if an interested party or any other person, fails to provide information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, the Department shall, subject to 782(d), use the facts otherwise available in reaching the applicable determination under this title. Because GEL failed to provide the necessary variable cost-of-manufacture data, under section 776(a)(2)(B) of the Act, the Department is required to apply, subject to sections 782(c)(1), (d) and (e), the facts otherwise available.

Section 782(c)(1) of the Act provides that, if an interested party, promptly after receiving a request from the Department for information, notifies the Department that it is unable to submit the information in the requested form and manner and submits a full explanation and suggested alternative forms in which such party is able to submit the information, the Department shall consider the ability of the interested party to submit the information in the requested form and manner, and it may modify such requirements to the extent necessary to avoid imposing an unreasonable burden on that party. In the instant proceeding, GEL did not indicate that it could not submit the variable and total cost-of-manufacture data in the form or manner requested.

Nevertheless, in accordance with section 782(d) of the Act, we again asked GEL to provide this information in our December 17, 1998, supplemental questionnaire. GEL did not provide the requested data in its response to the supplemental questionnaire, even though we granted an extension of the due date for the response. We notified the respondent that its request to extend further the due date for this material to January 29, 1999, was unacceptable because this information was necessary to perform calculations for a preliminary determination due three days prior to GEL's proposed date. For more information, see Memo to the File, "Time Extension for Supplemental Questionnaire and Variable Cost of Manufacture Data," dated January 4, 1999. Thus, in accordance with section 782(d) of the Act, we provided GEL an opportunity to remedy or explain its deficiencies.

Finally, section 782(e) of the Act provides that the Department, when reaching its determination, shall not decline to consider information provided by the respondent that is

already on the record. Accordingly, the Department used the information GEL submitted to calculate the preliminary dumping margin on sales with identical matches and has applied facts available only to U.S. sales with non-identical matches.

Therefore, in accordance with section 776(a) of the Act, the use of facts available for GEL's variable cost-of-manufacture and total unit cost data is required in this case. In selecting the facts available, section 776(b) of the Act authorizes the Department to use an adverse inference if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with requests for information. See also, Statement of Administrative Action accompanying the URAA, H. Rep. No. 103-316 ("SAA"), at 870.

GEL did not provide the information as requested in our questionnaires, despite various extensions of the deadlines for the submission of this information. Therefore, we have determined that GEL has failed to cooperate by not acting to the best of its ability to comply with our request for information. In its response to our first request for this information, GEL indicated that it was not providing the variable and total cost information as requested. GEL's offer to submit this information in response to the possible initiation of a cost-of-production ("COP") investigation does not excuse its failure to provide the data in the time and manner requested. This information was needed to perform calculations for the preliminary determination. The cost allegation was not made until December 14, 1998, and the Department did not initiate a cost investigation until January 26, 1999. Therefore, at the time GEL completed its original response to the Department, it was unaware that a COP questionnaire would be issued. We find that GEL did not cooperate to the best of its ability and, therefore, pursuant to section 776(b) of the Act, we have used an adverse inference when selecting from among the facts otherwise available. As adverse facts available, we are assigning a dumping margin of 66.51 percent, derived from the petition, for those U.S. sales which did not have identical matches in the home market. See, the *Notice of Initiation*.

Section 776(c) of the Act directs that, when the Department relies on secondary information (such as the petition) in using the facts otherwise available, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal. When analyzing the petition prior to the initiation of this

investigation, we reviewed all of the data upon which the petitioners relied in calculating the estimated dumping margins, and we adjusted those calculations where necessary. See Initiation Checklist dated September 8, 1998. The estimated dumping margin of 66.51 percent was based on the highest price-to-price margin contained in the petition, as adjusted by the Department. For purposes of this preliminary determination, we have corroborated that estimated margin. See, *Notice of Initiation* and Memorandum from Team to Susan Kuhbach, dated January 26, 1999, for a detailed explanation of corroboration of the information in the petition.

#### Date of Sale

In their December 9, 1998 submission, the petitioners objected to GEL's use of date of invoice as the date of sale. The petitioners argued that, given the fact that GEL begins production of subject merchandise pursuant to a purchase order, the purchase-order date is the date when the material terms of sale are set and, thus, the appropriate date to use as the date of sale. They further argue that the Department's dumping margin calculation would be distorted by using GEL's reported date of sale due to the significant fluctuations in the exchange rate during the POI.

After a review of the petitioners' comments and the method by which GEL made sales in both the home market and U.S. market, we preliminarily determine that the date of invoice is the appropriate date of sale in this investigation.

Section 351.401(i) of our regulations states that, in identifying the date of sale,

[t]he Secretary normally will use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

According to GEL's response, product mix, product specifications, destination, and the quantity of a customer's original order can change until the date of shipment, which is the same as the company's date of invoice. Additionally, GEL indicated that the order can be canceled as late as the date of shipment or invoice date. Consequently, we have used the invoice date as the date of sale for GEL for purposes of this preliminary determination.

We intend to verify GEL's claims concerning changes between the date of

shipment and the date of invoice. Based upon the outcome of our verification, we will determine whether it is appropriate to continue to use the date of invoice as the date of sale. We will consider whether, in fact, there were any changes to the material terms between the original order and the date of invoice. See, e.g., *Notice of Final Results of Antidumping Duty Administrative Review: Canned Pineapple Fruit from Thailand*, 63 FR 7392 at 7394-7395 (February 13, 1998).

#### Critical Circumstances

The petitioners alleged in the petition that critical circumstances exist with respect to imports of ERT from India. In accordance with 19 CFR 351.206(c)(2)(i), since this allegation was filed at least 20 days prior to our preliminary determination, we must issue our preliminary critical circumstances determination not later than the preliminary determination.

Section 733(e)(1) of the Act provides that, if a petitioner alleges critical circumstances, the Department will determine whether there is a reasonable basis to believe or suspect that (A)(i) there is a history of dumping and material injury by reason of dumped imports in the United States or elsewhere of the subject merchandise, or (ii) the person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the subject merchandise at less than its fair value and that there was likely to be material injury by reason of such sales, and (B) there have been massive imports of the subject merchandise over a relatively short period.

With respect to the second criterion, whether imports of ERT have been massive over a relatively short period, GEL submitted its U.S. sales import data for subject merchandise for an eight-month period beginning with April 1998 and ending with November 1998. Section 351.206(h) states that, unless the imports during a "relatively short period" have increased by at least 15 percent over the imports during a period immediately preceding the filing of the petition, the Secretary will not consider the imports massive. Furthermore, the Secretary will normally consider a "relatively short period" the period beginning on the date the proceeding begins and ending at least three months later. We compared GEL's exports in the three-month period September through November 1998 (post-petition period) to its exports in the three months prior to the filing of the petition, June through August 1998. This comparison indicates that there was a decrease in GEL's

exports to the United States in the post-petition period.

Based on these facts, we determine that the second criterion for finding that critical circumstances exist is not satisfied. Therefore, we preliminarily determine that critical circumstances do not exist with respect to exports of ERT from India by GEL. As a result, we have not analyzed information pertaining to the first criterion. We will make a final determination concerning critical circumstances when we make our final determination in this investigation.

#### Affiliation

For the purposes of this preliminary determination, the Department finds that GEL and Elastomer Inc. (EI), a U.S. reseller of subject merchandise, are affiliated parties. Section 771 (33)(G) of the Act states that “{a}ny person who controls any other person \* \* \*” is affiliated with that person. The statute explains further that “a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person.” In determining control, the Department considers the following factors, among others: debt financing; franchise or joint venture agreements; corporate or family groupings; close supplier relationship in which the supplier or buyer becomes reliant upon the other. However, control will not exist on the basis of these factors unless the relationship has the potential to affect decisions concerning the production, pricing, or cost of the subject merchandise or foreign like product. See 19 CFR 351.102(b).

In the instant proceeding, information on the record indicates that GEL’s relationship with EI has the potential to affect decisions regarding the pricing of subject merchandise. Additionally, the nature of the relationship calls into question whether EI has a distinct operating personality outside its relationship with GEL. Specific information supporting our conclusion cannot be addressed in the notice due to its proprietary nature. For more information, see Memorandum to Richard W. Moreland From Case Team “Affiliation of GEL and Elastomer,” dated January 20, 1999.

#### Fair Value Comparisons

To determine whether sales of ERT from India to the United States were made at less than fair value, we compared the export price (“EP”) or the constructed export price (“CEP”) to the normal value (“NV”), as described below in the “Export Price,” “Constructed Export Price,” and “Normal Value” sections of this notice

where the products were identical. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs and CEPs for comparison to weighted-average NVs. Where there were no home market sales of merchandise identical to the merchandise being sold in the United States, we applied the 66.51 percent rate described above in the “Adverse Facts Available” section of this notice.

#### Level of Trade

In accordance with section 773(a)(1)(B) of the Act, to the extent practicable, we determine NV based on sales in the comparison market at the same level of trade (“LOT”) as the EP or CEP transaction. The NV LOT is that of the starting-price sales in the comparison market. For EP, the U.S. LOT is also the level of the starting-price sale, which is usually from exporter to importer. For CEP, it is the level of the constructed sale from the exporter to the importer.

To determine whether NV sales are at a different LOT than EP or CEP, we examine stages in the marketing process and selling functions along the chain of distribution between the producer and the unaffiliated customer. If the comparison-market sales are at a different LOT, and the difference affects price comparability, as manifested in a pattern of consistent price differences between the sales on which NV is based and comparison-market sales at the LOT of the export transaction, we make an LOT adjustment under section 773(a)(7)(A) of the Act. Finally, for CEP sales, if the NV level is more remote from the factory than the CEP level and there is no basis for determining whether the difference in the levels between NV and CEP affects price comparability, we adjust NV under section 773(a)(7)(B) of the Act (the CEP offset provision). See *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate from South Africa*, 62 FR 61731 (November 19, 1997).

We reviewed information from GEL regarding the marketing stage involved in the reported home market and U.S. sales, including a description of the selling activities performed by the respondent for each channel of distribution. Pursuant to section 773(a)(1)(B)(i) of the Act and the SAA at 827, in identifying LOTs for EP and home market sales, we considered the selling functions reflected in the starting prices before any adjustments. For CEP sales, we considered only the selling activities reflected in the price after the deduction of expenses and profit under

section 772(d) of the Act. We expect that, if claimed LOTs are the same, the functions and activities of the seller should be similar. Conversely, if a party claims that LOTs are different for different groups of sales, the functions and activities of the seller should be dissimilar.

Based on an analysis of the selling functions, class of customers, and level of selling expenses for GEL’s EP and CEP sales, we found that sales were made at a single stage in the marketing process in both the home market and the United States. However, we found that the stage of the marketing process in the home market and that in the United States were substantially dissimilar. In particular, we found GEL’s home market sales involved greater selling activities than its U.S. sales. Some of the activities that GEL performs for its home market sales in excess of those it performs for U.S. sales include calling on new customers, making site visits to existing clients and the provision of post-sale services. We also note that GEL sells to end-users in the home market while its U.S. EP customers and its U.S. importer for its CEP sales are all resellers. Therefore, we have preliminarily found that sales in both markets are at different LOTs.

While we have found GEL’s home market and U.S. sales to be at different levels of trade, there is no information on the record of this investigation to provide an appropriate basis for determining a LOT adjustment. In addition, as described above, we have preliminarily found the LOT in the home market to be more remote than that in the United States. Based on the foregoing, we are granting GEL a CEP offset pursuant to section 773(a)(7)(B) of the Act.

#### United States Price

GEL claimed an upward adjustment to its U.S. price for a “duty drawback” program. As stated in *Certain Welded Carbon Standard Steel Pipes and Tubes from India* (62 FR 47632 at 47635), September 10, 1997, we determine whether an adjustment to U.S. price for a respondent’s claimed duty drawback is appropriate when the respondent meets both parts of our two-part test. There must be (1) a sufficient link between the import duty and the rebate, and (2) a sufficient amount of raw materials imported and used in the production of the final exported product. Because GEL has not provided adequate information to meet either part of the test, we have not made an adjustment to EP or CEP. We will issue a supplemental questionnaire seeking additional documentation regarding

whether GEL's use of this program meets our two-part test, and we will revisit this issue for our final determination.

#### **Export Price**

For GEL's sales not made through its affiliate, we used EP methodology, in accordance with section 772(a) of the Act, because the subject merchandise was sold directly to the first unaffiliated purchaser in the United States prior to importation and because CEP methodology was not otherwise indicated. We based EP on the packed prices to the unaffiliated purchaser in the United States. In accordance with section 772(c)(2)(A) of the Act, we made deductions, where appropriate, from the starting price for foreign inland freight, international freight, marine insurance, U.S. customs duty, and brokerage and handling. We also made a deduction, where appropriate, for rebates.

#### **Constructed Export Price**

For GEL's sales through its U.S. affiliate, we used CEP methodology, in accordance with section 772(b) of the Act, because the first sale of subject merchandise to an unaffiliated purchaser was made by GEL's affiliate in the United States. We based CEP on the packed, delivered prices to unaffiliated purchasers in the United States. Where appropriate, we made deductions for discounts. We also made deductions for the following movement expenses, where appropriate, in accordance with section 772(c)(2)(A) of the Act: foreign inland freight, brokerage and handling, international freight, marine insurance, U.S. customs duties, U.S. inland freight, and U.S. warehouse expenses. In accordance with section 772(d)(1) of the Act, we deducted selling expenses associated with economic activities occurring in the United States, including direct selling expenses, inventory carrying costs, and other indirect selling expenses. Section 772(d)(3) of the Act directs the Department to deduct profit allocated to the CEP sale. However, we note that GEL did not make a profit during the POI. Therefore, no profit was deducted.

#### **Home Market Viability**

In order to determine whether there is a sufficient volume of sales in the home market to serve as a viable basis for calculating NV, we compared GEL's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise. As respondent's aggregate volume of home market sales of the foreign like product exceeded five percent of its aggregate volume of U.S. sales for the

subject merchandise, we have determined that the home market is viable for GEL, in accordance with section 773(a)(1)(C) of the Act.

#### **Normal Value**

We based NV on packed, delivered prices to unaffiliated customers in the home market. We made deductions, where appropriate, from the starting price for inland freight, inland insurance, pursuant to section 773(a)(6)(B) of the Act.

We also made deductions, where appropriate, for discounts. We made adjustments for differences in circumstances of sale ("COS") in accordance with section 773(a)(6)(iii) of the Act and 19 CFR 351.410. For comparisons to EP, we made COS adjustments by deducting direct selling expenses incurred on home market sales and adding U.S. direct selling expenses. For comparisons to CEP, we made COS adjustments by deducting direct selling expenses incurred on home market sales. Since GEL had no U.S. direct selling expenses other than those we deducted from the starting price in calculating CEP pursuant to section 772(d) of the Act, we made no additions to NV in making COS adjustments. We also made adjustments, where applicable, to offset commissions in CEP calculations in accordance with 19 CFR 351.410(e). Where commissions were paid on sales of a particular U.S. product but not on the home market comparison product, we made our adjustments by subtracting commissions from U.S. price and then deducting from NV the lesser of the amount of commissions paid on the U.S. product or the amount of indirect selling expenses incurred on home market sales of the comparison product, including inventory carrying costs. Conversely, where commissions were paid on sales of the home market comparison product but not on the U.S. product, we subtracted commissions from NV and then deducted from U.S. price the amount of indirect selling expenses, including inventory carrying costs. In addition, pursuant to sections 773(a)(6)(A) and (B) of the Act, we deducted home market packing costs and added U.S. packing costs.

#### **Cost of Production**

Based on a timely allegation by the petitioners on December 23, 1998, we initiated an investigation of sales below COP with respect to GEL's home market sales pursuant to section 773(b) of the Act (see January 26, 1999, *Memorandum to Susan Kuhbach from Team*). As a result of the Department's COP investigation, the Department requested

that GEL answer Section D of the original questionnaire concerning the COP of merchandise sold in the home market. Due to the timing of the initiation of our COP investigation, we are unable to include a COP analysis in this preliminary determination. However, we intend to issue a COP analysis memorandum for GEL prior to verification and we will conduct a cost verification.

#### **Currency Conversion**

We made currency conversions into U.S. dollars based on the exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank, in accordance with section 773(A) of the Act.

#### **Verification**

As provided in section 782(i) of the Act, we will verify all information relied upon in making our final determination.

#### **Suspension of Liquidation**

In accordance with section 733(d) of the Act, we are directing the Customs Service to suspend liquidation of all imports of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the **Federal Register**. We will instruct the Customs Service to require a cash deposit or the posting of a bond equal to the weighted-average amount by which the NV exceeds the export or constructed export price. We preliminarily determine that the weighted-average margin for GEL is 62.01 percent. Because we only investigated one producer/exporter, GEL's rate will also serve as the "all others" rate. The suspension-of-liquidation instructions will remain in effect until further notice.

#### **ITC Notification**

In accordance with section 733(f) of the Act, we have notified the ITC of our determination. If our final determination is affirmative, the ITC will determine before the later of 120 days after the date of this preliminary determination or 45 days after our final determination whether these imports are materially injuring, or threatening material injury to, the U.S. industry.

#### **Public Comment**

Case briefs or other written comments in at least ten copies must be submitted to the Assistant Secretary for Import Administration no later than March 5, 1999, and rebuttal briefs no later than March 10, 1999. A list of authorities used and an executive summary of issues should accompany any briefs submitted to the Department. Such

summary should be limited to five pages total, including footnotes. In accordance with section 774 of the Act, we will hold a public hearing, if requested, to afford interested parties an opportunity to comment on arguments raised in case or rebuttal briefs. Tentatively, the hearing will be held on March 15, 1999, time and room to be determined, at the U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230. Parties should confirm by telephone the time, date, and place of the hearing 48 hours before the scheduled time.

Interested parties who wish to request a hearing, or to participate if one is requested, must submit a written request to the Assistant Secretary for Import Administration, U.S. Department of Commerce, Room 1870, within 30 days of the publication of this notice. Requests should contain the following information: (1) the party's name, address, and telephone number; (2) the number of participants; and (3) a list of the issues to be discussed. Oral presentations will be limited to issues raised in the briefs. If this investigation proceeds normally, we will make our final determination no later than April 12, 1999.

This determination is issued and published in accordance with sections 733(d) and 777(i)(1) of the Act.

Dated: January 26, 1999.

**Richard W. Moreland,**  
*Acting Assistant Secretary for Import Administration.*

[FR Doc. 99-2455 Filed 2-1-99; 8:45 am]  
BILLING CODE 3510-DS-P

## DEPARTMENT OF COMMERCE

### International Trade Administration

[A-580-807]

#### **Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea; Initiation of New Shipper Antidumping Duty Administrative Review**

**AGENCY:** Import Administration, International Trade Administration, Department of Commerce.

**ACTION:** Notice of initiation of new shipper antidumping duty administrative review.

**SUMMARY:** The Department of Commerce has received a request for a new shipper review of the antidumping duty order on polyethylene terephthalate, film, sheet, and strip (PET film) from the Republic of Korea issued on June 5, 1991. In accordance with our regulations, we are initiating a new

shipper review covering Hyosung Corporation (Hyosung).

**EFFECTIVE DATE:** February 2, 1999.

**FOR FURTHER INFORMATION CONTACT:** Michael J. Heaney or John Kugelmann, AD/CVD Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230, telephone: (202) 482-4475 or 0649, respectively.

#### **SUPPLEMENTARY INFORMATION:**

#### **Applicable Statute and Regulations**

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act. In addition, unless otherwise indicated, all references to the Department's regulations are to 19 CFR part 351 (62 FR 27295, May 19, 1997).

#### **Background**

The Department received a timely request, in accordance with section 751(a)(2)(B) of the Tariff Act and 19 CFR 351.214(b) of the Department's regulations, for a new shipper review of the antidumping duty order on PET film Korea, which has a June anniversary date. (See Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value: Polyethylene Terephthalate Film, Sheet, and Strip From the Republic of Korea, 56 FR 25669 (June 5, 1991).)

#### **Initiation of Review**

Pursuant to the Department's regulations at 19 CFR 351.214(b), Hyosung certified in its December 30, 1998 submission that it did not export merchandise to the United States during the period of the investigation (POI) (November 1, 1989 through April 30, 1990), and that it was not affiliated with any exporter or producer of the subject merchandise to the United States during the POI. Hyosung submitted documentation establishing the date on which the merchandise was first entered for consumption in the United States, the volume of the shipments to the United States, and the date of the first sale to an unaffiliated purchaser in the United States.

In accordance with section 751(a)(2)(B) of the Tariff Act and section 351.214(d) of the Department's regulations, we are initiating a new shipper review of Hyosung for the antidumping duty order on PET film from the Republic of Korea. This

reviews covers the period July 1, 1998 through December 31, 1998. We intend to issue the final results of the review no later than 270 days from the date of publication of this notice.

We will instruct the Customs Service to allow, at the option of the importer, the posting, until completion of the review, of a bond or security in lieu of a cash deposit for each entry of the merchandise exported by Hyosung, in accordance with 19 CFR 351.214(e).

Interested parties may submit applications for disclosure under administrative protective order in accordance with 19 CFR 353.305(b).

This initiation and this notice are in accordance with section 751(a) of the Tariff Act (19 U.S.C. 1675(a)) and section 351.214 of the Department's regulations (19 CFR 351.214).

Dated: January 27, 1999.

**Roland L. MacDonald,**  
*Acting Deputy Assistant Secretary for AD/CVD Enforcement III.*

[FR Doc. 99-2457 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-DS-M

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

[I.D. 012599C]

#### **Endangered Species; Permits**

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

**ACTION:** Receipt of applications for scientific research permits (1193, 1197, 1198) and modifications to scientific research permits (1058, 1130)

**SUMMARY:** Notice is hereby given of the following actions regarding permits for takes of endangered and threatened species for the purposes of scientific research and/or enhancement: NMFS has received permit applications from: Fish Passage Center in Portland, OR (FPC) (1193), Mr. John Crutchfield, of Harris Energy & Environmental Center of Carolina Power and Light Company (HEEC-CPL) (1197), and J. Alan Huff, Florida Department of Environmental Protection (FDEP) (1198); and NMFS has received applications for modifications to existing permits from: U.S. Fish and Wildlife Service in Ahsahka, ID (FWS) (1058) and U.S. Geological Survey in Cook, WA (USGS) (1130).

**DATES:** Written comments or requests for a public hearing on any of the applications must be received on or before March 4, 1999.

**ADDRESSES:** The applications and related documents are available for review in the following offices, by appointment:

For permits 1197 and 1198: Protected Resources Division, F/SEO3, 9721 Executive Center Dr., St. Petersburg, FL 33702-2432 (813-570-5312).

For permits 1058, 1130, and 1193: Protected Resources Division, F/NWO3, 525 NE Oregon Street, Suite 500, Portland, OR 97232-4169 (503-230-5400).

All documents may also be reviewed by appointment in the Office of Protected Resources, F/PR3, NMFS, 1315 East-West Highway, Silver Spring, MD 20910-3226 (301-713-1401).

**FOR FURTHER INFORMATION CONTACT:** For permit 1197: Terri Jordan, Silver Spring, MD (301-713-1401).

For permit 1198: Michelle Rogers, Silver Spring, MD (301-713-1401).

For permits 1058, 1130, and 1193: Leslie Schaeffer, Portland, OR (503-230-5433).

**SUPPLEMENTARY INFORMATION:**

**Authority**

Issuance of permits and permit modifications, as required by the ESA, is based on a finding that such permits/modifications: (1) Are applied for in good faith; (2) would not operate to the disadvantage of the listed species which are the subject of the permits; and (3) are consistent with the purposes and policies set forth in section 2 of the ESA. Permits and modifications are issued in accordance with and are subject to parts 217-222 of Title 50 CFR, the NMFS regulations governing listed species permits.

**Species Covered in This Notice**

The following species and populations are covered in this notice: Green turtle (*Chelonia mydas*), Hawksbill turtle (*Eretmochelys imbricata*), Kemp's ridley turtle (*Lepidochelys kempi*), Leatherback turtle (*Dermochelys coriacea*), Loggerhead turtle (*Caretta caretta*), Shortnose sturgeon (*Acipenser brevirostrum*).

Sockeye salmon (*Oncorhynchus nerka*): Snake River (SnR).

Chinook salmon (*Oncorhynchus tshawytscha*): SnR fall, SnR spring/summer, Upper Columbia River (UCR) spring.

Steelhead trout (*Oncorhynchus mykiss*): SnR, UCR, Lower Columbia River (LCR)

To date, a listing determination for UCR spring chinook salmon under the ESA has not been promulgated by NMFS. To date, protective regulations

for threatened SnR and threatened LCR steelhead under section 4(d) of the ESA have not been promulgated by NMFS. This notice of receipt of applications requesting takes of these species is issued as a precaution in the event that NMFS issues an UCR spring chinook salmon listing determination and/or SnR and LCR steelhead protective regulations. The initiation of a 30-day public comment period on the applications, including their proposed takes of UCR spring chinook salmon and/or SnR and LCR steelhead, does not presuppose a listing determination or the contents of the eventual protective regulations, respectively.

**New Applications Received**

FPC (1193) requests a 5-year permit that would authorize annual direct takes of juvenile, endangered, SnR sockeye salmon; juvenile, threatened, SnR fall chinook salmon; juvenile, threatened, artificially propagated and naturally produced, SnR spring/summer chinook salmon; juvenile, threatened, SnR steelhead; juvenile, endangered, artificially propagated and naturally produced, UCR steelhead; and juvenile, threatened, LCR steelhead associated with the Smolt Monitoring Program (SMP). Takes of juvenile UCR spring chinook salmon are also requested in anticipation of a possible listing decision of this species by NMFS. The permit is proposed to replace permit 822 which expired on December 31, 1998. The objective of the SMP is to generate information on the migrational characteristics of various salmon and steelhead stocks in the Columbia River Basin, to provide advice on the implementation of flow and spill measures to improve fish passage conditions in the Snake and Columbia Rivers, to provide a long-term consistent database for year-to-year comparisons, and to monitor gas bubble trauma as required by the states' water quality agencies. ESA-listed fish are proposed to be captured, sampled for biological data and/or tagged with passive integrated transponder tags, and released. A study of resident fish species in the Clearwater River, Idaho using electrofishing as a collection method is also included in this permit application. ESA-listed juvenile fish indirect mortalities are also requested.

HEEC-CPL (1197) requests a 3-year permit to take endangered shortnose sturgeon while conducting original research regarding the population of fishes in the Pee Dee River, North Carolina. The Pee Dee River has been historically included in the shortnose sturgeon's native range. The applicant will be performing a baseline

assessments of the resident and migratory fish species inhabiting the river below the Blewett Hydroelectric Plant. To ensure compliance with the Endangered Species Act, the applicant requests a permit to capture, handle and release shortnose sturgeon that may be taken during this study.

FDEP requests a 5-year scientific research permit to take up to 700 loggerhead, 250 green, 5 leatherback, 25 hawksbill, and 100 Kemp's ridley sea turtles annually from Florida waters. Turtles captured will include all life history stages from post-hatchling through adult. Of the 700 loggerheads requested annually, 400 will be hatchlings. This research will further the understanding of life histories, habitat requirements, migratory behaviors, and threats to these five species of sea turtles occurring in Florida waters. The turtles will be captured by tended, straight-set, large-mesh tangle nets; tended, drifting large-mesh tangle nets; tended, encircling (strike) large-meshed nets; dip nets; and hand-capture. Captured turtles will be weighed, measured, photographed, and flipper and PIT tagged. Select turtles will be blood sampled, lavaged, and will receive radio, sonic, and/or satellite transmitters. Additionally, laparoscopy and tumor collection will be performed on selected turtles. This work is a continuation of research permitted under scientific research permit #878, which expires on February 28, 1999.

**Modification Requests Received**

FWS requests modification 2 to permit 1058, which authorizes annual direct takes of adult, threatened, SnR fall chinook salmon associated with research designed to monitor and evaluate adult returns of hatchery-origin fall chinook salmon released as juveniles above Lower Granite Dam on the Snake River in the Pacific Northwest. For modification 2, FWS requests annual direct takes juvenile, threatened, SnR steelhead and juvenile, threatened, SnR fall chinook salmon associated with an additional study designed to examine steelhead residualism in the Clearwater River Basin in Idaho. The purpose of the research is to gain a better understanding of factors leading to residualism and interactions between residuals and wild or natural stocks of fish. ESA-listed juvenile fish are proposed to be captured using electrofishing equipment, handled, and released. ESA-listed juvenile fish indirect mortalities are requested. An incidental take of ESA-listed adult steelhead is also requested. The additional study is requested to be valid

through 2001. Permit 1058 expires on December 31, 2002.

USGS requests modification 1 to permit 1130, which authorizes takes of juvenile, threatened, artificially propagated and naturally produced, SnR spring/summer chinook salmon; juvenile, threatened, SnR fall chinook salmon; and juvenile, endangered, artificially propagated, UCR steelhead associated with research designed to determine the movement, distribution, and passage behavior of radio-tagged juvenile salmonids at Bonneville, The Dalles, and John Day Dams on the Columbia River. For modification 1, USGS requests to rearrange the distribution of authorized fish takes across collection sites. Also for modification 1, USGS requests annual takes of juvenile UCR spring chinook salmon in anticipation of a possible listing decision of this species by NMFS. Modification 1 is requested to be valid for the duration of permit 1130, which expires on December 31, 2002.

Dated: January 26, 1999.

**Kevin Collins,**

Chief, Endangered Species Division, Office of Protected Resources, National Marine Fisheries Service.

[FR Doc. 99-2438 Filed 2-1-99; 8:45 am]

BILLING CODE 3510-22-F

**CORPORATION FOR NATIONAL AND COMMUNITY SERVICE**

**Submission for OMB Review; Comment Request**

The Corporation for National and Community Service (hereinafter the "Corporation"), has submitted the following two public information collection requests (ICRs) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paper Reduction Act of 1995. (Pub. L. 104-13, 44 U.S.C. Chapter 35). Copies of these individual ICRs, with applicable supporting documentation, may be obtained by calling the Corporation for National and Community Service, National Service Trust, Attn: Levon Buller, (202) 606-5000, Extension 383. Individuals who use a telecommunications device for the deaf (TTY/TDD) may call (1-800) 833-3722 between the hours of 9:00 am and 5:00 pm Eastern Time, Monday through Friday.

Comments should be sent to the Office of Information and Regulatory Affairs, Attn: Mr. Danny Werfel, OMB Desk Officer for the Corporation for National and Community Service, Office of Management and Budget, Room 10235, Washington, DC, 20503, (202)

395-7316, within 30 days from the date of this publication in the **Federal Register**.

The OMB is particularly interested in comments which:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the Corporation, 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;

- Propose to enhance the quality, utility and clarity of the information to be collected; and

- Propose to minimize the burden of the collection of information on those who are to respond, including 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.

Two ICR documents have been submitted to OMB for consideration. The first, *Forbearance Request for National Service*, is a proposed revision to an earlier form approved by OMB under a different name (OMB Number 3045-0030). The second document, *Interest Accrued During National Service*, is a new form. Both forms are important for AmeriCorps members who have outstanding qualified student loans during the period they are involved in national service.

The two documents were published in the **Federal Register** on April 2, 1998, for a 60-day pre-clearance public comment period. Two organizations responded to the notice: one was a student loan holder/servicer and the other was an association that represents student loan holders/servicers. Most of their suggestions have been incorporated into the versions now being presented for consideration by OMB. The Corporation contacted representatives from both organizations to discuss their comments, especially those suggestions that were not incorporated into this version of the forms. Each form is discussed separately below. Since most of the comments that were received as a result of the 60-day public comment period are related to both forms, all comments are discussed together in the Analysis of Comments Received section.

**Forbearance Request for National Service**

*Type of Review:* Renewal/Revision.  
*Agency:* Corporation for National and Community Service.

*Title:* Forbearance Request for National Service (form is currently titled *Federal Education Loan Forbearance Request*).

*OMB Number:* OMB #3045-0030.

*Agency Number:* None.

*Affected Public:* AmeriCorps participants and the holders of their qualified student loans.

*Total Respondents:* 6,000 annually.

*Frequency:* Average of once per year per loan.

*Average Time Per Response:* 10 minutes for the AmeriCorps member to complete the form (it will take student loan holders time to process the request for forbearance once they receive the form).

*Estimated Total Burden Hours:* 1,000 hours.

*Total Burden Cost (capital/startup):* N/A.

*Total Burden Cost (operating/maintenance):* N/A.

*Description:* By law, AmeriCorps members are eligible for a forbearance on the repayment of their qualified student loans while they are serving in an approved national service position. This form will serve as both the member's official request to the loan holders for the forbearance and the Corporation's verification that the borrower is serving in an approved national service position.

Currently, AmeriCorps members use an OMB-approved form titled *Federal Education Loan Forbearance Request* to request a forbearance and to obtain certification that they are eligible for a forbearance based on their service. Forbearance can be granted only by the loan holder and not the Corporation. The Corporation's role is to verify that the borrower is an AmeriCorps member and is eligible for this mandatory forbearance on qualified student loans. An AmeriCorps member completes one part of the form, requesting forbearance, and sends it to the office of the National Service Trust. The Trust completes a second part verifying service dates and sends it to the loan holder at the address provided by the AmeriCorps member. The loan holder then acts upon the request.

The form currently in use has been adopted by many of the larger loan holders (e.g., Sallie Mae) and is given to their borrowers with the loan holders' own logos at the top of the form. The form was originally developed with the assistance of representatives of several student loan associations. Having a separate form for forbearance based on AmeriCorps service clearly distinguishes it from forbearance requests based on one of the other conditions for which a borrower may be

eligible—e.g., military service, employment in certain low income areas, student status.

Several other loan holders have chosen to modify their own forbearance request forms by including an additional option—“AmeriCorps service” or “national service”—with the choices already available. The Corporation verifies national service participation using all types of forms presented to it, be it a loan holder’s unique form or the Corporation’s OMB approved form.

The Corporation seeks to continue using this particular form, although in a revised version. The form needs some minor revisions. First, the Corporation proposes changing the name of the form to better reflect its actual purpose—it is a form used by a borrower to request forbearance on a qualified student loan based on involvement in national service. Experience has shown that the existing form could use a better set of instructions for explaining the process for requesting forbearance and for completing the form.

This is a voluntary form. It is one way to provide verification to a loan holder that one of their borrowers is eligible for the mandatory forbearance, at the same time allowing the borrower to request the forbearance of the loan company. The Corporation will continue its policy of verifying AmeriCorps participation on any form the loan holder wishes to use.

#### **Interest Accrued During Nation Service**

*Type of Review:* New.

*Agency:* Corporation for National and Community Service.

*Title:* Interest Accrued During National Service.

*OMB Number:* None yet.

*Agency Number:* N/A.

*Affected Public:* AmeriCorps members and the holders of their qualified student loans.

*Total Respondents:* 6,000 annually.

*Frequency:* Average of once per year per loan.

*Average Time Per Response:* 10 minutes, total (three minutes for the AmeriCorps member to complete the form and seven minutes for the loan holder to report the amount of interest accrued).

*Estimated Total Burden Hours:* 1,000 hours.

*Total Burden Cost (capital/startup):* N/A.

*Total Burden Cost (operating/maintenance):* N/A.

*Description:* The Corporation pays all or a portion of the interest that accrues during a period of national service for those who successfully complete their service and have had their loans in forbearance during the service. Currently, AmeriCorps members ask their loan holders to report to the Corporation the amount of interest that accrued on their qualified student loans while they were in their national service position. When the Corporation receives this information, it is reviewed for accuracy and is either paid or returned to the member or loan holder for additional information.

This information comes to the Corporation in many formats, such as letters, statements, and printouts, with varying degrees of clarity and accuracy. Frequently, an amount of interest is reported without any accompanying dates—there is no indication of the period of time upon which the calculation was based. The Corporation can only pay interest that accrued while the borrower was in the AmeriCorps program; sometimes the amount of interest the loan holder reports includes interest that began accruing well before or well after the national service period. Many times the Corporation receives from a loan holder a printout of the member’s account, from which it is difficult or impossible to determine the amount of interest that accrued during the service period. All of these have to be returned to obtain the correct information and this takes time—time, during which the unpaid loan continues to accrue additional interest.

This proposed form is intended to obtain clear and accurate information from loan holders in order to expedite the interest payments for AmeriCorps members. Members will complete the top section and indicate their dates of service. They will then mail the form to their loan holders where the loan company will indicate the total amount of interest that accrued between those dates or indicate a daily accrual amount. The loan holder will fill in the address where the payment should be sent, and return the form to the National Service Trust for payment.

#### **Analysis of Comments Received During the Public Comment Period**

The bulk of the comments received from the commentors were related to increasing the consistency between

these two forms—using the same format, font, and terminology. The Corporation concurred and adopted these changes into the forms being presented to OMB. Both commentors questioned the Corporation’s original estimated time to complete the forms. The Corporation agrees and changed the estimated time to a mutually accepted 10 minutes for each form.

Both commentors suggested making the interest accrual form one which could be filled out once for several loan holders, rather than the originally proposed one form for each loan holder. This would significantly reduce the burden for members who have multiple student loans. The Corporation agrees and has made space on the front of the form for two loan holders with directions to include additional loan holders on the back side of the form, if necessary. An attempt was made to include four loan holders on the front of the form rather than two, but the form appeared too cluttered.

One commentor suggested not providing an option for the loan holder to give a daily interest accrual rate. The argument being that if a loan holder knows the daily interest accrual rate and the forbearance period, using simple multiplication they should be able to provide the total amount accrued. While the Corporation agrees with this logic, when this form was developed originally, some members of the loan community argued to include this option. It is also useful information when incorrect service dates are included on the form. Rather than having to return the form for correct information, the Corporation’s database will calculate the accrued interest using the daily rate. The other commentor had no opinion on the matter and the first, after discussion, had no problem including it. So it remains on the form as an option. Both commentors had suggestions for including additional language in the top section of the forbearance form that explained to the member the availability of an administrative forbearance to resolve any delinquency that might exist prior to the mandatory forbearance for national service. The Corporation agreed and included a version of the language suggested by the commentors that included both their thoughts.

Both commentors questioned the instructions directing the forms to be sent through the local AmeriCorps projects to the Trust for verification rather than instructing the members to send them directly and individually to the Trust. Due to timing issues related to when the Trust receives official enrollment information from the various

projects, the Corporation believes this is the best way to facilitate the prompt processing of these requests. The commentors agreed that if this is the fastest and most accurate way to obtain verification, it should be used. The Corporation will continue its practice of processing all forms, regardless if they came to the Trust through the projects or directly from members.

Both commentors suggested moving the item which asks for service dates from the section to be completed by the member to the section to be completed by the Corporation. The concern was that an AmeriCorps member may use incorrect dates. However, if a member enters an incorrect date, the Corporation can correct it. When the Corporation signs the form it is verifying that the dates are correct, regardless of who enters them. The commentors agreed to this.

Dated: January 27, 1999.

**Thomas L. Bryant,**

*Acting General Counsel.*

[FR Doc. 99-2384 Filed 2-1-99; 8:45 am]

BILLING CODE 6050-28-P

## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### Grant of Exclusive, or Partially Exclusive Licenses

**AGENCY:** Army Corps of Engineers, DoD.

**ACTION:** Notice.

**SUMMARY:** The Department of the Army, U.S. Army Corps of Engineers, announces the general availability of exclusive, or partially exclusive licenses under the following patents. Any license granted shall comply with 35 U.S.C. 209 and 37 CFR part 404.

*Patent No:* 5,657,601

*Title:* Method and Apparatus for Micro Modeling the Sediment Transport Characteristics of a River

*Issue Date:* 08/15/97

*Patent No:* 5,657,601

*Title:* Multiple Sensor Fish Surrogate for Acoustic and Hydraulic Data Collection

*Issue Date:* 10/07/97

*Patent No:* 5,683,344

*Title:* Method for Solidification and Stabilization of Soils Contaminated with Heavy Metals and Organic Compounds Including Explosive Compounds

*Issue Date:* 11/04/97

*Patent No:* 5,702,203

*Title:* Floating "V" Shaped Breakwater

*Issue Date:* 12/30/97

*Patent No:* 5,702,651

*Title:* Use of Oriented Tabular Aggregate in Manufacture of High-Flexural-Strength Concrete

*Issue Date:* 12/30/97

*Patent No:* 5,706,018

*Title:* Multi-Band Variable, High-Frequency Antenna

*Issue Date:* 01/06/98

*Patent No:* 5,796,679

*Title:* Doppler Velocimeter for Monitoring Groundwater Flow

*Issue Date:* 08/18/98

*Patent No:* 5,804,721

*Title:* Capacitor for Water Leak Detection in Roofing Structures

*Issue Date:* 09/08/98

*Patent No:* 5,815,064

*Title:* Snow Temperature and Depth Probe

*Issue Date:* 09/29/98

*Patent No:* 5,813,340

*Title:* Roof Moisture Sensing System and Method for Determining Presence of Moisture in a Roof Structure

*Issue Date:* 10/06/98

*Patent No:* 5,828,220

*Title:* Method and System Utilizing Radio Frequency for Testing The Electromagnetic Shielding Effectiveness of an Electromagnetically Shielded Enclosure

*Issue Date:* 10/27/98

*Patent No:* 5,835,025

*Title:* Portable Battery Operated Power Managed Event Recorder and Interrogator System

*Issue Date:* 11/10/98

*Patent No:* 5,841,289

*Title:* System and Method for Detecting Accretion of Frazil Ice on the Underwater Grating

*Issue Date:* 11/24/98

**ADDRESSES:** Humphreys Engineer Center Support Activity, Office of Counsel, 7701 Telegraph Road, Alexandria, Virginia 22315-3860.

**DATES:** Applications for an exclusive or partially exclusive license may be submitted at any time from the date of this notice. However, no exclusive or partially exclusive license shall be granted until 90 days from the date of this notice.

**FOR FURTHER INFORMATION CONTACT:**

Patricia L. Howland (703) 428-6672 or Alease J. Berry, (703) 428-8160.

**SUPPLEMENTARY INFORMATION:** USP

5,653,592 Apparatus for modeling the sediment transport characteristics of a selected section of a river or the like includes an elevated inclined platform adapted to receive and insert representing a scaled model of the section of river to be studied and a

water source for delivering water containing a simulated sediment to the model. As the water flows over the model, the sediment is transported so as to simulate the sedimentary characteristics of the modeled portion of the river. The apparatus is provided with a function generator which allows the water to be delivered to the model in accordance with a specified hydrograph and is also provided with a sliding digital micrometer survey system which allow accurate survey to be taken at selected increments along the model. Method for modeling the sediment transport characteristics of a river is also described.

USP 5,657,601 An apparatus for assembling two cement board stay-in-place form panels for making concrete-filled walls that is cost-effective and forms a uniform precise composite wall construction. The assembly includes a coextensive corrugated spacer panels are secured in place with a notched tie rod that penetrates the spacer and both wall panels, this assembly allows for rapid form installation. The spacer panel has two embodiments, viz. (i) a preformed rigid corrugated panel and (ii) a flattened unassembled panel with precut fold lines that are folded at the building site and then secured with a dowel-rod bracing component. The apparatus preferably uses fiber-glass-reinforced cement board for the say-in place forms. The final composite wall construction typically is made up of 4 feet wide by 8 feet high by 6.5-inch thick composite wall sections. The form walls use standard 4 feet by 8 feet by half-inch thick concrete or cement bard. Assembly of composite wall form requires erecting the corrugated spacer panel first and then attaching two form panels to the spacer panel's corrugations thereby forming a series of vertical compartments that are then filled with concrete of foam concrete with proper reinforcement.

USP 5,575,555 The apparatus of the invention are multiple fish surrogates that each have a plurality of piezoelectric and triaxial accelerometer sensors for emulating sensory organs of a particular fish. The multiple fish surrogates are immersed in flowing water intakes of a hydraulic structure such as: Intakes, intake bypasses, and diversion structures: Or also natural geological formation such as riffles, shoal areas, and pools. The invention is used for acquisition of acoustic and fluid dynamic data in or near these hydraulic structures and natural formations. To accomplish this, multiple sensors in multiple fish-shaped physical enclosures are deployed at same time to describe a fish's aquatic

environment at locations such as in proximity to a dam's intake. Since such an intake exhibits turbulent and high energy flow fields that cannot be characterized by a single sensor, many sensor bodies are required for a complete characterization of the environment. Similar deployment of the multiple sensor fish bodies can be made in complex natural channels to describe their acoustic fields and hydrodynamic fields. Such data are correlated with fish behavior for the purpose of developing methods of diverting fish from such areas of danger of a water intake or to attract them to a water bypass entrance system.

USP 5,683,344 A method for solidification and stabilization of soils contaminated with heavy metals and organic compounds removable by activated carbon includes the steps of placing a selected weight of the contaminated soil in a vessel, adding water to the contaminated soil in the vessel, mixing the soil, water and carbon in the vessel, adding cement and fly ash to the soil, water, carbon, cement and fly ash in the vessel and pouring the mixture of soil, water carbon, cement and fly ash into a mold and curing the mixture therein.

USP 5,702,203 The present invention pertains to a floating breakwater structure in the shape "V". This breakwater design allows for a wide range of wave periods, unlike previous floating breakwater. The construction of the instant invention is that of a suspended curtain which deflects and redirects the waves that are incident thereto rather than absorb or reflect incoming wave energy. This design results in a substantially smaller structure with reduced mooring loads. Moreover, the floating breakwater of the instant invention allows for fast deployment that can be either shipped in sections and assembled on site or assembled in sheltered waters and towed to a site for deployment. The breakwater of the instant invention is intended for temporary coastal operations such as military force projection and sustainment, dredging, coastal civil construction and repair, oil spill recovery, and search/rescue relief missions.

USP 5,702,651 High-flexural-strength concrete is produced by mixing wet hydraulic cement-sand mixture with coarse, flat, tabular aggregate, pouring the resulting mixture into a form in a shallow layer, vibrating the form containing the mixture, thereby orienting the coarse aggregate particles, pouring another shallow layer of the mixture into the form, again vibrating the form, and repeating these processes

until the form has been filled to the desired level. The mixture then is allowed to cure. Cast-in-place items are prepared by placing thin layers or lifts of oriented, tabular-aggregate concrete into conventional forms and vibrating each lift using flat-plate vibrators.

USP 5,706,018 A multi-band, variable, high-frequency antenna comprises a pair of transmission lines for conveyance of signal from and to a transceiver, and a pair of braided copper conductor and elements, each in electrical communication at a proximal end thereof with one of the transmission lines. Each of the braided copper conductor elements is mounted on a nonconductive support cord, the braided copper conductor elements being expandable and retractable along the support cords on which the conductor elements are mounted. A cord lock is proximate a distal end of each of the conductor elements for releasable locking the distal end of the conductor element at a selected position on the support cord on which the conductor elements, and locking the cord locks is operative to lock the conductor elements in place on the support cords selectively fix a length of each of the conductor elements.

USP 5,796,679 Groundwater velocity and direction of flow are determined by insertion in a borehole below the water table of a sound source and plurality of sound sensors. A periodic sound signal is emitted by the sound source. Which is submerged in groundwater at the bottom of the borehole. The sound signals are sensed by the sound sensors, which are also submerged in the water in the vicinity of the sound source. Owing to the Doppler effect there is a shift in the frequency of the sound signal observed by the different sound sensors. The differences in frequency are determined by pulse counters and used to compute the components of groundwater velocity along north-south and east-west axes. The velocity of groundwater flow and its direction are determined by vector addition of the groundwater velocity components. These computational processes are carried out by an appropriately programmed microprocessor.

USP 5,804,721 A pair of metal plates having a space therebetween are surrounded by a flexible enclosure which is waterproof and which is filled with a dry gas. A pair of electrical conductors connected to the plates extend through and are water-tight sealed to the enclosure. A water-deformable element which expands in the presence of moisture is disposed around the enclosure, and a rigid housing having holes therethrough is

disposed around the water-deformable element so that moisture passing through the holes into the water-deformable element causes it to expand to move the enclosure and at least one plate so as to reduce the space between the plates to change the capacitance of the capacitor.

USP 5,804,721 A pair of metal plates having a space therebetween are surrounded by a flexible enclosure which is waterproof and which is filled with a dry gas. A pair of electrical conductors connected to the plates extended through and are water-tight sealed to the enclosure. A water-deformable element which expands in the presence of moisture is disposed around the enclosure, and a rigid housing having holes therethrough is disposed around the water-deformable element so that moisture passing through the holes into the water-deformable element causes it to expand to move the enclosure and at least one plate so as to reduce the space between the plates to change the capacitance of the capacitor.

USP 5,815,064 A temperature and depth probe for accurate temperature measurements in snow contains a temperature sensing element such as a thermistor placed in a protective cap affixed to the end of a hollow carbon fiber tube. Wires connected to the output terminals of the temperature sensing element pass through the hollow tube to the input terminal of a temperature indicating instrument. The depth of insertion of the probe into the snow is read from depth markings on the side of the hollow tube.

USP 5,818,340 A roof moisture sensing system includes (1) a radio frequency pulse transmitter, (2) a moisture sensor disposed on a roof, and (3) a radio receiver adapted to monitor resonance of the moisture sensor activated by a pulse transmitted by the pulse transmitter. The receiver is adapted to analyze the resonance of the sensor to determine the presence of moisture in the sensor. The transmitter and the receiver can be remote from the sensor and the roof.

USP 5,828,220 A system and method for continuously monitoring the shielding effectiveness of an electromagnetically shielded enclosure is disclosed including an RF transmitter positioned remote from the shielded enclosure. RF signals received by both an enclosure receiver positioned inside of the enclosure and simultaneously by a reference receiver having its antenna positioned outside of the shielded enclosure. These two received signals are mixed so as to produce IF signals which are subsequently forwarded to a

synchronous detector which determines the ratio of the two signal levels by comparing their strengths. This ratio is indicative of the enclosure's electromagnetic shielding effectiveness. If the effectiveness drops below a predetermined or threshold limit, such is determined by a comparator position within the enclosure and an alarm may be sounded so as to indicate that the shield is failing. Accordingly, the effectiveness of the electromagnetic shield may be monitored twenty-four hours a day. It is also noted that the remotely positioned transmitter may be that of an existing radio station according to certain embodiments of this invention.

USP 5,835,025 A data acquisition apparatus that includes a recorder device of an event's time and date signified by the opening of an external trigger switching circuit in combination with a complimentary interrogator device for collecting data from the recorder device. The recorder device's components comprise a battery powered source with a power regulator, a processor, a dip-switch identifier, a programmable read only memory, a timing/control subcircuit interface that connects to the external trigger switching circuit. The interrogator device is portable and has multiple functional capabilities. This interrogator comprise a regulated battery power source, a processor, a programmable ROM, an event storage RAM, a clock/calender subcircuit, an optional liquid crystal display and an input/output interface port to communicate with the recorder device.

USP 5,841,289 A system for detecting accretion of frazil ice on underwater grating comprises a pair of parallel electrically conductive bars mounted side-by-side, for disposition beneath a water surface and spaced from but proximate an underwater intake grating. The system further includes a coaxial transmission line connected at a first end to the pair of bars for extension from the bars upwardly above the water surface, and a time domain reflectometer disposed above the water surface for generating electromagnetic pulses and having a second end of the transmission line fixed thereto. The transmission line facilitates propagation of the pulses to the bars for further travel time in the bars and to compute changes in the round trip travel time, from which can be determined absence, presence, and build-up of frazil ice on the bars providing an indication of same on the grating. The invention further contemplates a method for detecting accretion of frazil ice on underwater

gratings, utilizing the above-described system.

**Gregory D. Showalter,**  
*Army Federal Register Liaison Officer.*  
[FR Doc. 99-2184 Filed 2-1-99; 8:45 am]  
BILLING CODE 3710-92-P

## DEPARTMENT OF DEFENSE

### Department of the Navy

#### Public Hearing for Draft Environmental Impact Statement for the Improved Ordnance Storage for Marine Corps Air Station Yuma, Arizona

**AGENCY:** Department of the Navy, DOD.  
**ACTION:** Announcement of public hearing.

**SUMMARY:** The United States Marine Corps has prepared and filed with the U.S. Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for the Improved Ordnance Storage for Marine Corps Air Station Yuma, Arizona. Two public hearings will be held to inform the public of the DEIS findings and to solicit oral and written comments. Federal, state and local agencies, and interested parties are invited to be present or represented at the hearings.

**DATES:** Hearing dates are as follows:  
(1) February 17, 1999, 1:00 p.m., Yuma, AZ.  
(2) February 23, 1999, 7:00 p.m., Yuma, AZ.

**ADDRESSES:** Hearing locations are:  
(1) February 17, 1999, at the Ramada Inn Chilton Conference Center, Maya Room, 300 East 32nd Street, Yuma, AZ 85364.  
(2) February 23, 1999, at the Ramada Inn Chilton Conference Center, Maya Room, 300 East 32nd Street, Yuma, AZ 85364.

**FOR FURTHER INFORMATION CONTACT:** Ms. Deb Theroux, (619) 532-2058.

**SUPPLEMENTARY INFORMATION:** Pursuant to Council on Environmental Quality regulations (40 CFR Parts 1500-1508) implementing procedural provisions of the National Environmental Policy Act, the United States Marine Corps has prepared and filed with the U.S. Environmental Protection Agency the Draft Environmental Impact Statement (DEIS) for the Improved Ordnance Storage for Marine Corps Air Station Yuma, Arizona.

The proposed action includes constructing a new Combat Aircraft Loading Area (CALA), constructing a new station ordnance area, and acquiring land for the elimination of safety waivers and the relocation of facilities at MCAS Yuma.

The Marine Corps has analyzed the environmental effects of the proposed action. The environmental studies were based on reasonable alternatives for accomplishing the proposed action, taking into account sites identified through the scoping process. Four potential alternatives have been identified: (1) the preferred alternative, acquiring 1,641 acres of nonmilitary land south of MCAS Yuma and constructing new ordnance storage magazines and other military facilities in that area; (2) acquiring 1,069 acres of nonmilitary land south of MCAS Yuma and constructing new ordnance storage magazines and other military facilities in that area; (3) acquiring 482 acres of nonmilitary land south of MCAS Yuma and constructing military facilities in that area, along with constructing ordnance storage magazines on the nearby Barry M. Goldwater U.S. Air Force Range; and (4) taking no action (No Action Alternative).

No decision on the proposed action will be made until the National Environmental Policy Act process has been completed and the Secretary of the Navy, or a designated representative, releases the Record of Decision (ROD).

The DEIS has been distributed to various federal, state, and local agencies, elected officials, and special interest groups. Two copies of the DEIS are available for review at each of the following libraries: Yuma County Library District—Main Library, 350 S. 3rd Avenue, Yuma, AZ 85364; and Foothills Branch Library, 11279 S. Glenwood, Yuma, AZ 85367. A limited number of single copies are available from Mr. Richard Samrah, Planning Supervisor, Building 888, Box 99140, Marine Corps Air Station, Yuma, AZ 85369-9110.

The two public hearings will be conducted by the Marine Corps to receive oral and written comments. Federal, state and local agencies, and interested parties are invited and urged to be present or represented at the hearings. Oral statements will be heard and transcribed by a stenographer; however, to assure accuracy of the record, all statements should be submitted in writing. All statements, both oral and written, will become part of the public record on this study. Equal weight will be given to both oral and written statements. In the interest of available time, speakers will be asked to limit their oral comments to five minutes. If longer statements are to be presented, they should be summarized at the public hearings and submitted in writing either at the hearings or mailed to Mr. Richard Samrah, Planning Supervisor, Building 888, Box 99140,

Marine Corps Air Station, Yuma, AZ 85369-9110. All written statements must be received by Monday, March 15, 1999, to become part of the official record. A Spanish/English interpreter will be present at the February 23 hearing.

Dated: January 29, 1999.

**Lawrence L. Larson,**

Colonel, USMC, Head, Land Use and Military Construction Branch, Facilities and Services Division, Installations and Logistics Department, Headquarters, U.S. Marine Corps.

[FR Doc. 99-2546 Filed 2-1-99; 8:45 am]

BILLING CODE 3810-FF-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 March 4, 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, NW, Room 10235, New Executive Office Building, Washington, D.C. 20503 or should be electronically mailed to the internet address DWERFEL@OMB.EOP.GOV. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 400 Maryland Avenue, SW, Room 5624, Regional Office Building 3, Washington, DC 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 27, 1999.

**Kent H. Hannaman,**

Leader, Information Management Group, Office of the Chief Financial and Chief Information Officer.

### Office of Elementary and Secondary Education

**Type of Review:** New.

**Title:** Reporting Requirements for the Education Flexibility Partnership Demonstration Program.

**Frequency:** Annually.

**Affected Public:** State, local or Tribal Gov't, SEAs or LEAs.

**Reporting and Recordkeeping Hour Burden:**

Responses: 12.

Burden Hours: 240.

Abstract: Section 311(e)(6) of the Goals 2000: Educate America Act requires states participating in the Education Flexibility Partnership Demonstration Program to annually report to the Secretary on the monitoring of waivers it grants through this program.

### Office of Educational Research and Improvement

**Type of Review:** Reinstatement.

**Title:** National Education Longitudinal Study: 1988-2000.

**Frequency:** On occasion.

**Affected Public:** Individuals or households.

**Reporting and Recordkeeping Hour Burden:**

Responses: 457.

Burden Hours: 214.

**Abstract:** The National Education Longitudinal Study: 1988-2000 (NELS:88/2000) is designed to provide data about critical transitions experienced by students as they progress through high school and into postsecondary institutions or the work force.

NELS:88/2000, the fourth follow-up to this longitudinal data collection initiated with the 8th grade class of 1988, will provide important information about young adults' experiences after high school, including postsecondary education and training, labor force participation, and family formation.

### Office of Educational Research and Improvement

**Type of Review:** Revision.

**Title:** Data Collection for Third International Mathematics and Science Study—Report (TIMSS-R).

**Frequency:** One-Time Student Assessment.

**Affected Public:** Individuals or households; Not-for-profit institutions.

**Reporting and Recordkeeping Hour Burden:**

Responses: 11,250.

Burden Hours: 24,583.

**Abstract:** In order to provide international benchmarks against which to measure the performance of American students in mathematics and science, with comparisons of data for 1995 and 1999, and to measure progress toward the U.S. national goal of being first in the world in mathematics and science in the year 2000, the National Center for Education Statistics (NCES) wishes to repeat TIMSS for the 8th grade in U.S. schools in 1999.

### Office of Educational Research and Improvement

**Type of Review:** Reinstatement.

**Title:** National Postsecondary Student Aid Study: 2000 (NPSAS: 2000).

**Frequency:** On occasion.

**Affected Public:** Individuals or households; Business or other for-profit; Not-for-profit institutions.

**Reporting and Recordkeeping Hour Burden:**

Responses: 1,964.

Burden Hours: 1,898.

**Abstract:** The NPSAS is a comprehensive study that examines how students and their families pay for postsecondary education. It includes nationally representative samples of undergraduates, graduates, and first-professional students; students attending public and private less-than-2-year institutions, community colleges, 4-year colleges, and major universities. Students who receive financial aid as well as those who do not receive

financial aid participate in NPSAS. Comprehensive student interviews and administrative records, with exceptional detail concerning student financial aid, are available for academic years 1986-87, 1989-90, 1992-93, and 1995-96.

[FR Doc. 99-2372 Filed 2-1-99; 8:45 am]

BILLING CODE 4000-01-P

## DEPARTMENT OF EDUCATION

### Submission for OMB Review; Comment Request

**AGENCY:** Department of Education

**SUMMARY:** The Acting Leader, Information Management Group, Office of the Chief Information Officer invites comments on the submission for OMB review as required by the Paperwork Reduction Act of 1995.

**DATES:** Interested persons are invited to submit comments on or before March 4, 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 DWERFEL@OMB.EOP.GOV. Requests for copies of the proposed information collection requests should be addressed to Patrick J. Sherrill, Department of Education, 400 Maryland 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 Acting Leader, Information Management Group, Office of the 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 29, 1999.

**Joseph Schubart,**

*Acting Leader, Information Management Group, Office of the Chief Information Officer.*

*Office of Elementary and Secondary Education.*

*Type of Review:* Reinstatement.

*Title:* Parental Assistance Program Grant Application.

*Frequency:* Annually.

*Affected Public:* Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.

*Reporting and Recordkeeping Hour Burden:*

Responses: 200.

Burden Hours: 8,000.

*Abstract:* The Department of Education analyzes these applications to determine which application is most likely to conduct effective projects. Without this information, that judgement could not be objectively made and the appropriate funds could not be awarded.

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. 99-2491 Filed 2-1-99; 8:45 am]

BILLING CODE 4000-01-P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Rocky Flats

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental

Management Site-Specific Advisory Board (EM SSAB), Rocky Flats. The Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Tuesday, February 16, 1999. 6:30 p.m.-9:30 p.m.

**ADDRESSES:** College Hill Library, (Front Range Community College), 3705 West 112th Avenue Westminster, CO.

**FOR FURTHER INFORMATION CONTACT:** Ken Korkia, Board/Staff Coordinator, EM SSAB-Rocky Flats, 9035 North Wadsworth Parkway, Suite 2250, Westminster, CO 80021, phone: (303) 420-7855, fax: (303) 420-7579.

#### **SUPPLEMENTARY INFORMATION:**

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

#### **Tentative Agenda**

1. Conduct a follow-up discussion on building rubble, based on the presentation received at its February 4 work session.

2. Review and discuss waste disposition pathways.

3. Presentation and discussion on developing an offsite disposal alternative for low-level waste.

4. Other Board business may be conducted as necessary.

*Public Participation:* The meeting is open to the public. Written statements may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact Ken Korkia at the address or telephone number listed above. Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments at the beginning of the meeting. This notice is being published less than 15 days before the date of the meeting due to programmatic issues that had to be resolved prior to publication.

*Minutes:* The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be available at the Public Reading

Room located at the Board's office at 9035 North Wadsworth Parkway, Suite 2250, Westminster, CO 80021; telephone (303) 420-7855. Hours of operation for the Public Reading Room are 9:00 am and 4:00 pm on Monday through Friday. Minutes will also be made available by writing or calling Deb Thompson at the Board's office address or telephone number listed above.

Issued at Washington, DC on January 28, 1999.

**Rachel M. Samuel,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. 99-2425 Filed 2-1-99; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF ENERGY

### Environmental Management Site-Specific Advisory Board, Paducah

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the Environmental Management Site-Specific Advisory Board (EM SSAB), Paducah Gaseous Diffusion Plant. The Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Thursday, February 18, 1999: 5:30 p.m.-10:00 p.m.

**ADDRESSES:** Paducah Information Age Park Resource Center, 2000 McCracken Boulevard, Paducah, Kentucky.

**FOR FURTHER INFORMATION CONTACT:** John D. Sheppard, Site-Specific Advisory Board Coordinator, Department of Energy Paducah Site Office, Post Office Box 1410, MS-103, Paducah, Kentucky 42001, (502) 441-6804.

#### SUPPLEMENTARY INFORMATION:

*Purpose of the Board:* The purpose of the Board is to make recommendations to DOE and its regulators in the areas of environmental restoration, waste management, and related activities.

#### Tentative Agenda

5:30 p.m. Call to Order  
 5:45 p.m. Approve Meeting Minutes  
 6:00 p.m. Public Comment/Questions  
 6:30 p.m. Presentations  
 7:30 p.m. Break  
 7:45 p.m. Presentations  
 9:00 p.m. Public Comment  
 9:30 p.m. Administrative Issues  
 10:00 p.m. Adjourn

Copies of the final agenda will be available at the meeting.

*Public Participation:* The meeting is open to the public. Written statements

may be filed with the Committee either before or after the meeting. Individuals who wish to make oral statements pertaining to agenda items should contact John D. Sheppard at the address or telephone number listed above.

Requests must be received 5 days prior to the meeting and reasonable provision will be made to include the presentation in the agenda. The Designated Federal Officer is empowered to conduct the meeting in a fashion that will facilitate the orderly conduct of business. Each individual wishing to make public comment will be provided a maximum of 5 minutes to present their comments as the first item on the meeting agenda.

*Minutes:* The minutes of this meeting will be available for public review and copying at the Freedom of Information Public Reading Room, 1E-190, Forrestal Building, 1000 Independence Avenue, SW, Washington, DC 20585 between 9:00 a.m. and 4 p.m., Monday-Friday, except Federal holidays. Minutes will also be available at the Department of Energy's Environmental Information and Reading Room at 175 Freedom Boulevard, Highway 60, Kevil, Kentucky between 8:00 a.m. and 5:00 p.m. on Monday through Friday, or by writing to John D. Sheppard, Department of Energy Paducah Site Office, Post Office Box 1410, MS-103, Paducah, Kentucky 42001, or by calling him at (502) 441-6804.

Issued at Washington, DC, on January 28, 1999.

**Rachel M. Samuel,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. 99-2426 Filed 2-1-99; 8:45 am]

BILLING CODE 6450-01-P

## DEPARTMENT OF ENERGY

### Office of Science, High Energy Physics Advisory Panel

**AGENCY:** Department of Energy.

**ACTION:** Notice of open meeting.

**SUMMARY:** This notice announces a meeting of the High Energy Physics Advisory Panel (HEPAP). Federal Advisory Committee Act (Pub. L. 92-463, 86 Stat. 770) requires that public notice of these meetings be announced in the **Federal Register**.

**DATES:** Monday, March 1, 1999; 9:00 a.m. to 6:00 p.m.; and Tuesday, March 2, 1999; 8:30 a.m. to 4:00 p.m.

**ADDRESSES:** Stanford Linear Accelerator Center; Central Laboratory; Building 40; Orange Room; Stanford, California 94309.

**FOR FURTHER INFORMATION CONTACT:** John Metzler, Executive Secretary; High

Energy Physics Advisory Panel; U.S. Department of Energy; 19901 Germantown Road; Germantown, Maryland 20874-1290; Telephone: 301-903-2979.

#### SUPPLEMENTARY INFORMATION:

*Purpose of the Meeting:* To provide advice and guidance on a continuing basis with respect to the high energy physics research program.

#### Tentative Agenda

*Monday, March 1, 1999 and Tuesday, March 2, 1999*

- Discussion of Department of Energy High Energy Physics Programs.
- Discussion of National Science Foundation Elementary Particle Physics Program.
- Discussion of High Energy Physics University Programs.
- Reports on and Discussion of the Use of Networks and Computing in High Energy Physics.
- Reports on and Discussion of U.S. Large Hadron Collider Activities.
- Reports on the Stanford Linear Accelerator Center Program.
- Reports on and Discussions of Topics of General Interest in High Energy Physics.
- Public Comment (10-minute rule).

*Public Participation:* The meeting is open to the public. If you would like to file a written statement with the Panel, you may do so either before or after the meeting. If you would like to make oral statements regarding any of the items on the agenda, you should contact John Metzler at 301-903-5079 (fax) or john.e.metzler@science.doe.gov (e-mail). You must make your request for an oral statement at least 5 business days before the meeting. Reasonable provision will be made to include the scheduled oral statements on the agenda. The Chairperson of the Panel will conduct the meeting to facilitate the orderly conduct of business. Public comment will follow the 10-minute rule.

*Minutes:* The minutes of the meeting will be available for public review and copying within 30 days at the Freedom of Information Public Reading Room; Room 1E-190; Forrestal Building; 1000 Independence Avenue, SW; Washington, DC, between 9:00 a.m. and 4:00 p.m., Monday through Friday, except Federal holidays.

Issued at Washington, DC on January 28, 1999.

**Rachel M. Samuel,**

*Deputy Advisory Committee Management Officer.*

[FR Doc. 99-2424 Filed 2-1-99; 8:45 am]

BILLING CODE 6450-01-P

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Docket No. CP99-168-000]

**Columbia Gas Transmission Corporation; Notice of Request Under Blanket Authorization**

January 28, 1999.

Take notice that on January 21, 1999, Columbia Gas Transmission Corporation (Columbia), 12801 Fair Lakes Parkway, Fairfax, Virginia 22030 filed in Docket No. CP99-168-000 a request pursuant to Sections 157.205 and 157.212 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.212) seeking NGA Section 7 certification for an existing point of delivery to Mountaineer Gas Company (MGC) in West Virginia, under Columbia's blanket certificate issued in Docket No. CP83-76-000 pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request on file with Commission and open to public inspection.

Columbia requests certification to provide this service at an existing point of delivery which was originally authorized under Section 311 of the Natural Gas Policy Act (NGPA) for transportation service. The maximum daily quantity for MGC is 1,500 Dth and the estimated annual quantity is 547,500 Dth and the end use of gas will be industrial.

Columbia constructed the existing point of delivery to MGC in Upshur County, West Virginia, and placed it in service on June 15, 1998. Interconnecting facilities installed by Columbia included a 4-inch tap and valve, 20 feet of 4-inch pipeline, a filter separator and a meter. The cost of constructing the existing point of delivery was \$18,129.

Columbia states that the quantities of natural gas to be provided through the existing point will be within Columbia's authorized level of service. Therefore, there is no impact on Columbia's existing point of delivery for transportation service.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be

authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the Natural Gas Act.

**Linwood A. Watson, Jr.,***Acting Secretary.*

[FR Doc. 99-2394 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

**DEPARTMENT OF ENERGY****Federal Energy Regulatory Commission**

[Project No. 271]

**Entergy Arkansas, Inc; Notice of Availability of Study Reports and Request for Additional Scientific Studies**

January 28, 1999.

Entergy Arkansas, Inc. (Entergy) is preparing an application to obtain a new license from the Federal Energy Regulatory Commission (FERC) for the Carpenter-Rommel Hydroelectric Project (FERC No. 271). The project is located on the Ouachita River in Garland and Hot Spring Counties, Arkansas.

The Carpenter-Rommel Project's existing license expires on February 28, 2003. Under FERC's regulations, Entergy must file an application for a new license on or before February 28, 2001. Entergy is using FERC's alternative licensing procedures, pursuant to 18 CFR § 4.34(i), and is preparing the license application and applicant prepared environmental assessment (APEA) in cooperation with a term of federal, state and local agencies, non-governmental organizations (NGO), and the public.

Entergy held a public meeting on March 23-24, 1998 to discuss the project, and solicit information from resource agencies and other stakeholders on project issues and alternatives that should be evaluated in the APEA. Following the March meetings, Entergy formed a Relicensing Team, consisting of federal, state and local resource agencies, NGOs, and the public, to help identify and develop study plans for the project issues. Based on the information gathered at the March 1998 meetings and subsequent Relicensing Team meetings, Entergy developed study scopes in cooperation with the Relicensing Team and conducted the resource studies during the summer and fall of 1998.

On August 17, 1998, Entergy published Scoping Document 1 (SD1) and issued a notice of scoping meetings, pursuant to the National Environmental Policy Act (NEPA). On September 22, 1998, Entergy held a public NEPA scoping meeting at the Clarion Hotel in Hot Springs, Arkansas, to solicit input on any further issues and project alternatives for evaluation in the APEA. Following the comment period for SD1, Entergy conducted a whitewater boating study on November 7-8, 1998.

The study reports for the studies conducted in the summer and fall 1998 are now available for review and comment. These reports can be reviewed at Entergy's Jones Mill office and the Hot Spring and Garland County Public Libraries from January 27, 1999 to March 27, 1999. A copy of all reports is also available at FERC's Public Reference Room at 888 First Street, NE, Washington, D.C.

The public is invited to review these documents and to file comments on the adequacy of these studies in addressing issues raised in the March 1998 public meeting and the September 22, 1998, NEPA scoping meeting. Comments on these studies and requests for any additional studies are due by March 27, 1999. All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

If any resource agency, Indian tribe, or person believes that an additional scientific study should be conducted in order to form an adequate factual basis for a complete application and APEA on its merits, the resource agency, Indian tribe, or person must file a request for the study with the Secretary of the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426 by March 27, 1999. A copy of the request must also be sent to Mr. Henry Jones, Entergy, P.O. Box 218, Jones Mill, AR 72105.

Any comments or recommendations for further studies should include a detailed description of the recommended study and the basis for the study, including the study objectives and how the study and information sought will be useful in furthering the resource goals that are affected by the project. The request should include the amount of time needed for the recommended study and an explanation of why the existing data cannot be used to achieve the study objectives.

For further information, please contact Ed Lee, (202) 219-2809 or E-

mail address at Ed.Lee@FERC.fed.us or Henry Jones, Entergy, at (501) 844-2148.  
**Linwood A. Watson, Jr.,**  
*Acting Secretary.*  
 [FR Doc. 99-2396 Filed 2-1-99; 8:45 am]  
 BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-162-000]

#### Great Lakes Gas Transmission Limited Partnership; Notice of Request Under Blanket Authorization

January 28, 1999.

Take notice that on January 19, 1999, Great Lakes Gas Transmission Limited Partnership (Great Lakes), One Woodward Avenue, Suite 1600, Detroit, Michigan 48226, filed in Docket No. CP99-162-000 a request pursuant to Sections 157.205, and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.211) for authorization to construct and operate a tap, a meter station, approximately 1.6 miles of 16-inch pipe (to connect the tap and meter station), and appurtenant facilities to establish a delivery point (the China Township Delivery point) for service to The Detroit Edison Company (Detroit Edison), a new end-use shipper on its system, in St. Clair County, Michigan, under the blanket certificate issued in Docket No. CP90-2053-000, all as more fully set forth in the request which is on file with the Commission and open to public inspection.

Great Lakes states that the proposed tap will consist of a below-grade 16-inch tap off of its mainline loop (the 200 line), a below-grade valve, a riser, and above-grade manual valve operator, and interconnecting piping. Great Lakes notes that permanent fencing will enclose the above-grade facilities. Great Lakes proposes to construct and operate an above-grade, 8-inch meter station (which will consist of a single 8-inch meter run and turbine meter, a pressure regulator, gas heater, and appurtenant facilities) adjacent to the location where Detroit Edison will house three new gas-fired 72 megawatt generating units.

According to Great Lakes once the proposed facilities are completed, they will enable Detroit Edison to receive gas to fuel three new gas-fired peak load electric generating units, which will be capable of producing a total of 216 megawatts of electricity per hour. Great Lakes contends that Detroit Edison will use this power to increase reserve capacity levels, which will thereby

alleviate potential shortfalls in meeting its peak power requirements. Great Lakes claims that Detroit Edison will require transportation service for these three units as of May 1, 1999, without service by this date the units will not be available to generate the power required under peak load conditions.

According to Great Lakes, SEMCO Gas Company (SEMCO), a shipper on Great Lakes' system, currently provides retail gas distribution service in this area. Great Lakes states that SEMCO provides Detroit Edison with minimal gas volumes at the Belle River location and that those volumes are not associated with the generation of power. According to Great Lakes the Detroit Edison's base load power generation at the Belle River location is coal-fired. Thus, Great Lakes alleges that the service which it will provide to Detroit Edison is for new gas-fired generating facilities, which will not displace any service presently provided by SEMCO to Detroit Edison. Great Lakes states that Detroit Edison executed a precedent agreement providing for deliveries of up to 3,384 dth per hour.

Great Lakes states that Detroit Edison will acquire its own natural supplies and utilize the seller's existing transportation service on Great Lakes' system upstream of the proposed line tap, or utilize a backhaul transportation service on Great Lakes' mainline, to receive gas at the delivery point. Therefore, Great Lakes states that it will be able to provide the service without impacting upon its system-wide peak day and annual deliveries. According to Great Lakes, the transportation of gas for Detroit Edison's account will occur under Rate Schedule FT of its FERC Gas Tariff. Great Lakes claims that the parties will execute a ten-year firm transportation agreement under Rate Schedule FT. Great Lakes estimates that the cost of constructing the new facilities will be approximately \$2.3 million.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for

authorization pursuant to Section 7 of the Natural Gas Act.

**Linwood A. Watson, Jr.,**  
*Acting Secretary.*  
 [FR Doc. 99-2393 Filed 2-1-99; 8:45 am]  
 BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket Nos. CP96-178-008, CP96-809-007, and CP97-238-008]

#### Maritimes & Northeast Pipeline, L.L.C.; Notice of Amendment

January 27, 1999.

Take notice that on January 22, 1999, Maritimes & Northeast Pipeline, L.L.C. (Maritimes), filed in Docket Nos. CP96-178-008, CP96-809-007, and CP97-238-008, an application pursuant to Section 7(c) of the Natural Gas Act for an amendment to the certificates previously issued to Maritimes to construct, install, own, operate, and maintain the Maritimes Phase I and Phase II facilities from Dracut, Massachusetts to a point at the international border between the United States and Canada near Woodland, Maine. Maritimes's proposal is more fully set forth in the application for amendment which is on file with the Commission and open to public inspection.

Maritimes is a limited liability company, organized and existing under the laws of the state of Delaware, Maritimes' members are M&N Management Company, an indirect, wholly owned subsidiary of Duke Energy Corporation; Westcoast Energy (U.S.) Inc., an indirect, wholly owned subsidiary of Westcoast Energy, Inc.; Mobil Midstream Natural Gas Investments Inc., an indirect, wholly owned subsidiary of Mobil Corporation; and Scotia Power U.S., Ltd., an indirect, wholly subsidiary of NS Power Holdings, Inc.

Maritimes requests that its certificates be amended as they apply to Phases I and II service:

- (1) To phase the in-service date of certain of its lateral line facilities;
- (2) To defer, subject to further market commitments, certain other laterals;
- (3) To eliminate one compressor unit at the Baileyville, Maine compressor station;
- (4) To install one compressor unit at Richmond, Maine on a back up basis;
- (5) To uprate each of the three compressor units to be installed (two at Richmond, one at Baileyville) to 8311

horsepower (HP) to reflect the manufacturer's current rating;

(6) To construct, install and operate minor delivery facilities, including about 250 feet of 10-inch diameter pipeline in Haverhill, Massachusetts;

(7) To revise its initial rates to reflect changed cost estimates and revised billing determinants;

(8) To revise certain of its initial tariff sheets, including those tariff sheets addressing creditworthiness standards;

(9) To the extent authorization is required, to implement certain non-conforming provisions in its executed service and backstop agreements that differ from the *pro forma* service agreements in Maritimes' tariff.

Maritimes states that as markets in Maine, Massachusetts, and Canada are changing, there have been changes in the contracts between Maritimes and its shippers. Maritimes has included in its amendment its new agreements, totaling 360,575 Dth/d, including backstop arrangements for 20 years equal to 360,000 Dth/d of firm capacity.

Maritimes says that it is fully contracted under these executed service and backstop agreements. Maritimes notes that there are some provisions in the service and backstop agreements reached with the shippers that deviate from its tariff and asks that the Commission, to the extent required, grant authorization for such deviations.

Maritimes says that market changes have led to a proposed phasing of the construction of Maritimes' laterals. Thus, Maritimes proposes to defer construction of one of the originally proposed Phase II laterals—the Bucksport lateral—with the in-service date to be within two years of the date of the order approving the amendment, subject to the receipt of firm service agreements. Also, Maritimes proposes to defer other laterals proposed in the original Phase II application, subject to obtaining additional market commitments.

Maritimes proposes to eliminate one compressor unit at Baileyville, Maine; to install one of the compressor units at Richmond, Maine on a back up basis; and to uprate the three compressor units to be installed to 8,311 HP to reflect current manufacturer ratings. Maritimes proposes to construct other minor delivery facilities. In particular, Maritimes proposes the construction and operation of the Haverhill Spur and the Essex Gas Company meter station located near Haverhill. The Haverhill Spur will be about 250 feet of 10-inch diameter pipeline located in an area currently dedicated to natural gas facility use. Also, Maritimes proposes to install and operate a new meter to be

wholly located within the already approved Dracut, Massachusetts meter station site as a new delivery point for Boston Gas Company.

Maritimes proposes to revise its initial rates to reflect the increased cost of its mainline facilities and revised billing determinants. Maritimes says that these increased costs are due to the receipt of construction contract bids, which reflect cost increases related to schedule extensions, environmental agency requirements, cathodic protection, material transportation, and wage increases; costs associated with reroutes and route refinements; and additional mainline pipeline mileage of 3.3 miles. The revised billing determinants reflect the firm contractual commitments of 360,575 Dth/d.

The initial rates for mainline service under Rate Schedule NM365 are proposed to be \$0.715 per Dth (on a 100% load factor basis). This is based on a total gas plant of \$619.5 million and an annual cost allocation to Rate Schedule MN365 of about \$94.1 million and a modified/levelized depreciation method for the first four years of operation. Also, \$10.3 million has been allocated to interruptible mainline service under Rate Schedule MNIT. Rates for other mainline services are derivative of the Rate Schedule MN365 rate.

Maritimes also proposes incremental rates for three laterals (Newington, New Hampshire, Westbrook, Maine, and Haverhill) under Rate Schedule MNLFT, the approval of which is pending in Docket No. CP98-797-000.<sup>1</sup> A total gas plant of \$6.9 million is proposed to be allocated incrementally among the above three laterals as more fully set forth in Exhibit P of Maritimes' application.

Maritimes also proposes certain amendments to its tariff. It proposes to revise its creditworthiness provisions to reflect provisions typical of other project-financed pipelines. Also, in order to promote seamless service, Maritimes proposes an agency arrangement reflected in its tariff.

Any person desiring to be heard or making any protest with reference to said amendment should on or before February 12, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211)

<sup>1</sup> In Docket No. CP98-797-000, Maritimes is proposing another lateral near Veazie, Maine with a cost of \$5.6 million that is also proposed to be incrementally priced under Rate Schedule MNLFT.

and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. The Commission's rules require that protests provide copies of their protests to the party or person to whom the protests are directed. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents issued by the Commission, filed by the applicant, or filed by all other intervenors. An intervenor can file for rehearing of any Commission order and can petition for court review of any such order.

However, an intervenor must serve copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as filing an original and 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of such comments to the Secretary of the Commission. Commenters will not be placed on the Commission's environmental mailing list, will receive copies of environmental documents, and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, commenters will not receive copies of all documents filed by other parties or issued by the Commission, and will not have the right to seek rehearing or appeal the Commission's final order to a Federal court. The Commission will consider all comments and concerns equally, whether filed by commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the NGA and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on these applications if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public

convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Maritimes to appear or be represented at the hearing.

**Linwood A. Watson, Jr.,**

*Acting Secretary*

[FR Doc. 99-2365 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-161-000]

#### Natural Gas Pipeline Company of America; Notice of Application

January 28, 1999.

Take notice that on January 19, 1999, Natural Gas Pipeline Company of America (Natural), 747 East 22nd Street, Lombard, Illinois 60148, filed in Docket No. CP99-161-000 an application pursuant to Section 7(b) of the Natural Gas Act, for permission and approval to abandon by sale to MidCon Gas Products Corp. (MGP), a non-jurisdictional gathering affiliate, certain certificated facilities located in Carson, Gray, Hutchinson, Moore and Roberts Counties, Texas, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Natural states that the facilities for which it is seeking abandonment authority are located in two separate gathering areas—the Panhandle Gathering Area and the Quinduno Gathering Area. Natural states that it requests permission to abandon from the Panhandle Gathering Area, nine compressor units located at Compressor Station 112 in Moore County, Texas, totaling 11,250 horsepower; and Booster Stations 52 and 53, both located in Carson County, Texas, each housing one 660 horsepower compressor unit, for a total of 1,320 horsepower. Also, Natural states that it requests permission to abandon from the Quinduno Gathering Area, 37 miles of pipe ranging from 6-inches to 16-inches in diameter, six compressor units at Booster Station 149 and twelve wellhead meters.

Natural states that all of the facilities, included certificated and non-certificated facilities, in the Panhandle Gathering Area and the Quinduno Gathering Area comprise Natural's West Panhandle Gathering System (WPGS).

Natural states that the WPGS consists of 527 miles of pipe (main trunklines and laterals) ranging in diameter from 2 inches to 24 inches, compression, field booster stations, meters, taps and appurtenant facilities. It is stated that due to the fact that Natural no longer provides a bundled sales service, there is no need for Natural to purchase gas along the WPGS for its system supply. Therefore, Natural is seeking in the subject filing, to abandon by sale to MGP, the certificated laterals, compression, field booster stations and associated meters and equipment that are located in the WPGS.

Natural states that it intends to transfer the entire WPGS to MGP. In addition, Natural states that it will sell the WPGS to MGP at its net book value. Natural states that as of September 30, 1998, the net book value of the certificated facilities was \$0 and the net book value of the non-certificated facilities was \$7.6 million.

Natural states that there is one firm transportation agreement under Rate Schedule FTS with a primary receipt point in the WPGS that will need to be terminated in connected with the proposed sale to MGP. Natural states that the shipper is KN Marketing, Inc. (KNM), an affiliate of Natural. Natural further states that it has been transporting up to 70,000 MMBtu per day for KNM under the agreement and will continue to provide such service until the facilities are transferred to MGP, at which time, MGP has agreed to provide the service for KNM.

Natural requests that the order state that the facilities in the WPGS that are being abandoned will be exempt from the Commission's jurisdiction after such facilities are transferred to MGP and operated by MGP as a non-jurisdictional gathering system.

Any person desiring to be heard or to make any protest with reference to said application should on or before February 18, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that permission and approval for the proposed abandonment are required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Natural to appear or be represented at the hearing.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2392 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. ER99-1459-000]

#### Northeast Utilities Service Company; Notice of Filing

January 27, 1999.

Take notice that on January 19, 1999, Northeast Utilities Service Company (NUSCO), tendered for filing, its response to the Commission's December 16, 1998, Order regarding the North American Electric Reliability Council Transmission Loading Relief (TLR) Procedures.

NUSCO states that because it has been informed by the New England Power Pool that the TLR Procedures would not apply to the NEPOOL Control area, the Northeast Utilities System Companies are not adopting the TLR Procedures.

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 and protests should be filed on or before February 8, 1999. Protests will be considered by the Commission to determine the appropriate action to be

taken, but will not serve to make protestants parties to the proceedings. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2389 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP98-399-002]

#### Northern Border Pipeline Company; Notice of Compliance Filing

January 27, 1999.

Take notice that on January 22, 1999, Northern Border Pipeline Company (Northern Border) tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheet to become effective November 1, 1998:

First Revised Sheet Number 248C.02

Northern Border states that the purpose of this filing is to comply with the Commission's letter order issued January 12, 1999 in Docket No. RP98-399-001. The Commission's January 12, 1999 letter order required Northern Border to either replicate in its tariff the Timely Nomination/Intra-day Nomination diagramed at GISB Standard 1.3.2(vi) or incorporate this standard model in its tariff by specifically referring to this standard by number and version. The proposed change incorporates by reference this standard by number and version.

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. 99-2369 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-157-000]

#### Northwest Pipeline Corporation; Notice of Request Under Blanket Authorization

January 28, 1999.

Take notice that on January 19, 1999, Northwest Pipeline Corporation (Northwest) 295 Chipeta Way, Salt Lake City, Utah 84108, filed a request with the Commission in Docket No. CP99-157-000, pursuant to Sections 157.205, 157.211 and 157.216(b) of the Commission's Regulations under the Natural Gas Act (NGA) for authorization to abandon in place its existing Byford tap. Northwest additionally requests authorization to construct and operate a relocated, replacement Byford tap authorized in blanket certificate issued in Docket No. CP82-433-000, all as more fully set forth in the request on file with the Commission and open to public inspection.

Northwest proposes to abandon in place its existing Byford tap consisting of a 2-inch tap and appurtenances for delivery of natural gas to Avista's Corporation (Avista's) distribution facilities. Northwest additionally proposes to construct and operate a relocated, replacement Byford tap on its Coeur d'Alene Lateral located in Spokane County, Washington. Northwest states this project is necessary to accommodate a request by Avista, formerly the Washington Power Company, to relocate the Byford tap.

Any person or the Commission's staff may, within 45 days after the Commission has issued this notice, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the NGA (18 CFR 157.205) a protest to the request. If no protest is filed within the authorized time, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to Section 7 of the NGA.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2391 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-164-000]

#### Panhandle Eastern Pipe Line Company; Notice of Request Under Blanket Authorization

January 27, 1999.

Take notice that on January 19, 1999, Panhandle Eastern Pipe Line Company (Panhandle), P.O. Box 1642, Houston, Texas 77251-1642, filed in Docket No. CP99-164-000 a request pursuant to Sections 157.205 and 157.211 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205, 157.211) for authorization to construct, own and operate certain facilities to be located in Scott County, Illinois, in order to establish a new delivery point for Soyland Power Cooperative, Inc. (Soyland), under Panhandle's blanket certificate issued in Docket No. CP83-83-000, pursuant to Section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Panhandle proposes to install two 10-inch hot taps, check valves and associated facilities on Panhandle's mainline facilities. Panhandle states that it will also install electronic gas measurement equipment on the proposed metering facilities to be constructed and installed by Soyland. Panhandle states that the proposed interconnection will be utilized to provide transportation service to Soyland and that the new interconnection will be designed to deliver up to 96,000 Dth/day of natural gas. Panhandle states that the estimated cost of the proposed facilities is approximately \$252,000.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to Section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If not protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for

authorization pursuant to Section 7 of the Natural Gas Act.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2367 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. GT99-9-000]

#### PG&E Gas Transmission, Northwest Corporation; Notice of Refund Report

January 27, 1999.

Take notice that on January 25, 1999, PG&E Gas Transmission, Northwest Corporation (PG&E GT-NW) filed a Refund Report for interruptible transportation revenue credits on its Coyote Springs Extension.

PG&E GT-NW states that it refunded \$1,102.03 to Portland General Electric Company, the sole eligible firm shipper on the Coyote Springs Extension, by credit billing adjustment on January 12, 1999.

PG&E GT-NW further states that a copy of this filing has been served on all affected customers and interested state regulatory agencies.

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 on or before February 3, 1999. 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. 99-2368 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. RP99-208-000]

#### Sea Robin Pipeline Company; Notice of Flowthrough Crediting Report

January 27, 1999.

Take notice that on January 21, 1999, Sea Robin Pipeline Company (Sea

Robin) submitted its Annual Flowthrough Crediting Mechanism Filing. Sea Robin states that this filing was made pursuant to Section 27 of the General Terms and Conditions of Sea Robin's FERC Gas Tariff which requires the crediting of certain amounts received as a result of resolving monthly imbalances between its gas and liquefiables shippers and under its operational balancing agreements, and imposing scheduling penalties during the 12 month period ending October 31, 1998.

Sea Robin reports that it paid \$442,911.56 in excess of amounts received from Shippers. Accordingly, this year there is no amount to be credited to shippers. Sea Robin requested for good cause the Commission accept this filing out-of-time.

Sea Robin states that copies of Sea Robin's filing will be served upon all of Sea Robin's shippers, interested commissions and interested parties.

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 on or before February 3, 1999. 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. 99-2370 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP96-582-001]

#### Texas Gas Transmission Corporation; Notice of Petition To Amend

January 28, 1999.

Take notice that on January 19, 1999, Texas Gas Transmission Corporation (Texas Gas), 3800 Frederica Street, Owensboro, Kentucky 42304, filed in Docket No. CP96-582-001, a petition to amend the authorizations issued on December 4, 1996 in Docket No. CP96-

582-000, pursuant to Section 7 of the Natural Gas Act and Part 157 of the Commission's (Commission) Regulations, in order to perform remedial work on 35 wells and five associated tank batteries at the Dixie Storage Field, all as more fully described in the application which is on file with the Commission and open for public inspection.

In Docket No. CP96-582-000, the Commission authorized Texas Gas to expand the storage boundary at the Dixie Storage Field located in Henderson County, Kentucky. In the instant application, Texas Gas seeks Commission authorization to proceed with remedial activity on 35 wells and 5 associated tank batteries, all within the approved 837-acre storage expansion zone which was authorized in Docket No. CP96-582-000. Texas Gas says the aforementioned wells are all abandoned oil wells that have been non-productive for many years. Further, Texas Gas says the original well operator failed to properly plug and abandon these wells when they were abandoned.

Any person desiring to participate in the hearing process or to make any protest with reference to said application should on or before February 18, 1999, file with the Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. The Commission's rules require that protestors provide copies of their protests to the party or person to whom the protests are directed. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

A person obtaining intervenor status will be placed on the service list maintained by the Secretary of the Commission and will receive copies of all documents issued by the Commission, filed by the applicant, or filed by other intervenors. An intervenor can file for rehearing of any Commission order and can petition for a court review of any such order. However, an intervenor must submit copies of comments or any other filing it makes with the Commission to every other intervenor in the proceeding, as well as

filing an original and 14 copies with the Commission.

A person does not have to intervene, however, in order to have comments considered. A person, instead, may submit two copies of such comments to the Secretary of the Commission. Commenters will be placed on the Commission's environmental mailing list, will receive copies of environmental documents, and will be able to participate in meetings associated with the Commission's environmental review process. Commenters will not be required to serve copies of filed documents on all other parties. However, Commenters will not receive copies of all documents filed by other parties or issued by the Commission and will not have the right to seek rehearing or appeal the Commission's final order to a Federal court. The Commission will consider all comments and concerns equally, whether filed by Commenters or those requesting intervenor status.

Take further notice that, pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this application if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed or if the Commission on its own motion believes that a formal hearing is required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Texas Gas to appear or be represented at the hearing.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2390 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-170-000]

#### Texas Gas Transmission Corporation; Notice of Request Under Blanket Authorization

January 28, 1999.

Take notice that on January 22, 1999, Texas Gas Transmission Corporation (Texas Gas), P.O. Box 20008, Owensboro, Kentucky 42304, filed in Docket No. CP99-170-000 a request pursuant to sections 157.205 and 157.216 of the Commission's Regulations under the Natural Gas Act (18 CFR 157.205 and 157.216) for authorization to abandon the existing measurement facilities at its LaFourche No. 1 Delivery Meter Station located on Texas Gas' Bayou Chevreuil-Trahan 10-Inch Pipeline in LaFourche Parish, Louisiana, under Texas Gas' blanket certificate issued in Docket No. CP82-407-000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the request that is on file with the Commission and open to public inspection.

Texas Gas states that it currently delivers gas to Trans Louisiana Gas Company, a Division of Atmos Energy Corporation, (TransLa) at the LaFourche No. 1 Delivery Meter Station. TransLa has requested that Texas Gas permit it to render gas service at this meter site, and Texas Gas has agreed to allow TransLa to be the custody transfer provider at this location. To accomplish this change in delivery of gas, Texas Gas agreed to file for approval to retire its existing measurement facilities at the LaFourche No. 1 Delivery Meter Station.

Thereafter, TransLa will install, own, operate and maintain measurement, regulation, odorization and other related facilities necessary to provide service at this meter site on Texas Gas' existing meter lot.

Texas Gas has agreed to pay to TransLa up to a maximum of \$13,880 as a contribution in aid for the costs relative to the installation of the above-mentioned facilities. No new facilities are required to be constructed by Texas Gas to provide service to TransLa.

Texas Gas states that the abandonment of facilities will not result in any termination of currently provided service. Texas Gas states that its existing tariff does not prohibit this activity and that there is sufficient capacity to accommodate the proposed changes without detriment or disadvantage to its other customers.

Any person or the Commission's staff may, within 45 days after issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to section 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefor, the proposed activity shall be deemed to be authorized effective in the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2395 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. EG99-67-000, et al.]

#### Lake Road Generating Company, L.P., et al.; Electric Rate and Corporate Regulation Filings

January 26, 1999.

Take notice that the following filings have been made with the Commission:

##### 1. Lake Road Generating Company, L.P.

[Docket No. EG99-67-000]

Take notice that on January 22, 1999, Lake Road Generating Company, L.P. (Lake Road), a Delaware limited partnership with its principal place of business at 7500 Old Georgetown Road, Bethesda, MD 20814, 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.

Lake Road proposed to construct, own and operate a nominally rated 792 MW natural gas-fired combined cycle power plant in the Town of Killingly, Connecticut. The proposed power plant is expected to commence commercial operation in the year 2001. All capacity and energy from the plant will be sold exclusively at wholesale.

*Comment date:* February 16, 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.

## 2. MEG Marketing, LLC and Sempra Energy Trading Corp.

[Docket No. EC99-28-000]

Take notice that on January 22, 1999, MEG Marketing, LLC (MEG) and Sempra Energy Trading Corp. (SET), both marketers of electric power, filed a request for approval of the disposition of all of the member interests in MEG to a new entity and subsequent purchase of 40 percent of the member interests in the new entity by SET.

*Comment date:* February 22, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 3. Empresa de Generacion Electrica Fortuna, S.A.

[Docket No. EG99-66-000]

Take notice that on January 20, 1999, Empresa de Generacion Electrica Fortuna, S.A. (Applicant), Chiriquicito Distrito de Gualaca, Provincia de Chiriqui, Republica Panama, 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.

Applicant, a Panamanian sociedad anonima, owns certain power generating facilities in Panama. These facilities consist of an approximately 300 MW hydroelectric power generating facility in Chiriqui province, Panama.

*Comment date:* February 16, 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.

## 4. Americas Generation Corp.

[Docket No. EG99-68-000]

Take notice that on January 22, 1999, Americas Generation Corp. (Applicant), Dresdner Bank Tower, Ninth Floor, 50th Street, Panama City, P.O. Box 8376, Panama 7, Republic of Panama, 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.

Applicant, a Panamanian sociedad anonima, intends to operate and manage certain power generating facilities in Panama. These facilities will consist of an approximately 300 MW hydroelectric power generating facility in Chiriqui province, Panama.

*Comment date:* February 16, 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.

## 5. Wolverine Power Supply Cooperative, Inc.

[Docket No. EL99-29-000]

Take notice that on January 19, 1999, Wolverine Power Supply Cooperative, Inc. (Wolverine), tendered for filing an application to waive the Commission's requirement that Wolverine file a joint pool-wide open access transmission pro form tariff for the 1991 Municipal/Cooperative Coordinated Pool Agreement (MCCP Agreement) between Wolverine and the Michigan Public Power Agency (MPPA).

Copies of the filing were served upon the Michigan Public Power Agency and the Public Utility Commission of Michigan.

*Comment date:* February 18, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 6. Entergy Services, Inc.

[Docket No. ER99-635-000]

Take notice that on January 20, 1999, Entergy Services, Inc. (Entergy Services), on behalf of Entergy Gulf States, Inc., tendered for filing an amendment to the filing of three Letter Amendments to the Agreements for Wholesale Electric Service between Entergy Gulf States, Inc., and the Cities of Caldwell, Kirbyville and Newton, Texas.

*Comment date:* February 9, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 7. Kansas City Power & Light Company

[Docket No. ER99-1005-000]

Take notice that on January 20, 1999, Kansas City Power & Light Company (KCPL), tendered for filing an amendment to its original filing made on December 24, 1998 in the above-captioned docket.

A copy of this filing was served on customers presently taking service under FERC Electric Tariff, Original Volume No. 4, the Kansas Corporation Commission and the Missouri Public Service Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 8. New England Power Pool

[Docket No. ER99-1142-000]

Take notice that on January 19, 1999, the New England Power Pool (NEPOOL), Executive Committee tendered for filing a supplemental filing to the Fortieth Agreement Amending New England Power Pool Agreement (the Fortieth Agreement), including an affidavit and updated exhibits thereto and addressing issues raised by the Commission's December 30, 1998, order

in FERC Docket Number ER98-3554-000 with respect to Schedule 3 of the ISO New England Inc., tariff for Transmission Dispatch and Power Administration Services and Section 1.13 of the Fortieth Agreement.

The NEPOOL Executive Committee states that copies of these materials were sent to all entities on the service lists in the captioned docket, to all entities on the service lists in FERC Docket Numbers OA97-237-000, ER97-1079-000, ER97-3574-000, OA97-608-000, ER97-4421-000, and ER98-499-000, to the participants in the New England Power Pool, and to the New England state governors and regulatory commissions.

*Comment date:* February 8, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 9. Niagara Mohawk Power Corporation

[Docket No. ER99-1205-000]

Take notice that on January 20, 1999, Niagara Mohawk Power Corporation (Niagara Mohawk), tendered for filing a Notice of Withdrawal applicable to the executed Service Agreement it filed on January 7, 1999 on behalf of PECO Energy Company—Power Team under its proposed Scheduling and Balancing Services Tariff. The Commission's Order Rejecting Scheduling And Balancing Tariff, And Accepting In Part And Rejecting In Part (As Modified) Proposed Amendment To Open Access Tariff (issued January 11, 1999) mandates the withdrawal of the PECO Service Agreement.

Copies of the filing were served upon PECO Energy Company—Power Team and the New York Public Service Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 10. Rochester Gas and Electric Corporation

[Docket No. ER99-1371-000]

Take notice that on January 19, 1999, Rochester Gas and Electric Corporation (RG&E), tendered a Market-Based Service Agreement between RG&E and Coral Power L.L.C. (Customer) with the Federal Energy Regulatory Commission (Commission). This Service Agreement specifies that the Customer has agreed to the rates, terms and conditions of RG&E's FERC Electric Rate Tariff, Original Volume No. 3 (Power Sales Tariff) accepted by the Commission in Docket No. ER97-3553 (80 FERC ¶ 61,284) (1997).

RG&E requests waiver of the Commission's sixty (60) day notice requirements and an effective date of

January 6, 1999, for the Service Agreement.

RG&E has served copies of the filing on the New York State Public Service Commission and on the Customer.

*Comment date:* February 8, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 11. Duke Energy Morro Bay LLC

[Docket No. ER99-1380-000]

Take notice that on January 20, 1999, Duke Energy Morro Bay LLC (DEMB), tendered for filing an unexecuted service agreement establishing the California Independent System Operator Corporation (ISO) as a customer under DEMB's Amended FERC Electric Rate Schedule No. 2.

DEMB requests an effective date of March 22, 1999.

DEMB states that a copy of the filing was served on the ISO.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 12. Duke Energy Moss Landing LLC

[Docket No. ER99-1381-000]

Take notice that on January 20, 1999, Duke Energy Moss Landing LLC (DEML), tendered for filing an unexecuted service agreement establishing the California Independent System Operator Corporation (ISO) as a customer under DEML's Amended FERC Electric Rate Schedule No. 3.

DEML requests an effective date of December 22, 1998, the date upon which service commenced.

DEML states that a copy of the filing was served on the ISO.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 13. Duke Energy Oakland LLC

[Docket No. ER99-1382-000]

Take notice that on January 20, 1999 Duke Energy Oakland LLC (DEO), tendered for filing an unexecuted service agreement establishing the California Independent System Operator Corporation (ISO) as a customer under DEO's Amended FERC Electric Rate Schedule No. 3.

DEO requests an effective date of March 22, 1999.

DEO states that a copy of the filing was served on the ISO.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 14. Allegheny Power Service Corp., on behalf of Monongahela Power Co., The Potomac Edison Company and West Penn Power Company (Allegheny Power)

[Docket No. ER99-1383-000]

Take notice that on January 20, 1999, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), tendered for filing Supplement No. 14, to add one (1) new Customer to the Market Rate Tariff under which Allegheny Power offers generation services.

Allegheny Power requests a waiver of notice requirements to make service available as of January 19, 1999, to FirstEnergy Corporation.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission, and all parties of record.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 15. Wisconsin Public Service Corporation

[Docket No. ER99-1384-000]

Take notice that on January 20, 1999, the Wisconsin Public Service Corporation (WPSC), tendered for filing Supplement No. 12, to its service agreement with Consolidated Water Power Company (CWPCO). Supplement No. 12, provides CWPCO's contract demand nominations for January 1999–December 2003, under WPSC's W-3 tariff and CWPCO's applicable service agreement.

The company states that copies of this filing have been served upon CWPCO and to the State Commissions where WPSC serves at retail.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 16. Wisconsin Public Service Corporation

[Docket No. ER99-1385-000]

Take notice that on January 20, 1999, the Wisconsin Public Service Corporation (WPSC), tendered for filing Supplement No. 1, to its partial requirements service agreement with Upper Peninsula Power Company (UPPCo). Supplement No. 1, provides UPPCo's contract demand nominations for January 2000–December 2002, under WPSC's W-2A partial requirements

tariff and UPPCo's applicable service agreement.

The company states that copies of this filing have been served upon UPPCo and to the State Commissions where WPSC serves at retail.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 17. Wisconsin Public Service Corporation

[Docket No. ER99-1386-000]

Take notice that on January 20, 1999, the Wisconsin Public Service Corporation (WPSC), tendered for filing Supplement No. 12, to its partial requirements service agreement with Manitowoc Public Utilities (MPU). Supplement No. 12, provides MPU's contract demand nominations for January 1999–December 2003, under WPSC's W-2A partial requirements tariff and MPU's applicable service agreement.

The company states that copies of this filing have been served upon MPU and to the State Commissions where WPSC serves at retail.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 18. PP&L, Inc.

[Docket No. ER99-1387-000]

Take notice that on January 20, 1999, PP&L, Inc. (PP&L), tendered for filing a Service Agreement for Sale of Capacity Credits, dated December 29, 1998, with DTE Edison America, Inc. (DTE), under PP&L's Market-Based Rate and Resale of Transmission Rights Tariff, FERC Electric Tariff, Revised Volume No. 5. The Service Agreement adds DTE as an eligible customer under the Tariff.

PP&L requests an effective date of January 20, 1999, for the Service Agreement.

PP&L states that copies of this filing have been supplied to DTE and to the Pennsylvania Public Utility Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

#### 19. PP&L, Inc.

[Docket No. ER99-1388-000]

Take notice that on January 20, 1999, PP&L, Inc. (PP&L) tendered for filing a Service Agreement for Sale of Capacity Credits, dated December 31, 1999, with Horizon Energy d/b/a Exelon Energy (Exelon) under PP&L's Market-Based Rate and Resale of Transmission Rights Tariff, FERC Electric Tariff, Revised Volume No. 5. The Service Agreement adds Exelon as an eligible customer under the Tariff.

PP&L requests an effective date of January 20, 1999, for the Service Agreement.

PP&L states that copies of this filing have been supplied to Exelon and to the Pennsylvania Public Utility Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 20. Niagara Mohawk Power Corporation

[Docket No. ER99-1390-000]

Take notice that on January 20, 1999, Niagara Mohawk Power Corporation (Niagara Mohawk), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between Niagara Mohawk and Niagara Mohawk Energy Marketing, Inc. This Transmission Service Agreement specifies that NMEM has signed on to and has agreed to the terms and conditions of Niagara Mohawk's Open Access Transmission Tariff as filed in Docket No. OA96-194-000.

Niagara Mohawk requests an effective date of March 1, 1999. Niagara Mohawk has requested waiver of the Commission's 60-day notice requirements for good cause shown.

Niagara Mohawk has served copies of the filing upon New York Public Service Commission and NMEM.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 21. Niagara Mohawk Power Corporation

[Docket No. ER99-1391-000]

Take notice that on January 20, 1999, Niagara Mohawk Power Corporation (Niagara Mohawk), tendered for filing with the Federal Energy Regulatory Commission an executed Transmission Service Agreement between Niagara Mohawk and Niagara Mohawk Energy Marketing, Inc. This Transmission Service Agreement specifies that NMEM has signed on to and has agreed to the terms and conditions of Niagara Mohawk's Open Access Transmission Tariff as filed in Docket No. OA96-194-000.

Niagara Mohawk requests an effective date of March 1, 1999. Niagara Mohawk has requested waiver of the Commission's 60-day notice requirements for good cause shown.

Niagara Mohawk has served copies of the filing upon New York Public Service Commission and NMEM.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 22. Kansas Gas and Electric

[Docket No. ER99-1392-000]

Take notice that on January 20, 1999, Western Resources, Inc. (Western Resources), on behalf of its wholly owned subsidiary, Kansas Gas and Electric Company, tendered for filing a proposed change to its Rate Schedule FERC No. 198. Western Resources states that the change is to add a new point of delivery under the generating municipal electric service agreement with the City of Winfield, Kansas.

The change is proposed to become effective May 1, 1999.

Copies of the filing were served upon the City of Winfield, Kansas, and the Kansas Corporation Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 23. Florida Power & Light Company

[Docket No. ER99-1395-000]

Take notice that on January 21, 1999, Florida Power & Light Company (FPL), tendered for filing a proposed service agreement with Georgia Transmission Corporation for long-term firm transmission service under FPL's Open Access Transmission Tariff.

FPL requests that the proposed service agreements be permitted to become effective on January 1, 1999.

FPL states that this filing is in accordance with Section 35 of the Commission's Regulations.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 24. Florida Power & Light Company

[Docket No. ER99-1396-000]

Take notice that on January 21, 1999, Florida Power & Light Company (FPL), tendered for filing proposed service agreements with City of Lakeland, Department of Electric and Water Utilities for Short-Term Firm under FPL's Open Access Transmission Tariff.

FPL requests that the proposed service agreements be permitted to become effective on January 1, 1999.

FPL states that this filing is in accordance with Section 35 of the Commission's Regulations.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 25. Virginia Electric and Power Company

[Docket No. ER99-1397-000]

Take notice that on January 21, 1999, Virginia Electric and Power Company (Virginia Power), tendered for filing a Service Agreement for Long Term Firm Point-to-Point Transmission Service

with Morgan Stanley Capital Group, Inc. (Transmission Customer), under the Open Access Transmission Tariff to Eligible Purchasers dated July 14, 1997. Under the tendered Service Agreement, Virginia Power will provide Long Term Firm Point-to-Point Transmission Service to the Transmission Customer under the rates, terms and conditions of the Open Access Transmission Tariff.

Virginia Power requests an effective date of January 1, 1999, the date of the first transaction under the Service Agreement.

Copies of the filing were served upon Morgan Stanley Capital Group, Inc., the Virginia State Corporation Commission and the North Carolina Utilities Commission.

*Comment date:* February 10, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 26. Louisville Gas and Electric Company and Kentucky Utilities Company

[Docket No. ER99-1403-000]

Take notice that on January 20, 1999, Louisville Gas and Electric Company (LG&E) and Kentucky Utilities Company (KU) tendered for filing with the Federal Energy Regulatory Commission (Commission) the Form of Service Agreement for Market-Based Sales Service (Rate MBSS), which was accepted by the Commission for filing without hearing or suspension in Louisville Gas and Electric Co., 85 FERC ¶61,215 (1998), together with a list of customers of LG&E and KU for whom new service will be provided under Rate MBSS as of January 1, 1999.

*Comment date:* February 9, 1999, in accordance with Standard Paragraph E at the end of this notice.

## 27. Allegheny Power Service Corp., on behalf of Monongahela Power Co., The Potomac Edison Company, and West Penn Power Company (Allegheny Power)

[Docket No. ER99-1407-000]

Take notice that on January 20, 1999, Allegheny Power Service Corporation on behalf of Monongahela Power Company, The Potomac Edison Company and West Penn Power Company (Allegheny Power), tendered for filing Supplement No. 45, to add ConAgra Energy Services, Inc., and Entergy Power Marketing Corporation to Allegheny Power Open Access Transmission Service Tariff which has been submitted for filing by the Federal Energy Regulatory Commission in Docket No. OA96-18-000.

The proposed effective date under the Service Agreements is January 19, 1999.

Copies of the filing have been provided to the Public Utilities Commission of Ohio, the Pennsylvania Public Utility Commission, the Maryland Public Service Commission, the Virginia State Corporation Commission, the West Virginia Public Service Commission.

*Comment date:* February 9, 1999, in accordance with Standard Paragraph E at the end of this notice.

### 28. New England Power Pool and ISO New England Inc.

[Docket No. ER99-1414-000]

Take notice that on January 15, 1999, the New England Power Pool and ISO New England Inc. filed a response with respect to the Commission's December 16, 1998 Order in Docket No. EL98-52-000.

*Comment date:* February 16, 1999, in accordance with Standard Paragraph E at the end of this notice.

### 29. Public Service Company of New Mexico

[Docket Nos. OA96-202-001 and OA97-655-000]

Take notice that on January 22, 1999, Public Service Company of New Mexico (PNM) submitted for filing a corrected page 2 (correcting a typographical error) of Ancillary Service Schedule 3, "Regulation and Frequency Response Service", to its Open Access Transmission Tariff, submitted as a component of contemporaneous filings made on July 27, 1998, in association with the above captioned dockets.

A copy of the corrected page has been sent to all parties on the Official Service List of the above captioned dockets, as well as to the New Mexico Public Regulation Commission. PNM's filing is available for public inspection at its offices in Albuquerque, New Mexico.

*Comment date:* February 22, 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, N.E., Washington, D.C. 20426, in accordance with Rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 18 CFR 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies

of these filings are on file with the Commission and are available for public inspection.

**David P. Boergers,**  
*Secretary.*

[FR Doc. 99-2364 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-P

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. CP99-151-000]

#### ANR Pipeline Company; Notice of Intent To Prepare an Environmental Assessment for the Proposed 100 Line and Line 1-100 Replacement Project and Request for Comments on Environmental Issues

January 27, 1999.

The staff of the Federal Energy Regulatory Commission (FERC or Commission) will prepare an environmental assessment (EA) that will discuss the environmental impacts of the 100 Line and Line 1-100 Replacement Project by ANR Pipeline Company (ANR), in Porter County, Indiana.<sup>1</sup> These facilities would consist of about 1.63 miles of 22-inch-diameter pipeline and 1.63 miles of 30-inch-diameter loop. This EA will be used by the Commission in its decision-making process to determine whether the project is in the public convenience and necessity. The application and other supplemental filings in this docket are available for viewing on the FERC Internet website ([www.ferc.fed.us](http://www.ferc.fed.us)). Click on the "RIMS" link, select "Docket #" from the RIMS Menu, and follow the instructions.

Similarly, the "CIPS" link on the FERC Internet website provides access to the texts of formal documents issued by the Commission, such as orders, notices, and rulemakings. From the FERC Internet website, click on the "CIPS" link, select "Docket #" from the CIPS menu, and follow the instructions.

If you are a landowner receiving this notice, you may be contacted by a pipeline company representative about the acquisition of an easement to construct, operate, and maintain the proposed facilities. The pipeline company would seek to negotiate a mutually acceptable agreement. However, if the project is approved by the Commission, that approval conveys with it the right of eminent domain. Therefore, if easement negotiations fail

<sup>1</sup> ANR's application was filed with the Commission under Section 7(c) of the Natural Gas Act.

to produce an agreement, the pipeline company could initiate condemnation proceedings in accordance with state law. A fact sheet addressing a number of typically asked questions, including the use of eminent domain, is attached to this notice as appendix 1.<sup>2</sup>

### Summary of the Proposed Project

ANR wants to replace 1.63 miles of 22-inch-diameter pipeline and 1.63 miles of 30-inch-diameter loop in Porter County, Indiana. The replacements are required for ANR to remain compliant with U.S. Department of Transportation regulations, pursuant to Title 49, Code of Federal Regulations, Part 192, as a result of increased human population density in the vicinity of ANR's existing pipeline right-of-way (ROW).

The location of the project facilities is shown in appendix 2.

### Land Requirements for Construction

Construction of the proposed facilities would require about 33.7 acres of land, including 24.1 acres of existing permanent ROW, 0.8 acre of new permanent ROW, and 8.8 acres of temporary construction ROW that would be restored and allowed to revert to its former use.

### The EA Process

The National Environmental Policy Act (NEPA) requires the Commission to take into account the environmental impacts that could result from an action whenever it considers the issuance of a Certificate of Public Convenience and Necessity. NEPA also requires us to discover and address concerns the public may have about proposals. We call this "scoping". The main goal of the scoping process is to focus the analysis in the EA on the important environmental issues. By this Notice of Intent, the Commission requests public comments on the scope of the issues it will address in the EA. All comments received are considered during the preparation of the EA. State and local government representatives are encouraged to notify their constituents of this proposed action and encourage them to comment on their areas of concern.

The EA will discuss impacts that could occur as a result of the construction and operation of the proposed project under these general headings:

<sup>2</sup> The appendices reference in this notice are not being printed in the **Federal Register**. Copies are available from the Commission's Public Reference and Files Maintenance Branch, 888 First Street, N.E., Washington, D.C. 20426, or call (202) 208-1371. Copies of the appendices were sent to all those receiving this notice in the mail.

- Geology and soils;
- Water resources, fisheries, and wetlands;
- Vegetation and wildlife;
- Public safety;
- Land use;
- Cultural resources;
- Endangered and threatened species.

We will also evaluate possible alternatives to the proposed project or portions of the project, and make recommendations on how to lessen or avoid impacts on the various resources areas.

Our independent analysis of the issues will be in the EA. Depending on the comments received during the scoping process, the EA may be published and mailed to Federal, state, and local agencies, public interest groups, interested individuals, affected landowners, newspapers, libraries, and the Commission's official service list for this proceeding. A comment period will be allotted for review if the EA is published. We will consider all comments on the EA before we make our recommendations to the Commission.

To ensure your comments are considered, please carefully follow the instructions in the public participation section below.

#### Currently Identified Environmental Issues

We have already identified the following issue that we think deserves attention based on a preliminary review of the proposed facilities and the environmental information provided by ANR. This preliminary list of issues may be changed based on your comments and our analysis.

- Four residences in the project area would be within 50 feet of the construction ROW.

#### Public Participation

You can make a difference by providing us with your specific comments or concerns about the project. By becoming a commentor, your concerns will be addressed in the EA and considered by the Commission. You should focus on the potential environmental effects of the proposal, alternatives to the proposal (including alternative routes, and measures to avoid or lessen environmental impact. The more specific your comments, the more useful they will be. Please carefully follow these instructions to ensure that your comments are received in time and properly recorded:

- Send two copies of your letter to: David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First St., N.E., Room 1A, Washington, DC 20426;

• Label one copy of the comments for the attention of the Environmental Review and Compliance Branch, PR-11.2;

• Reference Docket No. CP99-151-000; and

• Mail your comments so that they will be received in Washington, DC on or before February 26, 1999.

#### Becoming an Intervenor

In addition to involvement in the EA scoping process, you may want to become an official party to the proceeding known as an "intervenor". Intervenor play a more formal role in the process. Among other things, intervenors have the right to receive copies of case-related Commission documents and filings by other intervenors. Likewise, each intervenor must provide 14 copies of its filings to the Secretary of the Commission and must send a copy of its filings to all other parties on the Commission's service list for this proceeding. If you want to become an intervenor you must file a motion to intervene according to Rule 214 of the Commission's Rules of Practice and Procedure (18 CFR 385.214) (see appendix 3). Only intervenors have the right to seek rehearing of the Commission's decision. You do not need intervenor status to have your nvironmental comments considered.

Additional information about the proposed project is available from Mr. Paul McKee of the Commission's Office of External Affairs at (202) 208-1088 or on the FERC website ([www.ferc.fed.us](http://www.ferc.fed.us)) using the "RIMS" link to information in this docket number. For assistance with access to RIMS, the RIMS helpline can be reached at (202) 208-2222. Access to the texts of formal documents issued by the Commission with regard to this docket, such as orders and notices, is also available on the FERC website using the "CIPS" link. For assistance with access to CIPS, the CIPS helpline can be reached at (202) 208-2474.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2366 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

#### DEPARTMENT OF ENERGY

#### Federal Energy Regulatory Commission

#### Notice of Application Accepted for Filing; Ready for Environmental Analysis; and Soliciting Motions To Intervene and Protests, Comments, Recommendations, Terms and Conditions, and Prescriptions

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Application:* Major Water Power Project, 5 Megawatts or Less (Subsequent License).

*b. Project No.:* 2964-006.

*c. Date filed:* March 31, 1998.

*d. Applicant:* City of Sturgis, Michigan.

*e. Name of Project:* Sturgis Project.

*f. Location:* On the St. Joseph River, near the Town of Centreville, St. Joseph County, Michigan.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. 791(a)-825(r).

*h. Applicant Contact:* Mr. John J. Griffith, P.E., Electric Department Superintendent, City of Sturgis, 130 North Nottawa, P.O. Box 280, Sturgis, Michigan 49091, (616) 651-2321.

*i. FERC Contact:* Any questions on this notice should be addressed to Patrick Murphy, E-mail address [patrick.murphy@ferc.fed.us](mailto:patrick.murphy@ferc.fed.us) or telephone (202) 219-2659.

*j. Deadline for filing motions to intervene and protests, comments, recommendations, terms and conditions, and prescriptions:* 60 days from the issuance date of this notice.

*All documents (original and eight copies) should be filed with:* David P. Boergers, Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426.

The Commission's Rules of Practice and Procedure require all intervenors filing documents with the Commission to serve a copy of that document on each person whose name appears on the official service list for the project. Further, if an intervenor files comments or documents with the Commission, relating to the merits of an issue that may affect the responsibilities of a particular resource agency, they must also serve a copy of the document on that resource agency.

*k. Status of environmental analysis:* This application has been accepted for filing and is ready for environmental analysis at this time.

*l. Description of Project:* The existing project consists of: (1) an 800-foot long

dam, comprised of a 300-foot-long spillway and a 500-foot-long earthen portion; (2) two powerhouses (old & new); and (3) an 18-mile-long 14.4/24.9-kV transmission line. The old powerhouse houses two turbine-generator units (each 550 Kilowatts (KW)); the new powerhouse houses two units (each 750 KW) totaling 2,600-kW generating capacity. The Sturgis Project reservoir has a surface area of 580 acres and a storage volume of approximately 6,550 acre-feet at 825 feet surface elevation.

*m. Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference, located at 888 First Street N.E., Room 2A, Washington, DC 20426, or by calling (202) 208-1371. The application may be viewed on the web at [www.ferc.fed.us](http://www.ferc.fed.us). Call (202) 208-2222 for assistance. A copy is also available for inspection and reproduction at the address shown in item h above.

*n. This notice also consists of the following standard paragraphs: B and D6.*

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*D6. Filing and Service of Responsive Documents*—The application is ready for environmental analysis at this time, and the Commission is requesting comments, reply comments, recommendations, terms and conditions, and prescriptions.

The Commission directs, pursuant to Section 4.34(b) of the Regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108, May 20, 1991) that all comments, recommendations, term and conditions and prescriptions concerning the application be filed with the Commission within 60 days from the issuance date of this notice. All reply comments must be filed with the Commission within 105 days from the date of this notice.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary

circumstances in accordance with 18 CFR 385.2008.

All filings must (1) bear in all capital letters the title "PROTEST", "MOTION TO INTERVENE", "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," or "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address, and telephone number of the person protesting or intervening; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Agencies may obtain copies of the application directly from the applicant. Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, at the above address. A copy of any protest or motion to intervene must be served upon each representative of the applicant specified in the particular application. A copy of all other filings in reference to this application must be accompanied by proof of service on all persons listed in the service list prepared by the Commission in this proceeding, in accordance with 18 CFR 4.34(b) and 385.2010.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2397 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Surrender of Exemption

January 28, 1999.

Take notice that on the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Application:* Surrender of Exemption.

*b. Project No.:* 8083-005.

*c. Date Filed:* August 29, 1996.

*d. Applicant:* George and Arminda Briggs.

*e. Name of Project:* Briggs Hydroelectric

*f. Location:* On the Teton River, in Fremont County, Idaho.

*g. Filed Pursuant to:* Federal Power Act, 16 U.S.C. 791(a)-825(r).

*h. Applicant Contact:* George and Arminda Briggs, 149 N. 2 W. Box 62, Teton, ID 83451, (208) 458-4548.

*i. FERC Contact:* Regina Saizan, (202) 219-2673.

*j. Comment Date:* March 12, 1999.

*k. Description of Proposed Action:* The exemptee requests to surrender its exemption because the project is no longer operable.

*l. This notice also consists of the following standard paragraphs: B, C1, and D2.*

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*C1. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS" "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also

be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**  
Acting Secretary.

[FR Doc. 99-2398 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Request for Extension of Time To Commence and Complete Project Construction

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Filing:* Request for Extension of Time to Commence and Complete Project Construction.

*b. Applicant:* Town of Telluride, Colorado.

*c. Project No.:* The proposed San Miguel Hydroelectric Project, FERC No. 9248-014 is located on the San Miguel River in San Miguel County, Colorado.

*d. Date Filed:* November 24, 1998.

*e. Pursuant to:* Public Law 105-212.

*f. Applicant Contact:* Sandra M. Stuller, Town Attorney, Town of Telluride, Colorado, 113 Columbia Avenue, P.O. Box 397, Telluride, CO 81435, (970) 728-3071.

*g. FERC Contact:* Mr. Lynn R. Miles, (202) 219-2671.

*h. Comment Date:* March 5, 1999.

*i. Description of the Request:* The licensee requests that the deadline for commencement of construction for FERC Project No. 9248-014 be extended to January 30, 2002. The deadline for completion of construction would be extended to January 30, 2004. Public Law 105-212 directs the Commission to reinstate the project license as of January 30, 1996.

*j. This notice also consists of the following standard paragraphs:* B, C1, and D2.

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified

comment date for the particular application.

*C1. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", OR "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**

Acting Secretary.

[FR Doc. 99-2399 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Request for Extension of Time To Commence and Complete Project Construction

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Filing:* Request for Extension of Time to Commence and Complete Project Construction.

*b. Applicant:* JDJ Energy Company.

*c. Project No.:* The proposed River Mountain Pumped Storage Hydroelectric Project, FERC No. 10455 is to be located on the Arkansas River in Logan County, near Dardanelle, Arkansas.

*d. Date Filed:* November 2, 1998.

*e. Pursuant to:* Public Law 105-283.

*f. Applicant Contact:* Donald H. Clarke, Esquire, Wilkinson, Barker, Knauer & Quinn, LLP, 2300 N Street,

N.W., Suite 700, Washington, D.C. 20037-1128, (202) 783-4141.

*g. FERC Contact:* Mr. Lynn R. Miles, (202) 219-2671.

*h. Comment Date:* March 7, 1999.

*i. Description of the Request:* The licensee requests that the deadline for commencement of construction for FERC Project No. 10455 be extended an additional two years. The deadline to commence project construction would be extended to October 17, 2000. The deadline for completion of construction would be extended to October 17, 2006.

*j. This notice also consists of the following standard paragraphs:* B, C1, and D2.

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*C1. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title

"COMMENTS", "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTEST", or "MOTION TO INTERVENE", as

applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. A copy of any motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also

be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2400 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Application Accepted for Filing and Request for Motions To Intervene and Protests

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Application:* Preliminary Permit.

*b. Project No.:* P-11649-000.

*c. Date filed:* December 18, 1998.

*d. Applicant:* Universal Electric Power Corp.

*e. Name of Project:* Dierks Dam Hydroelectric Project.

*f. Location:* At the existing U.S. Army Corps of Engineers' Dierks Dam on the Saline River, near the Town of Provo, Sevier County, Arkansas.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791 (a)-825(r).

*h. Applicant Contact:* Mr. Ronald S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115.

*i. FERC Contact:* Susan Tseng (202) 219-2798 or E-mail address at susan.tseng@FERC.fed.us

*j. Comment Date:* March 24, 1999.

*k. Description of Project:* The proposed project would utilize the existing U.S. Army Corps of Engineers' Dierks Dam and Reservoir, and would consist of the following facilities: (1) a powerhouse downstream of the dam having an installed capacity of 1,000 kilowatts; (2) a new transmission line; and (3) appurtenant facilities. The proposed average annual generation is estimated to be 5.5 gigawatthours. The cost of the studies under the permit will not exceed \$800,000.

*l. This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

*m. Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 North Capitol Street, N.E., Room 2-A, Washington, D.C. 20426, or by calling (202) 219-

1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Ronald S. Feltenberger 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at www.ferc.fed.us. For assistance, users may call (202) 208-2222.

*A5. Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

*A7. Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

*A9. Notice of intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

*A10. Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these

studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*C. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, NE, Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2401 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
CommissionNotice of Application Accepted for  
Filing and Request for Motions To  
Intervene and Protests

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

*a. Type of Application:* Preliminary Permit.

*b. Project No.:* P-11650-000.

*c. Date filed:* December 18, 1998.

*d. Applicant:* Universal Electric Power Corp.

*e. Name of Project:* Jennings Randolph Dam Hydroelectric Project.

*f. Location:* At the existing U.S. Army Corps of Engineers' Jennings Randolph Dam on the North Branch of the Potomac River, near the Town of Bloomington, MD and Garrett, MD and Mineral, WV counties.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791(a)-825(r).

*h. Applicant Contact:* Mr. Ronald S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115.

*i. FERC Contact:* Susan Tseng (202) 219-2798 or E-mail address at susan.teseng@FERC.fed.us

*j. Comment Date:* March 24, 1999.

*k. Description of Project:* The proposed project would utilize the existing U.S. Army Corps of Engineers' Jennings Randolph Dam and Reservoir, and would consist of the following facilities: (1) a powerhouse downstream of the dam having an installed capacity of 2,570 kilowatts; (2) a new transmission line; and (3) appurtenant facilities. The proposed average annual generation is estimated to be 8.4 gigawatthours. The cost of the studies under the permit will not exceed \$1,000,000.

*l. This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

*m. Available Locations of Applications:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 North Capitol Street, NE, Room 2-A, Washington, D.C. 20426, or by calling (202) 219-1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Ronald S. Feltenberger 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115. A copy of the application may also be viewed or

printed by accessing the Commission's website on the Internet at www.ferc.fed.us. For assistance, users may call (202) 208-2222.

*A5. Preliminary Permit*—Any one desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36).

Submission of a timely notice of intent allows an interested person to file the completing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

*A7. Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

*A9. Notice of intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

*A10. Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the

requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*C. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**  
Acting Secretary.

[FR Doc. 99-2402 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

Federal Energy Regulatory  
CommissionNotice of Application Accepted for  
Filing and Request for Motions To  
Intervene and Protests

January 28, 1999.

Take notice that the following hydroelectric application has been filed

with the Commission and is available for public inspection:

*a. Type of Application:* Preliminary Permit.

*b. Project No.:* P-11652-000.

*c. Date filed:* December 28, 1998.

*d. Applicant:* Universal Electric Power Corp.

*e. Name of Project:* Muskingum L&D #7 Hydroelectric Project.

*f. Location:* At the existing U.S. Army Corps of Engineers' Muskingum Lock and Dam 7 on the Muskingum River, near the Town of McConnellsville, Morgan County, Ohio.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791(a)-825(r).

*h. Applicant Contact:* Mr. Ronald S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115.

*i. FERC Contact:* Susan Tseng (202) 219-2798 or E-mail address at susan.tseng@FERC.fed.us.

*j. Comment Date:* March 24, 1999.

*k. Description of Project:* The proposed project would utilize the existing U.S. Army Corps of Engineers' Muskingum Lock and Dam #7 and Reservoir, and would consist of the following facilities: (1) a powerhouse downstream of the dam having an installed capacity of 3,140 kilowatts; (2) a new transmission line; and (3) appurtenant facilities. The proposed average annual generation is estimated to be 20 gigawatt hours. The cost of the studies under the permit will not exceed \$1,500,000.

*l. This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

*m. Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 North Capitol Street, NE, Room 2-A, Washington, DC 20426, or by calling (202) 219-1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Ronald S. Feltenberger, 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at [www.ferc.fed.us](http://www.ferc.fed.us). For assistance, users may call (202) 208-2222.

*A5. Preliminary Permit*—Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36).

Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

*A7. Preliminary Permit*—Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

*A9. Notice of intent*—A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

*A10. Proposed Scope of Studies under Permit*—A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

*B. Comments, Protests, or Motions to Intervene*—Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protest, or motions to intervene must be received on or before the specified comment date for the particular application.

*C. Filing and Service of Responsive Documents*—Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTESTS", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments*—Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed the have no comments. One copy of an agency's comments must also be sent to the Applicant's representative.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2403 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

#### Notice of Application Accepted for Filing and Request for Motions To Intervene and Protests

January 28, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection;

*a. Type of Application:* Preliminary Permit.

*b. Project No.:* P-11653-000.

*c. Date filed:* December 28, 1998.

*d. Applicant:* Universal Electric Power Corp.

*e. Name of Project:* Muskingum L&D #10 Hydroelectric Project.

*f. Location:* At the existing U.S. Army Corps of Engineers' Muskingum Lock and Dam #10 on the Muskingum River,

near the Town of Zanesville, Muskingum County, Ohio.

*g. Filed Pursuant to:* Federal Power Act 16 U.S.C. §§ 791 (a)–825(r).

*h. Applicant Contact:* Mr. Ronald S. Feltenberger, Universal Electric Power Corp., 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115.

*i. FERC Contact:* Susan Tseng (202) 219-2798 or E-mail address at susan.tseng@FERC.fed.us.

*j. Comment Date:* March 24, 1999.

*k. Description of Project:* The proposed project would utilize the existing U.S. Army Corps of Engineers' Muskingum Lock and Dam #10 and Reservoir, and would consist of the following facilities: (1) a powerhouse downstream of the dam having an installed capacity of 4,000 kilowatts; (2) a new transmission line; and (3) appurtenant facilities. The proposed average annual generation is estimated to be 26 gigawatthours. The cost of the studies under the permit will not exceed \$1,750,000.

*l. This notice also consists of the following standard paragraphs:* A5, A7, A9, A10, B, C, and D2.

*m. Available Locations of Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference and Files Maintenance Branch, located at 888 North Capitol Street, NE., room 2-A, Washington, DC 20426, or by calling (202) 219-1371. A copy is also available for inspection and reproduction at Universal Electric Power Corp., Mr. Ronald S. Feltenberger, 1145 Highbrook Street, Akron, Ohio 44301, (330) 535-7115. A copy of the application may also be viewed or printed by accessing the Commission's website on the Internet at [www.ferc.fed.us](http://www.ferc.fed.us). For assistance, users may call (202) 208-2222.

*A5. Preliminary Permit—*Anyone desiring to file a competing application for preliminary permit for a proposed project must submit the competing application itself, or a notice of intent to file such an application, to the Commission on or before the specified comment date for the particular application (see 18 CFR 4.36). Submission of a timely notice of intent allows an interested person to file the competing preliminary permit application no later than 30 days after the specified comment date for the particular application. A competing preliminary permit application must conform with 18 CFR 4.30(b) and 4.36.

*A7. Preliminary Permit—*Any qualified development applicant desiring to file a competing development application must submit to the Commission, on or before a

specified comment date for the particular application, either a competing development application or a notice of intent to file such an application. Submission of a timely notice of intent to file a development application allows an interested person to file the competing application no later than 120 days after the specified comment date for the particular application. A competing license application must conform with 18 CFR 4.30(b) and 4.36.

*A9. Notice of intent—*A notice of intent must specify the exact name, business address, and telephone number of the prospective applicant, and must include an unequivocal statement of intent to submit, if such an application may be filed, either a preliminary permit application or a development application (specify which type of application). A notice of intent must be served on the applicant(s) named in this public notice.

*A10. Proposed Scope of Studies under Permit—*A preliminary permit, if issued, does not authorize construction. The term of the proposed preliminary permit would be 36 months. The work proposed under the preliminary permit would include economic analysis, preparation of preliminary engineering plans, and a study of environmental impacts. Based on the results of these studies, the Applicant would decide whether to proceed with the preparation of a development application to construct and operate the project.

*B. Comments, Protests, or Motions to Intervene—*Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules of Practice and Procedure, 18 CFR 385.210, .211, .214. In determining the appropriate action to take, the Commission will consider all protests or other comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules may become a party to the proceeding. Any comments, protests, or motions to intervene must be received on or before the specified comment date for the particular application.

*C. Filing and Service of Responsive Documents—*Any filings must bear in all capital letters the title "COMMENTS", "NOTICE OF INTENT TO FILE COMPETING APPLICATION", "COMPETING APPLICATION", "PROTEST", "MOTION TO INTERVENE", as applicable, and the Project Number of the particular application to which the filing refers. Any of the above-named documents must be filed by providing the original and the number of copies provided by

the Commission's regulations to: The Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426. An additional copy must be sent to Director, Division of Project Review, Federal Energy Regulatory Commission, at the above-mentioned address. A copy of any notice of intent, competing application or motion to intervene must also be served upon each representative of the Applicant specified in the particular application.

*D2. Agency Comments—*Federal, state, and local agencies are invited to file comments on the described application. A copy of the application may be obtained by agencies directly from the Applicant. If an agency does not file comments within the time specified for filing comments, it will be presumed to have no comments. One copy of an agency's comments must also be sent to the Applicant's representatives.

**Linwood A. Watson, Jr.,**

*Acting Secretary.*

[FR Doc. 99-2404 Filed 2-1-99; 8:45 am]

BILLING CODE 6717-01-M

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## ENVIRONMENTAL PROTECTION AGENCY

[FRL-6228-8]

### Agency Information Collection Activities: Submission for OMB Review; Comment Request; StarTrack Program

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

**ACTION:** Notice.

**SUMMARY:** In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this document announces that the following Information Collection Request (ICR) has been forwarded to the Office of Management and Budget (OMB) for review and approval: StarTrack Program, EPA ICR Number 1825.01. The ICR describes the nature of the information collection and its expected burden and cost; where appropriate, it includes the actual data collection instrument.

**DATES:** Comments must be submitted on or before March 4, 1999.

**FOR FURTHER INFORMATION CONTACT:** Contact Sandy Farmer at EPA by phone at (202) 260-2740, by email at [farmer.sandy@epamail.epa.gov](mailto:farmer.sandy@epamail.epa.gov), or download off the Internet at <http://www.epa.gov/icr> and refer to EPA ICR No. 1825.01.

**SUPPLEMENTARY INFORMATION:**

*Title:* StarTrack Program, EPA ICR No. 1825.01. This is a new collection.

*Abstract:* U.S. EPA's New England Region office (Boston, MA), in conjunction with participating states and, in some cases, local agencies, is developing a third-party certification system for environmental performance as part of its StarTrack Program. Participants in StarTrack will develop, demonstrate, and/or test compliance tools and principles associated with third-party certification of environmental performance. The goal of the program is to expand the use of compliance and environmental management systems to improve protection of the environment, increase the public's understanding of a company's environmental performance, and further promote efficient use of public and private resources.

StarTrack is one of many reinvention initiatives within EPA. EPA's reinvention philosophy is focused on improving environmental results while allowing flexibility in how the improved results are achieved; sharing information and decision-making with all stakeholders; creating marketplace incentives for compliance with environmental requirements; and lessening the red-tape and paperwork burden of complying with environmental requirements.

Reinventing environmental protection means addressing the everyday inefficiencies and limitations associated with environmental regulations and managing for better environmental results. It includes designing and testing fundamentally new systems, such as those encouraged in StarTrack, and considering alternative approaches to address environmental challenges.

In each year of participation in StarTrack, a company agrees to audit its environmental compliance and management system and to prepare and publish a comprehensive environmental performance report. During every third year of participation, the company will have its compliance and management system audit results reviewed and certified by an independent third party. Follow-up certification may be required on a more frequent basis for facilities not meeting full certification requirements.

To participate, a company must have an established compliance auditing program and a demonstrated commitment to compliance, pollution prevention, and continuous improvement of environmental performance.

Applicants to the program must submit information addressing the selection factors (commitment to

compliance, continuous improvement, and pollution prevention), using examples, quantitative data, and existing documentation, where applicable. An applicant may submit information such as a compliance audit protocol, auditors' qualifications, and a sample of previous audit findings and corrective action plans to support a claim to an established compliance auditing program. The facility should have an acceptable compliance history including no open or recent major enforcement actions.

Upon acceptance to the program, the participant will sign a Letter of Commitment with the EPA Region, participating state regulatory agencies, and participating local regulatory agencies. Facilities renewing their status as a StarTrack company after their first year will not need to re-apply to the program, but will need to sign a Letter of Commitment for the new year of participation. The participant will be required to submit several reports documenting required StarTrack activities throughout the 12-month period of participation. It is ultimately the responsibility of the StarTrack facility to ensure that the following required documents are submitted to EPA in a timely fashion: audit workplans, reports and corrective action plans for all compliance and EMS audits; third party certifier reports and certifications; the facility improvement plan (in response to the certification report); and an annual environmental performance report.

Application to StarTrack is voluntary. Information submitted as part of the requirements for ongoing participation in the program (e.g., EMS and compliance audits, status reports, etc.) is mandatory to maintain StarTrack participatory status and to obtain the Program benefits.

EPA shall treat information claimed as confidential business information (CBI) in accordance with the requirements of 40 CFR part 2. If the participant fails to claim the information as confidential upon submission, it may be made available to the public without further notice. EPA cannot guarantee that information submitted pursuant to this agreement and claimed as confidential will be immune from disclosure to a requester under the Freedom of Information Act (FOIA). Participating state agencies will maintain CBI confidentiality to the extent allowed by relevant state law. Note that some state laws provide for a greater degree of access to and narrower protections for information considered confidential under federal law.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR Chapter 15.

The **Federal Register** document required under 5 CFR 1320.8(d), soliciting comments on this collection of information was published on September 11, 1998 (63 FR 48725); no comments were received.

*Burden Statement:* The annual public reporting and recordkeeping burden for this collection of information is estimated to average 36 hours per response for application to the program; 156 hours per response for program participation; and 67 hours per response for third-party auditor activities. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

*Respondents/Affected Entities:* Businesses, State Governments.

*Estimated Number of Respondents:* 68.

*Frequency of Response:* Annually  
*Estimated Total Annual Hour Burden:* 11,391 hours.

*Estimated Total Annualized Cost Burden:* \$0.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques to the following addresses. Please refer to the EPA ICR number in any correspondence.

Ms. Sandy Farmer, U.S. Environmental Protection Agency, OP Regulatory Information Division (2137), 401 M Street, SW, Washington, DC 20460; and  
Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for

EPA, 725 17th Street, NW,  
Washington, DC 20503.

Dated: January 26, 1999.

**Joseph Retzer,**

*Director, Regulatory Information Division.*

[FR Doc. 99-2448 Filed 2-1-99; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION  
AGENCY**

[FRL-6229-1]

**Notice of Open Meeting of the  
Environmental Financial Advisory  
Board on March 2-3, 1999**

The Environmental Protection Agency's (EPA) Environmental Financial Advisory Board (EFAB) will hold an open meeting of the full Board in Washington, DC on March 2-3, 1999. The meeting will be held at the National Press Club, 13th Floor in the Holeman Lounge, 14th and F Street, NW, Washington, DC. The Tuesday, March 2 session will run from 8:45 a.m. to 5:00 p.m. and the Wednesday, March 3 session will begin at 8:15 a.m. and end at approximately 11:30 a.m.

EFAB is chartered with providing analysis and advice to the EPA Administrator on environmental finance. The purpose of this meeting is to discuss progress with work products under EFAB's current strategic action agenda. Environmental financing topics expected to be discussed include: Clean Water Plan, environmental and multi-state revolving funds, cost-effective environmental management, community-based environmental protection, brownfields redevelopment, and small business access to capital.

The meeting will be open to the public, but seating is limited. For further information, please contact Alecia Crichlow, EFAB Coordinator, U.S. EPA on (202) 564-5188, or Joanne Lynch, U.S. EPA on (202) 564-4999.

Dated: January 26, 1999.

**Joseph Dillon,**

*Acting Comptroller.*

[FR Doc. 99-2446 Filed 2-1-99; 8:45 am]

BILLING CODE 6560-50-M

**ENVIRONMENTAL PROTECTION  
AGENCY**

[FRL-6228-9]

**Environmental Laboratory Advisory  
Board, Meeting Dates and Agenda**

**AGENCY:** Environmental Protection Agency.

**ACTION:** Notice of open meetings.

**SUMMARY:** The Environmental Protection Agency (EPA) will convene two open meetings of the Environmental Laboratory Advisory Board (ELAB) on March 1, 1999, from 2:00 p.m. to 4:00 p.m. and on March 9, 1999 from 10:00 a.m. to 12:00 p.m. Both meetings will be conducted by teleconference. The public is invited to join Ms. Ramona Trovato in Room 911, West Tower, Waterside Mall, 401 M Street, SW, Washington, D.C.

Topics for discussion will include at a minimum consistency of laboratory assessments from multiple accrediting authorities and assessors, the identity of the proficiency testing oversight board/proficiency testing provider accreditor in Chapter 2 of the National Environmental Laboratory Accreditation Conference (NELAC) standards and the role the National Institute of Standards and Technology serves, confidentiality of laboratory inspections when State laboratory staff serve on inspection teams of private laboratories, harmonization of the NELAC standards and EPA's quality guidance, and clarification of calibration issues.

The public is encouraged to attend. Time will be allotted for public comment. Written comments are encouraged and should be directed to Ms. Elizabeth Dutrow; Designated Federal Officer; USEPA; 401 M Street, SW (8724R); Washington, DC 20460. If questions arise, please contact Ms. Dutrow by phone at (202) 564-9061, by facsimile at (202) 565-2441 or by email at dutrow.elizabeth@epamail.epa.gov.

Dated: January 26, 1999.

**Thomas E. Dixon,**

*Acting Director, Quality Assurance Division.*

[FR Doc. 99-2449 Filed 2-1-99; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION  
AGENCY**

[FRL-6229-3]

**Proposed Agreement Pursuant to  
Section 122(h)(1) of the  
Comprehensive Environmental  
Response, Compensation, and Liability  
Act for the Tar Lake Superfund Site**

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

**ACTION:** Notice; request for public comment on proposed CERCLA 122(h)(1) agreement with 56th Century Antrim Iron Works, Inc. ("the Respondent") for the Tar Lake Superfund Site.

**SUMMARY:** In accordance with section 122(I)(1) of the Comprehensive

Environmental Response, Compensation and Liability Act of 1984, as amended ("CERCLA") and section 7003(d) of the Resource Conservation and Recovery Act ("RCRA"), notification is hereby given of a proposed administrative agreement concerning the Tar Lake Company hazardous waste site at 1010 Elder Road, Mancelona, Michigan (the "Site"). EPA proposes to enter into this agreement under the authority of sections 106, 107 and 122 of CERCLA. The proposed agreement has not yet been executed by the Respondent or by EPA or the United States.

Under the proposed agreement, the Respondent will agree to pay oversight costs incurred by the U.S. EPA pursuant to the Administrative Order on Consent dated March 9, 1993, as amended at the Tar Lake Site, in Mancelona, Michigan. In addition, the Respondent will agree to reimburse the United States for \$3.5 million for the tar removal underway at the Site and to pay one-half of the tar removal costs, if any, that exceed \$10 million. EPA will agree not to take action against 56th Century for tar removal costs that do not exceed \$10 million or other future response costs, that when combined with the tar removal costs, do not exceed \$10 million.

For thirty days following the date of publication of this document, the EPA will receive written comments relating to this proposed agreement. EPA will consider all comments received and may decide not to enter this proposed agreement if comments disclose facts or considerations which indicate that the proposed agreement is inappropriate, improper or inadequate. In accordance with section 7003(d) of RCRA, 42 U.S.C. 6973(d), commenters may request an opportunity for a public hearing in the affected area.

**DATES:** Comments on the proposed agreement must be received on or before March 4, 1999.

**ADDRESSES:** Comments should be addressed to the Docket Clerk, U.S. Environmental Protection Agency, Region 5, 77 West Jackson Boulevard, Chicago, Illinois, 60604-3590, and should refer to: In the Matter of Tar Lake Site, Chicago, Illinois, U.S. EPA Docket No. V-W-98-C-471.

**FOR FURTHER INFORMATION CONTACT:** Mary L. Fulghum, U.S. Environmental Protection Agency, Office of Regional Counsel, C-14J, 77 West Jackson Boulevard, Chicago, Illinois, 60604-3590, (312) 886-4683.

A copy of the proposed administrative settlement agreement may be obtained in person or by mail from the EPA's Region 5 Office of Regional Counsel, 77

West Jackson Boulevard, Chicago, Illinois, 60604-3590. Additional background information relating to the settlement is available for review at the EPA's Region 5 Office of Regional Counsel.

**Authority:** The Comprehensive Environmental Response, Compensation, and Liability Act, as amended, 42 U.S.C. 9601-9675.

**William E. Muno,**  
*Director, Superfund Division, Region 5.*  
 [FR Doc. 99-2453 Filed 2-1-99; 8:45 am]  
 BILLING CODE 6560-50-P

**FEDERAL COMMUNICATIONS COMMISSION**

[CC Docket No. 92-237; DA 99-254]

**Next Meeting of the North American Numbering Council**

**AGENCY:** Federal Communications Commission.

**ACTION:** Notice.

**SUMMARY:** On January 28, 1999, the Commission released a public notice announcing the February 17-18, 1999, meeting and agenda of the North American Numbering Council (NANC).

**FOR FURTHER INFORMATION CONTACT:** Linda Simms at (202) 418-2330 or via the Internet at lsimms@fcc.gov or Jeannie Grimes at (202) 418-2313 or via the Internet at jgrimes@fcc.gov. The address is: Network Services Division, Common Carrier Bureau, Federal Communications Commission, 2000 M Street, NW, Suite 235, Washington, DC 20554. The fax number is: (202) 418-7314. The TTY number is: (202) 418-0484.

**SUPPLEMENTARY INFORMATION:** This meeting is open to the members of the

general public. The FCC will attempt to accommodate as many participants as possible. Participation on the conference call is limited. The public may submit written statements to the NANC, which must be received two business days before the meeting. In addition, oral statements at the meeting by parties or entities not represented on the NANC will be permitted to the extent time permits. Such statements will be limited to five minutes in length by any one party or entity, and requests to make an oral statement must be received two business days before the meeting. Requests to make an oral statement or provide written comments to the NANC should be sent to Jeannie Grimes at the address under **FOR FURTHER INFORMATION CONTACT**, stated above.

**Proposed Agenda**

*Wednesday, February 17, 1999*

1. Approval of meeting minutes.
2. Local Number Portability Administration (LNPA) Working Group Report.
3. Industry Numbering Committee (INC) Report.
4. Numbering Resource Optimization (NRO) Working Group Report.
5. Cost Recovery Working Group Report. NBANC Board Report, NANPA Billing and Collection Agent activities.
6. Issue Management Group Report. Discussion and final resolution of NANC policy statement regarding scope of requirements of NANPA for Central Office Code Administration and NPA relief activities. NANC will reach resolution on NPA relief planning issue regarding California's requirement for court reporters at public meetings.
7. North American Numbering Plan Administration Report. Investigation of

the unauthorized use of central office code by carriers lacking certification by a state public utilities commission, and other issues raised by the Colorado Public Utilities Commission's letter of January 27, 1999.

*Thursday, February 18, 1999*

8. North American Numbering Plan Administration (NANPA) Oversight Working Group Report. Presentation of work plan, and other related issues, to meet April NANC deliverable for the first level of NANPA performance evaluation.

9. Steering Group Report. Progress report on interim (temporary) audit requirements for use by NANPA to perform audit of Central Office Code Administration holders and NANPA progress in defining methods to identify code holders.

10. Other Business.

Federal Communications Commission.

**Blaise A. Scinto,**  
*Deputy Chief, Network Services Division, Common Carrier Bureau.*  
 [FR Doc. 99-2458 Filed 2-1-99; 8:45 am]

BILLING CODE 6712-01-P

**FEDERAL COMMUNICATIONS COMMISSION**

**Deletion of Agenda Items From January 28th Open Meeting**

January 27, 1999.

The following items have been deleted from the list of agenda items scheduled for consideration at the January 28, 1999, Open Meeting and previously listed in the Commission's Notice of January 21, 1999.

Item No.	Bureau	Subject
2 .....	COMMON CARRIER	TITLE: Deployment of Wireline Services Offering Advanced Telecommunications Capability (CC Docket No. 98-147); and Request by Bell Atlantic-West Virginia for Interim Relief Under Section 706 or, in the Alternative, a LATA Boundary Modification (NSD-L-98-99). SUMMARY: The Commission will consider action concerning the availability and deployment of advanced services.
3 .....	COMMON CARRIER	TITLE: Inter-Carrier Compensation for ISP-Bound Traffic. SUMMARY: The Commission will consider issues related to the jurisdictional nature of dial-up traffic delivered to internet service providers.
5 .....	COMMON CARRIER	TITLE: Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended. Third Order on Reconsideration, (CC Docket No. 96-149). SUMMARY: The Commission will reconsider its rules implementing the non-accounting safeguard provisions of Section 272 of the Communications Act of 1934, as amended.
7 .....	COMMON CARRIER	TITLE: Defining Primary Lines (CC Docket No. 97-181). SUMMARY: The Commission will consider action to define "primary residential line" and "single line business line" to ensure uniformity in the way price-cap local exchange carriers assess subscriber line charges (SLCs) and presubscribed interexchange carrier charges. (PIICs).

Federal Communications Commission.

**Magalie Roman Salas,**  
Secretary.

[FR Doc. 99-2492 Filed 1-29-99; 8:45 am]

BILLING CODE 6712-01-M

## FEDERAL MARITIME COMMISSION

### Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applicants for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reasons why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

*LK Shipping*, 1012 W. Beverly Blvd., #138 Montebello, CA 90640, Eric Kwong, Sole Proprietor  
*International Freight Services, Inc.*, 10125 N.W., 116th Way #18, Miami, FL 33178, Officers: Margaret Mouttet, President, Kirk Camacho, Vice President

*The Hawken Group, Inc.*, 13126 S. Broadway, Los Angeles, CA 90061, Officers: Ricardo A. Campos, President, Imelda Galindo Post, Secretary.

Dated: January 28, 1999.

**Bryant L. VanBrakle,**  
Secretary.

[FR Doc. 99-2409 Filed 2-1-99; 8:45 am]

BILLING CODE 6730-01-M

## FEDERAL RESERVE SYSTEM

### Change in Bank Control Notices; Acquisitions of Shares of Banks or Bank Holding Companies

The notificants listed below have applied under the Change in Bank Control Act (12 U.S.C. 1817(j)) and § 225.41 of the Board's Regulation Y (12 CFR 225.41) to acquire a bank or bank holding company. The factors that are considered in acting on the notices are set forth in paragraph 7 of the Act (12 U.S.C. 1817(j)(7)).

The notices are available for immediate inspection at the Federal Reserve Bank indicated. The notices also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing to the Reserve Bank indicated for that notice or to the offices

of the Board of Governors. Comments must be received not later than February 17, 1999.

**A. Federal Reserve Bank of Atlanta** (Lois Berthaume, Vice President) 104 Marietta Street, N.W., Atlanta, Georgia 30303-2713:

1. *Harold V. Willis Family Trust*, Manchester, Tennessee; to acquire voting shares of Peoples Bancorp, Inc., Manchester, Tennessee, and thereby indirectly acquire voting shares of Peoples Bank & Trust Company, Manchester, Tennessee.

Board of Governors of the Federal Reserve System, January 28, 1999.

**Robert deV. Frierson,**  
Associate Secretary of the Board.

[FR Doc. 99-2443 Filed 2-1-99; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Formations of, Acquisitions by, and Mergers of Bank Holding Companies

The companies listed in this notice have applied to the Board for approval, pursuant to the Bank Holding Company Act of 1956 (12 U.S.C. 1841 *et seq.*) (BHC Act), Regulation Y (12 CFR Part 225), and all other applicable statutes and regulations to become a bank holding company and/or to acquire the assets or the ownership of, control of, or the power to vote shares of a bank or bank holding company and all of the banks and nonbanking companies owned by the bank holding company, including the companies listed below.

The applications listed below, as well as other related filings required by the Board, are available for immediate inspection at the Federal Reserve Bank indicated. The application also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the standards enumerated in the BHC Act (12 U.S.C. 1842(c)). If the proposal also involves the acquisition of a nonbanking company, the review also includes whether the acquisition of the nonbanking company complies with the standards in section 4 of the BHC Act. Unless otherwise noted, nonbanking activities will be conducted throughout the United States.

Unless otherwise noted, comments regarding each of these applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than March 1, 1999.

**A. Federal Reserve Bank of New York** (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. *Deutsche Bank AG*, Frankfurt, Germany (Deutsche Bank), to become a bank holding company by acquiring Bankers Trust Corporation, New York, New York (Bankers Trust), and thereby indirectly acquire Bankers Trust Company, New York, New York; Bankers Trust (Delaware), Wilmington, Delaware; and Bankers Trust Florida, N.A., Palm Beach, Florida. Deutsche Bank also may form one or more intermediate bank holding companies.

In connection with the proposed transaction, Deutsche Bank also has provided notice to acquire all of the nonbank subsidiaries of Bankers Trust and to engage, directly or indirectly through the nonbank subsidiaries of Deutsche Bank and Bankers Trust, in a variety of nonbanking activities that have been previously determined to be permissible for bank holding companies. These nonbanking activities and companies are described in the notice filed with the Board. Deutsche Bank proposes to engage in most of the activities authorized for bank holding companies under 12 CFR 225.28(b), and in all activities that Bankers Trust currently is authorized by Board Order to conduct. Included among the nonbanking companies that Deutsche Bank will operate after consummation of the proposal are BT Futures Corp., New York, New York, which engages in, among other things, investing and trading activities, and Deutsche Bank Securities Inc., New York, New York, and BT Alex. Brown Incorporated, New York, New York, which engage in, among other things, a limited amount of underwriting and dealing in all types of debt and equity securities (other than ownership interests in open-end investment companies), in accordance with previous Board decisions. These activities will be conducted on a worldwide basis.

In connection with the proposed transaction, Deutsche Bank also has applied to acquire an option to purchase up to 19.9 percent of the outstanding shares of Bankers Trust's common stock. The option would expire upon consummation of the merger.

**B. Federal Reserve Bank of Richmond** (A. Linwood Gill III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. *First Community Financial Corporation*, Burlington, North Carolina; to become a bank holding company by acquiring 100 percent of the voting shares of Community Savings Bank, Inc., SSB, Burlington, North Carolina.

Board of Governors of the Federal Reserve System, January 28, 1999.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 99-2441 Filed 2-1-99; 8:45 am]

BILLING CODE 6210-01-F

## FEDERAL RESERVE SYSTEM

### Notice of Proposals to Engage in Permissible Nonbanking Activities or to Acquire Companies that are Engaged in Permissible Nonbanking Activities

The companies listed in this notice have given notice under section 4 of the Bank Holding Company Act (12 U.S.C. 1843) (BHC Act) and Regulation Y, (12 CFR Part 225) to engage *de novo*, or to acquire or control voting securities or assets of a company, including the companies listed below, that engages either directly or through a subsidiary or other company, in a nonbanking activity that is listed in § 225.28 of Regulation Y (12 CFR 225.28) or that the Board has determined by Order to be closely related to banking and permissible for bank holding companies. Unless otherwise noted, these activities will be conducted throughout the world.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than February 17, 1999.

**A. Federal Reserve Bank of New York** (Betsy Buttrill White, Senior Vice President) 33 Liberty Street, New York, New York 10045-0001:

1. *Fortis (B)*, Brussels, Belgium, Fortis (NL) N.V., Utrecht, the Netherlands, Fortis SA/NV, Brussels, Belgium and Generale de Banque, Brussels, Belgium; to engage *de novo* through its subsidiary, Generale (USA) Finance LLC and Generale (USA) Financial Markets LLC, both of New York, New York, in extending credit and servicing loans, pursuant to § 225.28(b)(1) of Regulation Y; in leasing personal or real property, pursuant to § 225.28(b)(3) of Regulation Y; in investing and trading activities, pursuant to § 225.28(b)(8)(ii) of Regulation Y; and in buying and selling bullion, and related activities, pursuant to § 225.28(b)(8)(iii) of Regulation Y.

Board of Governors of the Federal Reserve System, January 28, 1999.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 99-2442 Filed 2-1-99; 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., Monday, February 8, 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 29, 1999.

**Robert deV. Frierson,**

*Associate Secretary of the Board.*

[FR Doc. 99-2573 Filed 1-29-99; 3:27 pm]

BILLING CODE 6210-01-F

## FEDERAL TRADE COMMISSION

### Public Workshop: U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace

**AGENCY:** Federal Trade Commission.

**ACTION:** Notice announcing dates of workshop, extending deadline for public comments, and modifying comment submission procedure.

**SUMMARY:** The Federal Trade Commission has: (1) set June 8-9, 1999 as the dates for its public workshop examining U.S. perspectives on

consumer protection in the global electronic marketplace announced in 63 **Federal Register** 69289 (December 16, 1998); (2) extended its deadline for receipt of comments to March 26, 1999; and (3) modified the procedure for comment submission to allow for electronic submissions.

**DATES:** The deadline for papers and written comments has been extended to March 26, 1999. The workshop will be held June 8 and June 9, 1999.

#### Comment Submission Procedure:

Written comments should be submitted to: Secretary, Federal Trade Commission, Room H-159, 600 Pennsylvania Ave., NW, Washington, DC, 20580. The Commission requests that commenters submit the original plus five copies, if feasible. To enable prompt review and accessibility to the public, papers and comments also should be submitted, if possible, in electronic form, on either one 5¼ or one 3½ inch computer disk, with a disk label stating the name of the submitter and the name and version of the word processing program used to create the document. (Programs based on DOS or Windows are preferred. Files from other operating systems should be submitted in ASCII text format.) Alternatively, the Commission will accept comments submitted to the following e-mail address <EMarketplace@ftc.gov>. All submissions should be captioned: "U.S. Perspectives on Consumer Protection in the Global Electronic Marketplace—Comment, P994312."

#### FOR FURTHER INFORMATION CONTACT:

A workshop agenda and information about participation will be published closer to the date of the workshop. For questions about the workshop, contact either: *Lisa Rosenthal*, Legal Advisor for International Consumer Protection, Division of Planning and Information, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, telephone 202-326-2249, e-mail <lrosenthal@ftc.gov>; or *Jonathan Smollen*, Attorney, Division of Financial Practices, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, Washington, DC 20580, telephone 202-326-3457, e-mail <jsmollen@ftc.gov>.

**Authority:** 15 U.S.C. section 41 et seq.

By direction of the Commission.

**Donald S. Clark,**

*Secretary.*

[FR Doc. 99-2437 Filed 2-1-99; 8:45 am]

BILLING CODE 6750-01-M

**GENERAL ACCOUNTING OFFICE****Federal Accounting Standards  
Advisory Board**

**AGENCY:** General Accounting Office.

**ACTION:** Notice of meeting on February 25 and 26; schedule of meetings in 1999.

**SUMMARY:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463), as amended, notice is hereby given that the Federal Accounting Standards Advisory Board will hold a two-day meeting on Thursday, February 25 and Friday, February 26, 1999 from 9:00 A.M. to 4:00 P.M. in room 7C13, the Comptroller General's Briefing Room, of the General Accounting Office building, 441 G St., NW., Washington, DC.

**Agenda**

The agenda for the meetings includes:

- Administrative Matters,
- Discussion of exposure drafts on:

- Proposed Amendments to SFFAS No. 2—Accounting for Direct Loans and Loan Guarantees
- Draft Recommended Accounting Standards—Amendments to National Defense PP&E Reporting Requirements
- Draft Interpretation on Accounting for Roadbed Costs in Timber Sales Program
- Management's Discussion and Analysis—Review of comments on the exposure drafts and draft recommendations
- Social Insurance—Issues related to responses to the ED and draft recommended standards
- Deferred Maintenance—Review of comment letters and draft recommendation

**Schedule of Meetings**

Remaining scheduled meetings dates in 1999 are as follows:

- April 12-13
- July 1-2
- September 16-17
- October 28-29
- December 13-14.

Any interested person may attend the meeting as an observer. Board discussions and reviews are open to the public.

**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. 92-463, Section 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 28, 1999.

**Wendy M. Comes,**

*Executive Director.*

[FR Doc. 99-2454 Filed 2-1-99; 8:45 am]

**BILLING CODE 1610-01-M**

**GENERAL ACCOUNTING OFFICE****Advisory Council on Government  
Auditing Standards; Notice of Meeting**

The Advisory Council on Government Auditing Standards will meet Monday, February 22, 1999, from 9:00 a.m. to 4:45 p.m., and Tuesday, February 23, 1999, from 8:30 a.m. to 11:00 a.m., in room 7C13 of the General Accounting Office building, 441 G St., NW., Washington, DC.

The Advisory Council on Government Auditing Standards will hold a meeting to discuss issues that may impact Government Auditing Standards. Any interested persons may attend the meeting as an observer. Council discussions and reviews are open to the public.

**FOR FURTHER INFORMATION CONTACT:** Marcia Buchanan, Assistant Director, Government Auditing Standards, AIMD, 202-512-9321.

Dated: February 5, 1999.

**Marcia B. Buchanan,**

*Assistant Director.*

[FR Doc. 99-2436 Filed 2-1-99; 8:45 am]

**BILLING CODE 1610-02-M**

**DEPARTMENT OF HEALTH AND  
HUMAN SERVICES****Administration for Children and  
Families****Invitation To Comment on Child  
Welfare Outcomes and Measures**

**AGENCY:** Administration on Children, Youth and Families, ACF, HHS.

**ACTION:** Notice of plan to report on outcomes and performance of State child welfare programs, and invitation to comment.

**SUMMARY:** Section 203 of the Adoption and Safe Families Act (ASFA), signed into law in November 1997, requires the Secretary of the Department of Health and Human Services (DHHS) “\* \* \* in consultation with Governors, State legislatures, State and local public officials responsible for administering child welfare programs, and child welfare advocates \* \* \* to develop a set of outcome measures (including length of stay in foster care, number of foster care placements, and number of adoptions) that can be used to assess the

performance of States in operating child protection and child welfare programs \* \* \*.” In addition, the law requires that “\* \* \* to the maximum extent possible, the outcome measures should be developed from data available from the Adoption and Foster Care Analysis and Reporting System.” Section 203 of ASFA also directs the Secretary to prepare and submit to Congress a report on the performance of each State on each outcome measure on May 1, 1999, and annually thereafter.

To meet these requirements, the Children's Bureau, the Federal agency charged with the task of implementing ASFA, engaged in a consultation process with various stakeholders. The outcomes presented in this notice are the result of the Children's Bureau's consultation process and reflect widely-held performance objectives for child welfare program practice. This notice is to advise the public of DHHS's plan to report on these outcomes for State child welfare programs and to invite public comment on them. This notice can be found at <http://www.acf.dhhs.gov/programs/cb/special/index.htm>.

**DATES:** Written comments must be submitted to the office listed in the **ADDRESS** section below on or before March 4, 1999.

**ADDRESS:** Mail written comments (in duplicate) to Marianne Ruffy at the address below.

**FOR FURTHER INFORMATION CONTACT:** Marianne Ruffy, Children's Bureau, 330 C Street, SW, Washington, DC 20447.

**SUPPLEMENTARY INFORMATION:** The Nation's child welfare systems are designed to protect children who have suffered maltreatment, who are at risk for maltreatment, or who are under the care and placement responsibility of the State because their families are unable to care for them. These systems also focus on securing permanent living arrangements for children who are unable to return home. The Children's Bureau is the agency within the Federal Government that is responsible for assisting State child welfare systems by promoting continuous improvement in the delivery of child welfare services.

The Adoption and Safe Families Act (ASFA) represents a significant effort on the part of the Federal Government to improve child welfare service systems. The ASFA establishes clear goals for children served by the Nation's child welfare systems—safety, permanency, and well-being. It calls on the Department of Health and Human Services (DHHS), State officials, advocates, and other experts in the field to work together to identify useful outcome measures to gauge State and

national progress in reaching those goals.

The ASFA also requires that DHHS prepare and submit to Congress a Report on the performance of each State on each outcome measure on May 1, 1999, and annually thereafter. This Report is intended to encourage continued improvements in State child welfare systems. It will provide an overview of system effectiveness by focusing on performance related to particular outcome measures. Additional data will be presented that pertain to system characteristics, some of which were requested in Section 203 of ASFA, to provide a context for the outcome measures. These data will address characteristics of a State's child welfare system such as the number of children reported for abuse or neglect, the number of children found to be victims of maltreatment, the number of children in out-of-home care, the number of adoptions, etc.

The first Report to Congress will include outcome measures that are based on data already available through the Adoption and Foster Care Analysis and Reporting System (AFCARS) and the National Child Abuse and Neglect Data Systems (NCANDS) to avoid additional reporting by the States. The AFCARS, which was implemented in December 1993, is the first federally-mandated data collection program for the collection of foster care and adoption data. The data are case-level data representing children in foster care under the responsibility of the State child welfare agencies and those children adopted with the involvement of those agencies. A list of the AFCARS data elements for foster care and adoption can be found at <http://www.acf.dhhs.gov/programs/cb/special/elements.htm>.

The NCANDS, which is a voluntary data collection system established in 1990, is the primary source of national information on abused and neglected children known to State child protective services agencies. The NCANDS is comprised of two parts: (1) A Summary Data Component, which is a compilation of key aggregate indicators of State child abuse and neglect statistics, and (2) a Detailed Case Data Component, which is a compilation of case-level data about individual children who are the subjects of child maltreatment reports. A list of the data elements for the Summary Data Component can be found at <http://www.acf.dhhs.gov/programs/cb/special/ncands.htm>. The data elements for the Detailed Case Data Component can be found at <http://www.acf.dhhs.gov/programs/cb/special/casedata.htm>.

[www.acf.dhhs.gov/programs/cb/special/casedata.htm](http://www.acf.dhhs.gov/programs/cb/special/casedata.htm).

One consequence of focusing on outcomes that can be measured through AFCARS and NCANDS is that the outcomes to be included in the first Annual Report do not address the goal of child well-being. In the first Annual Report to the Congress, the Children's Bureau intends to discuss issues pertaining to the development of future child well-being outcomes and possible procedures for collecting data pertaining to those outcomes. It is anticipated that these outcomes will relate to the educational and health status of children served by the foster care system.

Because of the extensive variation among State child welfare systems with respect to policies, definitions, resources, capacities, and demographic characteristics, future Annual Reports to the Congress will assess State performance by recording changes in each State's performance on each outcome measure. The ultimate objective will be to document either a pattern of continuous improvement or performance problems relevant to particular outcomes.

In order to ensure that the outcomes presented in the Annual Report would be meaningful with respect to the performance of a child welfare system, the Children's Bureau engaged in a consultation process to assist in developing the outcome measures. This consultation process included:

- Establishing a Consultation Group comprised of representatives from State, Tribal, county, and municipal child welfare agencies; private non-profit child and family services agencies; State legislatures; State Governors' offices; juvenile and family courts; local child advocacy organizations; and a public employee organization;
- Inviting national organizations to serve as resources to the Consultation Group, including the American Bar Association Center on Children and the Law, the American Public Human Services Association, the Child Welfare League of America, the Children's Defense Fund, the National Association of Child Advocates, the National Center for Juvenile Justice, the National Child Welfare Resource Center for Organizational Improvement, the National Conference of State Legislatures, the National Council of Juvenile and Family Court Judges, and the National Governors's Association;
- Convening a meeting of the Consultation Group in September 1998 during which multiple outcomes were proposed and discussed;

- Conducting a review of the outcomes proposed during the Consultation Group meeting by a Children's Bureau staff to identify those outcomes that reflect desired goals and objectives and could be measured using data from the AFCARS and the NCANDS;

- Preparing and disseminating a report on the outcome measures to the Consultation Group and resource organization representatives for their review and comment;
- Convening telephone conference calls and meetings to obtain feedback on the outcome measures from Consultation Group members and resource organization representatives;
- Presenting the outcome measures to participants of three focus groups at the 12th National Conference on Child Abuse and Neglect in Cincinnati, Ohio, to obtain feedback from the larger child welfare community;
- Conducting a review of comments from reviewers and focus group participants to determine areas for revision; and
- Disseminating the revised outcome measures to Consultation Group members and resource organization representatives for review and comment during the second meeting of the Consultation Group in December 1998.

The following outcome measures are the result of this consultation process. The Children's Bureau of DHHS invites your comment on these outcome measures. Revisions resulting from the comment process will be reflected in the final list of outcome measures, which will be used as the basis for the first and subsequent Annual Reports to the Congress on the performance of each State in meeting the goals and objectives of the child welfare system.

#### **Safety-Related Outcome 1: Reduce Recurrence of Child Abuse and/or Neglect**

- During a specified reporting period:
- Of all children who were victims of substantiated child abuse and/or neglect, what percentage had another substantiated report within 12-month period?
  - Of all children who were victims of substantiated child abuse and/or neglect, who were not placed in foster care, and whose families received services from the agency, what percentage had another substantiated report within a 12-month period?
  - Of all children who were victims of substantiated child abuse and/or neglect, who were not placed in foster care, and whose families did not receive services from the agency, what

percentage had another substantiated report within a 12-month period?

**Note:** This outcome addresses a primary objective of all child welfare systems—to prevent the recurrence of child abuse or neglect once it has come to the attention of the system. It is acknowledged that recurrence is the result of multiple factors and that child welfare interventions cannot prevent all recurrence. This outcome may be modified or expanded in the future to include a measure that addresses all reports referred for investigation, not solely those that are substantiated. In the current measure, “substantiated” reports include those that are classified by some States as “indicated.”

### **Safety-Related Outcome 2: Reduce Child Fatalities Due to Child Maltreatment**

During a specified reporting period:  
—Of all child fatalities resulting from abuse or neglect, what percentage of child victims had been the subject of a substantiated report of child abuse or neglect within 12 (24) months prior to the reported fatality?

**Note:** This outcome reflects a fundamental goal of child welfare systems—to prevent child fatalities as a result of abuse or neglect. The measure focuses on fatalities among children who were known to the child welfare system.

### **Safety-Related Outcome 3: Improve the Child Welfare System’s Response Time To Investigate Abuse or Neglect Reports**

During a specified reporting period:  
—Of all child protection investigations initiated, what was the mean length of time between the report and the initiation of the investigation?

**Note:** The selection of this outcome was based on the assumption that a rapid response to an abuse or neglect report can be used as at least one measure of a system’s performance in protecting children. The outcome may be modified in the future to incorporate State response standards for various types of maltreatment reports. The Summary Data Component of NCANDS recently incorporated data elements pertaining to response time information for different categories of reports.

### **Permanency-Related Outcome 1: Reduce Time in Foster Care To Reunification Without Increasing the Rate of Foster Care Re-Entry**

During a specified reporting period:  
—Of all children who were reunified with their parents or caretakers from foster care placements, what percentage was reunified in less than 12 months from the time of latest removal from home?  
—Of all children who were reunified with their parents or caretakers from foster care placements, what percentage was reunified in 12 to 24

months from the time of latest removal from home?

—Of all children who were reunified with their parents or caretakers from foster care placements in less than 12 months from the time of removal, what percentage re-entered foster care in less than 12 months from the time of reunification?

**Note:** The term “foster care” as used in this outcome refers to all out-of-home care arrangements for children for whom the State child welfare agency has responsibility for placement, care, or supervision. The term “reunification” refers to children who are returned to their parents as well as those who are discharged to other relatives (i.e., the child’s case is closed, but the relatives are not the child’s legal guardians).

This outcome reflects the objective of returning children in foster care to their families as soon as possible. The third measure is designed to address the concern that by expediting reunifications a child welfare system may risk increasing re-entries into foster care. Distribution of time-in-care information for all children in foster care may be provided as context information.

### **Permanency-Related Outcome 2: Reduce Time in Foster Care to Adoption Finalization Without Increasing the Number of Adopted Children Who Re-Enter Foster Care**

During a specified reporting period:  
—Of all children who were younger than age 3 at the time of foster care entry and who exited foster care to finalized adoptions, what percentage exited to finalized adoptions in less than 24 months from entry?  
—Of all children who were age 3 or older at the time of foster care entry and who exited foster care to finalized adoptions, what percentage exited to finalized adoptions in less than 36 months from entry?  
—Of all children entering foster care, what percentage had been previously adopted when they were older than 2 years of age?

**Note:** This outcome addresses the objective that children who cannot be reunified with their families should be adopted as quickly as possible. The first two measures reflect a decision to track adoptions of children younger than 3 years of age separately from adoptions of older children. Research findings indicate that adoptions can be achieved more frequently and quickly for children who are under age 3 at the time of entry into care than for children who enter foster care at age 3 or older. The third measure is designed to reflect concerns that expedited adoptions may result in re-entries into the foster care system. By only including children older than age 2 at the time of adoption, we expect to reduce the number of

private agency or international adoptions that may be included in the data.

### **Permanency-Related Outcome 3: Reduce Time in Foster Care to Legal Guardianship**

During a specified reporting period:  
—Of all children who were discharged with a legal guardianship, what percentage was discharged in less than 24 months from time of removal?

**Note:** This outcome reflects the objective of establishing a timely permanency option for children when reunification and adoption have been ruled out as permanency options.

### **Permanency-Related Outcome 4: Reduce the Disparity of Length of Time in Foster Care Between Children of Color and Caucasian Children**

During a specified reporting period:  
—For children in non-relative foster care who exited care, what was the median length of time in care for African American children, American Indian/Alaska Native children, Asian and Pacific Islander children, Caucasian children, and Hispanic children?  
—For children in relative foster care who exited care, what was the median length of time in care for African American children, American Indian/Alaska Native children, Asian and Pacific Islander children, Caucasian children, and Hispanic children?

**Note:** This outcome reflects concerns that children of color may receive differential treatment in many of National’s foster care systems. The measures are designed to track both the disparity of length of time in foster care and the impact of relative foster care on length of time in care.

### **Permanency-Related Outcome 5: Increase Permanency for Disabled and Older Children**

During a specified reporting period:  
—For all children who were identified as disabled and who exited care, what percentage exited to reunification, adoption, or legal guardianship?  
—For all children who were 12 years of age or older at the time of their most recent entry into care and who exited care, what percentage exited to reunification, adoption, or legal guardianship?  
—For all children exiting care through emancipation, what percentage was younger than 12 years of age at the time of their most recent entry into care?

**Note:** These measures address general concerns in the field about permanency for disabled children, children who enter care when they are adolescents, and older children for whom efforts to achieve permanent homes are lacking or ineffective.

### Permanency-Related Outcome 6: Increase Placement Stability

During a specified reporting period:

- For all children who had been in foster care for longer than 3 months, what percentage had not more than two placement settings during their most recent episode?

**Note:** This outcome addresses the objective of reducing the number of placement settings in a single-foster care episode. The measure acknowledges that in many States a large percentage of children will experience at least two placements because of the use of emergency foster care services at the time of removing a child from the home.

### Permanency-Related Outcome 7: Reduce Placements of Children in Group Homes, Institutions, and Out-of- State Care

During a specified reporting period:

- For all children who were younger than age 12 when they were placed in their current foster care settings, what percentage had a current placement in a group home? What percentage had a current placement in an institution?
- For all children who were 12 years of older when they were placed in their current foster care settings, what percentage had a current placement in a group home? What percentage had a current placement in an institution?
- For all children whose current placement settings are group homes or institutions, what percentage was placed out of State?

**Note:** This outcome reflects the objective of placing most children in family foster homes and in placements that are in close proximity to their families. It is acknowledged that for some children, particularly adolescents, group homes, institutions, or out-of-State placements may be appropriate.

Dated: January 26, 1999.

#### Patricia Montoya,

Commissioner, Administration on Children,  
Youth and Families.

[FR Doc. 99-2361 Filed 1-29-99; 8:45 am]

BILLING CODE 4184-01-M

## DEPARTMENT OF HEALTH AND HUMAN SERVICES

### Health Resources and Services Administration

#### Advisory Council; Notice of Meeting

In accordance with section 10(a) (2) of the Federal Advisory Committee Act (Public Law 92-463), announcement is made of the following National Advisory body scheduled to meet during the month of February 1999.

*Name:* National Advisory Council (NAC) on the National Health Service Corps (NHSC).

*Date and Time:* February 18, 1999; 6:00 p.m.–9:00 p.m., February 19, 1999; 9:00 a.m.–4:30 p.m., February 20, 1999; 9:00 a.m.–5:00 p.m., February 21, 1999; 8:30 a.m.–11:00 a.m.

*Place:* Residence Inn by Marriott, 7335 Wisconsin Avenue, Bethesda, Maryland 20814, Phone: (301) 718-0200.

*Agenda:* In preparation for the year 2000 reauthorization, the NAC has developed a draft position paper, "The National Health Service Corps for the 21st Century." Agenda items include staff from Capitol Hill and representatives from HRSA field offices convening separate panels to provide comments. Representatives from the central office will present their comments to the Council as well. Other agenda items include updates on the NHSC program. Copies of the draft paper will be available at the meeting.

The meeting is open to the public. For further information, call Ms. Eve Morrow, Division of National Health Service Corps, at (301) 594-4144.

Dated: January 28, 1999.

#### Jane M. Harrison,

Director, Division of Policy Review and  
Coordination.

[FR Doc. 99-2412 Filed 2-1-99; 8:45 am]

BILLING CODE 4160-15-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Availability of a Draft Recovery Plan for the San Benito Evening-Primrose for Review and Comment

**AGENCY:** Fish and Wildlife Service,  
Interior.

**ACTION:** Notice of document availability.

**SUMMARY:** The U.S. Fish and Wildlife Service announces the availability for public review of a draft Recovery Plan for the San Benito evening-primrose (*Camissonia benitensis*). This California plant occurs mostly on stream terraces whose soils are derived from serpentine rock near San Benito Mountain in southern San Benito County and western Fresno County.

**DATES:** Comments on the draft recovery plan received by April 5, 1999 will be considered by the Service.

**ADDRESSES:** Copies of the draft recovery plan are available for inspection, by appointment, during normal business hours at the following location: Ventura Fish and Wildlife Office, U.S. Fish and Wildlife Service, 2493 Portola Road, Suite B, Ventura, California 93003.

Requests for copies of the draft recovery plan and written comments and materials regarding this plan should be addressed to Diane K. Noda, Field Supervisor, at the above Ventura address.

**FOR FURTHER INFORMATION CONTACT:** Tim Thomas, Botanist, at the above Ventura address (phone: 805/644-1766).

#### SUPPLEMENTARY INFORMATION:

#### Background

Restoring endangered or threatened animals and plants to the point where they are again secure, self-sustaining members of their ecosystems is a primary goal of the Service's endangered species program. To help guide the recovery effort, the Service is working to prepare recovery plans for most of the listed species native to the United States. Recovery plans describe actions considered necessary for the conservation of the species, establish criteria for the recovery levels for downlisting or delisting them, and estimate time and cost for implementing the recovery measures needed.

The Endangered Species Act, as amended (16 U.S.C. 1531 *et seq.*) (Act), requires the development of recovery plans for listed species unless such a plan would not promote the conservation of a particular species. Section 4(f) of the Act as amended in 1988 requires that public notice and an opportunity for public review and comment be provided during recovery plan development. The Service will consider all information presented during the public comment period prior to approval of each new or revised recovery plan. Substantive technical comments will result in changes to the plans. Substantive comments regarding recovery plan implementation may not necessarily result in changes to the recovery plans, but will be forwarded to appropriate Federal or other entities so that they can take these comments into account during the course of implementing recovery actions. Individualized responses to comments will not be provided.

This annual herb is listed as endangered. It occurs largely on lands managed by the U.S. Bureau of Land Management, where it is threatened by off-highway vehicle recreation and the resultant accelerated erosion in its habitat. Its habitat consists of mostly alluvial terraces in areas of serpentine rock. This rock type is rather toxic to most plants because it provides an unusual balance of plant nutrients. Serpentine areas generally have sparse vegetation. Serpentine dust is toxic to people because it contains asbestos.

The objective of this plan is to conserve the plant so that protection by the Act is no longer necessary. Actions necessary to accomplish this objective include prevention of additional degradation and loss of the plant's habitat, partly by developing and

implementing an off-highway vehicle management plan. The plan also seeks to protect populations of the plant on private lands, protect populations from activities other than off-highway vehicular recreation, and to develop a public awareness program.

#### Public Comments Solicited

The Service solicits written comments on this draft recovery plan. All comments received by the date specified above will be considered prior to final approval of this plan.

**Authority:** The authority for this action is section 4(f) of the Endangered Species Act, 16 U.S.C. 1533(f).

Dated: January 25, 1999.

**Elizabeth H. Stevens,**

Acting Manager, California/Nevada Operations Office.

[FR Doc. 99-2375 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Availability of a Habitat Conservation Plan and Receipt of an Application for an Incidental Take Permit for the La Rue Housing/Bowley Center Projects, Yolo County, California

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of Availability and Receipt of Application.

**SUMMARY:** This notice advises the public that the University of California, Davis (University), has applied to the Fish and Wildlife Service (Service) for an incidental take permit pursuant to section 10(a)(1)(B) of the Endangered Species Act of 1973, as amended (Act). The proposed permit would authorize the incidental take of the valley elderberry longhorn beetle (*Desmocerus californicus dimorphus*), federally listed as threatened, and modification of its habitat during construction of a new student housing facility and a greenhouse/education facility on the University campus in Yolo County, California. The permit would be in effect for 10 years.

The Service announces the receipt of the University's incidental take permit application which includes the proposed "Low-Effect Habitat Conservation Plan for the Valley Elderberry Longhorn Beetle at the La Rue Student Housing and Bowley Center Projects, University of California, Davis." The proposed habitat conservation plan (Plan) is available for public comment. The Plan fully

describes the proposed project and the measures the University would undertake to minimize and mitigate project impacts to the valley elderberry longhorn beetle. The Service has made a preliminary determination that the University's Plan qualifies as a "low-effect" habitat conservation plan eligible for categorical exclusion under the National Environmental Policy Act. We explain the basis for this determination in an Environmental Action Statement, which is also available for public review. This notice is provided pursuant to section 10(c) of the Act.

**DATES:** Written comments on the permit application and Plan should be received on or before March 4, 1999.

**ADDRESSES:** Comments regarding the permit application or the Plan should be addressed to Wayne White, Field Supervisor, Fish and Wildlife Service, Sacramento Fish and Wildlife Office, 3310 El Camino Avenue, Suite 130, Sacramento, California 95821-6340. Comments may be sent by facsimile to (916) 979-2744.

**FOR FURTHER INFORMATION CONTACT:** Mr. Brian Twedt or Mr. William Lehman, Fish and Wildlife Biologists, Sacramento Fish and Wildlife Office; telephone (916) 979-2129.

#### SUPPLEMENTARY INFORMATION:

##### Document Availability

Individuals wishing copies of the Plan and associated documents for review should immediately contact the above office. Documents also will be available for public inspection, by appointment, during normal business hours at the above address.

##### Background

Section 9 of the Act and Federal regulation prohibit the "take" of a species listed as endangered or threatened, respectively (take is defined under the Act, in part, as to kill, harm, or harass a federally listed species). However, the Service may issue permits to authorize "incidental take" (defined by the Act as take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity) of listed species under limited circumstances. Regulations governing permits for threatened species are promulgated in 50 CFR 17.32; regulations governing permits for endangered species are promulgated in 50 CFR 17.22.

The La Rue Student Housing Project would be located in the western portion of the University's Central Campus and composed of four or more "neighborhoods." Approximately 16 studio, 40 one-bedroom, 64 two-bedroom, 52 three-bedroom, and 20

four-bedroom units would be divided among the "neighborhoods." Buildings would range from one to three stories in height. This project would provide housing for between 550 and 750 students.

The Bowley Center would consist of a Plant Science Teaching Center and would include laboratories, greenhouses, offices, and a lecture room. This facility would be located in the western portion of the Central Campus. It would integrate lecture, greenhouse, field, and dry lab facilities in a single site, allowing for a more efficient use of time.

In May, 1997, the proposed project area was surveyed for potential habitat for rare, threatened, or endangered species and other biological features that could be affected by the project. Only one federally listed species, the threatened valley elderberry longhorn beetle (beetle), has the potential to occur on the project site and to be directly impacted by the proposed project. The University has agreed to implement the following measures to minimize and mitigate impacts that may result from incidental take of the beetle: (1) mitigation and monitoring of transplanted elderberry shrubs and supplemental plantings would be conducted according to the Service's Mitigation Guidelines for the Valley Elderberry Longhorn Beetle, dated September 19, 1996; (2) 14 affected elderberry shrubs would be transplanted to a mitigation site along Putah Creek on Russel Ranch, on property owned by the University; (3) 336 additional elderberry cuttings would be planted to compensate for any adverse impacts to the 14 elderberry shrubs resulting from the proposed project; and (4) the mitigation area would be managed for the purpose of long-term protection of valley elderberry longhorn beetle habitat.

The Service has made a preliminary determination that the University's Plan qualifies as a "low-effect" habitat conservation plan as defined by the Service's Habitat Conservation Planning Handbook (November 1996). Low-effect habitat conservation plans are those involving: (1) minor or negligible effects on federally listed and candidate species and their habitats; and (2) minor or negligible effects on other environmental values or resources. The La Rue Housing/Bowley Center Plan qualifies as a low-effect habitat conservation plan for the following reasons:

1. Approval of the Plan would result in minor or negligible effects on the beetle and its habitat. The Plan may, in fact, result in a beneficial effect to the

beetle, since the fourteen affected shrubs would be transplanted from a relatively disturbed area to a protected environment. The Service does not anticipate significant direct or cumulative effects to the beetle resulting from construction of the new student housing or greenhouse/educational facilities.

2. Approval of the Plan would not have adverse effects on unique geographic, historic or cultural sites, or involve unique or unknown environmental risks.

3. Approval of the Plan would not result in any cumulative or growth inducing impacts and, therefore, would not result in significant adverse effects on public health or safety.

4. The project does not require compliance with Executive Order 11988 (Floodplain Management), Executive Order 11990 (Protection of Wetlands), or the Fish and Wildlife Coordination Act, nor does it threaten to violate a federal, state, local, or tribal law or requirement imposed for the protection of the environment.

5. Approval of the Plan would not establish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects.

The Service therefore has preliminarily determined that approval of the Plan qualifies as a categorical exclusion under the National Environmental Policy Act, as provided by the Department of the Interior Manual (516 DM 2, Appendix 1 and 516 DM 6, Appendix 1). Based upon this preliminary determination, we do not intend to prepare further National Environmental Policy Act documentation. The Service will consider public comments in making its final determination on whether to prepare such additional documentation.

This notice is provided pursuant to section 10(c) of the Act. The Service will evaluate the permit application, the Plan, and comments submitted therein to determine whether the application meets the requirements of section 10(a) of the Act. If it is determined that those requirements are met, a permit will be issued for the incidental take of the valley elderberry longhorn beetle in conjunction with implementation of the La Rue Student Housing and Bowley Center projects. The final permit decision will be made no sooner than 30 days from the date of this notice.

Dated: January 26, 1999.

**Elizabeth H. Stevens,**

*Manager, California/Nevada Operations Office, Fish and Wildlife Service, Region 1, Sacramento, California.*

[FR Doc. 99-2376 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Klamath Fishery Management Council Meeting

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Klamath Fishery Management Council, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The Klamath Fishery Management Council makes recommendations to agencies that regulate harvest of anadromous fish in the Klamath River Basin. This objectives of this meeting are to hear technical reports, review the 1998 fishery season, and discuss and plan management of the 1999 season, including fish allocation. The meeting is open to the public.

**DATES:** The Klamath Fishery Management Council will meet from 10:00 a.m. to 5:00 p.m. on Tuesday, February 23, 1999; from 8:00 a.m. to 5:00 p.m. on Wednesday, February 24, 1999; and from 8:00 a.m. to 3:00 p.m. on Friday, February 25, 1999.

**PLACE:** The meeting will be held at the Doubletree Hotel, 1929 Fourth Street, Eureka, California.

**FOR FURTHER INFORMATION CONTACT:**

Dr. Ronald A. Iverson, Project Leader, U.S. Fish and Wildlife Service, P.O. Box 1006 (1215 South Main), Yreka, California 96097-1006, telephone (530) 842-5763.

**SUPPLEMENTARY INFORMATION:** This meeting will be held jointly with the Klamath Fishery Management Council meeting on the morning of Wednesday, February 24, 1999. The Klamath Fishery Management Council was also established under the authority of the Klamath River Basin Fishery Resources Restoration Act.

For background information on the Klamath River Basin Fisheries Task Force, please refer to the notice of their initial meeting that appeared in the **Federal Register** on July 8, 1987 (52 FR 25639).

Dated: January 27, 1999.

**Elizabeth H. Stevens,**

*Acting Manager, California/Nevada Operations Office.*

[FR Doc. 99-2380 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-55-P

## DEPARTMENT OF THE INTERIOR

### Fish and Wildlife Service

#### Klamath River Basin Fisheries Task Force Meeting

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of meeting.

**SUMMARY:** Pursuant to section 10(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. I), this notice announces a meeting of the Klamath River Basin Fisheries Task Force, established under the authority of the Klamath River Basin Fishery Resources Restoration Act (16 U.S.C. 460ss *et seq.*). The meeting is open to the public.

**DATES:** The Klamath River Basin Fisheries Task Force will meet from 8:00 a.m. to 5:00 p.m. on Wednesday, February 24, 1999 and Thursday, February 25, 1999, and from 8:00 a.m. to 10:00 a.m. on Friday, February 26, 1999.

**PLACE:** The meeting will be held at the Doubletree Hotel (1929 Fourth Street), Eureka, California.

**FOR FURTHER INFORMATION CONTACT:** Dr. Ronald A. Iverson, Project Leader, U.S. Fish and Wildlife Service, P.O. Box 1006 (1215 South Main), Yreka, California 96097-1006, telephone (530) 842-5763.

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Dated: January 27, 1999.

**Elizabeth H. Stevens,**

*Acting Manager, California/Nevada Operations Office.*

[FR Doc. 99-2381 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-55-P

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**

**Bureau of Indian Affairs**

**Status of Red Lake Tribal Indian Lands in Minnesota**

**AGENCIES:** Bureau of Land Management, Interior; Bureau of Indian Affairs, Interior.

**ACTION:** Notice identifying lands subject to Secretarial Order of Restoration of February 22, 1945.

**SUMMARY:** On February 22, 1945, the Secretary of the Interior issued an Order restoring to the Red Lake Band of Chippewa Indians of Minnesota ("Tribe") certain lands that the Tribe had previously ceded to the United States for use by non-Indians. The lands restored to the Tribe by the 1945 Order are lands that were continuously held in trust by the United States since the cessions, that were never sold or otherwise disposed of, and for which the Tribe was never paid. This notice provides a partial list of the lands restored to the Tribe by the 1945 Order.

**FOR FURTHER INFORMATION CONTACT:** W. Hord Tipton, State Director, Eastern States Office, or Walter Rewinski, Deputy State Director, Resources Planning, Use and Protection, Eastern States Office, Bureau of Land Management, 7450 Boston Boulevard, Springfield, Virginia 22153.

**SUPPLEMENTARY INFORMATION:** The Nelson Act, Act of Jan. 14, 1889, ch. 24, 25 Stat. 642, created and authorized a federal commission to negotiate a cession of lands in northern Minnesota from the Red Lake Band of Chippewa Indians of Minnesota ("Tribe") to the United States. By agreement dated July 8, 1889, 2.9 million acres of land known as "Royce 706" was ceded by the Tribe to the United States to be held in trust, subject to sale by the United States for the benefit of the Tribe. The Tribe retained a much smaller area known as "Royce 707."

On March 10, 1902, another agreement was negotiated between the Tribe and the United States for the cession of an additional 256,152 acres of land in the western portion of Royce 707. This agreement was approved by Congress. Act of Feb. 20, 1904, ch. 161, 33 Stat. 46. The Tribe's present-day reservation is composed of land remaining after the 1889 and 1902 cessions. Consistent with the provisions of the Nelson Act, the lands the Tribe ceded to the United States were opened for timber sales and homesteading, and

most of the lands were disposed of by the 1930s.

The Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C. §§ 461 *et seq.*, authorized the Secretary of the Interior, if he found it to be in the public interest, "to restore to tribal ownership the remaining surplus lands of any Indian reservation [that prior to June 18, 1934 were] opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public land laws of the United States[.]" 25 U.S.C. § 463(a).

On February 22, 1945, exercising this authority granted by the IRA, the Secretary of the Interior issued an Order of Restoration ("1945 Order"), 10 Fed. Reg. 2448 (1945). The 1945 Order "restore[d] to tribal ownership all those lands of the Red Lake Indian Reservation which were ceded by the Indians under [the Nelson Act and the Act of Feb. 20, 1904] and which were opened for sale or entry but for which the Indians have not been paid and which now are or hereafter may be classified as undisposed of[.]" 10 Fed. Reg. at 2449. *See also* Act of Dec. 4, 1942, ch. 673, 56 Stat. 1039 ("[A]ll right, title, and interest of the Minnesota Chippewa Tribe in and to the so-called Red Lake Indian ceded lands, including any administrative reserves, is hereby declared extinguished and title thereto vested in the Red Lake Band of Chippewa Indians[.]").

On May 28, 1945, the Acting Commissioner of the General Land Office forwarded to the Commissioner of the Office of Indian Affairs a list of lands that satisfied the criteria of the 1945 Order and could be returned to the Band. On April 29, 1946 and January 9, 1947, amendments to the list of lands were made. The list of May 28, 1945 and the amendments of April 29, 1946 and January 9, 1947 (collectively, the "1945 List") totaled approximately 157,499 acres of non-contiguous lands. The 1945 List was to have been published in the **Federal Register** to provide public notice of which lands were subject to the 1945 Order. However, shortly after the 1945 List was completed, several title and legal description problems with lands on it were discovered, and the 1945 List was never published in the **Federal Register**.

From 1945 until 1988, the Department attempted to resolve many of the vexing title and legal description problems with the lands on the 1945 List. On December 22, 1988, the Acting State Director of the Eastern States Office, Bureau of Land Management ("BLM"), forwarded to the Bureau of Indian Affairs a comprehensive listing of lands totaling approximately 186,533 acres

("1988 List") that the BLM had determined qualified for restoration to the Band under the 1945 Order. Many of the lands on the 1945 List were on the 1988 List. However, shortly after the 1988 List was completed, several further title and legal description problems were manifested and the 1988 List was never published in the **Federal Register**.

In December, 1997, the Department initiated a review of the lands on the 1945 and 1988 Lists. The Department has determined that the following lands that were ceded by the Tribe to the United States in 1889 and 1902, that were held in trust by the United States, subject to sale for the benefit of the Tribe, and that were not disposed of by the United States, were restored to the Tribe by the 1945 Order. This list does not represent a final list of all those lands restored to tribal ownership under the 1945 Order. Descriptions of any additional lands that were restored by the 1945 Order may be published as they are confirmed.

Description	Acreage
T. 157 N., R. 25 W. Sec. 3, Lot 7 .....	3.08
T. 158 N., R. 26 W. Sec. 16, NE4, NW4, SW4, SE4 .....	640
T. 157 N., R. 27 W. Sec. 16, NW4, NW4NE4	200
T. 158 N., R. 27 W. Sec. 16, NE4, NW4 .....	320
T. 156 N., R. 28 W. Sec. 16, NE4, NW4, SW4, SE4 .....	640
T. 157 N., R. 28 W. Sec. 1, Lot 1, SE4NE4, E2SE4 .....	162.76
Sec. 4, Lots 1,2,3,4, S2NW4 .....	255.40
Sec. 6, NE4SW4 .....	40
Sec. 7, SE4SE4 .....	40
Sec. 8, SW4SW4 .....	40
Sec. 9, NE4, NW4, SW4, SE4 .....	640
Sec. 10, NW4, NE4SW4, W2SW4, .....	280
Sec. 12, NE4, E2SW4, SE4 .....	400
Sec. 13, N2NE4 .....	80
Sec. 15, NW4NW4, SE4NW4, SW4SW4 .....	120
Sec. 16, NE4, NW4, S2SW4, S2SE4 .....	480
Sec. 21, NE4, NW4, SW4, SE4 .....	640
Sec. 22, SW4NE4, NW4, N2SW4, SW4SW4 .....	320
Sec. 24, NE4NE4, S2NE4, SE4 .....	280
Sec. 25, NE4, NW4, SW4, SE4 .....	640
Sec. 28, NE4, NW4, SW4, SE4 .....	640
Sec. 33, Lots 1,2,3,4, NE4, NW4, N2SW4, N2SE4 .....	637.16

Description	Acreege	Description	Acreege	Description	Acreege
Sec. 36, NE4, NW4, SW4, SE4 .....	640	Sec. 7, SW4NE4, SE4NW4, E2SW4, SE4	320	Sec. 34, W2NE4, W2NW4, SE4NW4, SW4, N2SE4, SE4SE4	480
T. 158 N., R. 28 W.		Sec. 8, SE4NE4, E2SW4, NE4SE4, S2SE4 .....	240	Sec. 35, W2SW4, SE4SW4 .....	120
Sec. 33, NE4, NW4, SW4, SE4 .....	640	Sec. 9, W2SW4 .....	80	Sec. 36, NE4, E2NW4 .....	240
Sec. 34, SW4NE4, NW4, SE4SW4 .....	240	Sec. 10, W2SW4 .....	80	T. 166 N., R. 33 W.	
Sec. 36, S2SE4 .....	80	Sec. 11, N2NE4, NE4NW4 .....	120	Sec. 6, Lots 2, 3, 6, NE4NW4 .....	159.25
T. 159 N., R. 28 W.		Sec. 12, S2NE4, NW4, NE4SW4, N2SE4 .....	360	Sec. 25, Lot 2 .....	35.75
Sec. 3, S2NE4, SE4NW4, N2SW4 .....	200	Sec. 13, N2SW4 .....	80	T. 167 N., R. 33 W.	
Sec. 4, S2SW4 .....	80	Sec. 14, N2NE4, NW4NW4, NE4SE4 .....	160	Sec. 1, SE4NW4 .....	40
Sec. 5, SE4SE4 .....	40	Sec. 15, E2NE4, W2NW4, SW4, N2SE4	400	Sec. 2, SW4SE4 .....	40
Sec. 36, NE4NE4 .....	40	Sec. 16, S2NE4, S2NW4, SW4, SE4 .....	480	Sec. 3, SE4NW4 .....	40
T. 153 N., R. 29 W.		Sec. 17, W2NE4, NW4, SW4, SE4 .....	560	Sec. 4, Lots 2, 6 .....	6.85
Sec. 7, Lot 2 .....	0.31	Sec. 18, Lots 1, 2, 3, 4, NE4, NE4NW4, SE4SW4, NE4SE4, S2SE4 .....	516.20	Sec. 5, Lot 5 .....	7.55
T. 158 N., R. 29 W.		Sec. 19, N2NE4, SE4NE4, NE4SE4, S2SE4 .....	240	Sec. 7, N2NW4 .....	80
Sec. 5, N2SW4, SE4SW4	120	Sec. 20, NE4, NW4, SW4, W2SE4 .....	560	Sec. 11, N2NE4, NE4NW4 .....	122.40
Sec. 6, Lot 6 .....	41.81	Sec. 21, W2NE4, NW4, N2SE4 .....	320	Sec. 12, Lot 6, N2NW4 ...	80.15
T. 159 N., R. 29 W.		Sec. 22, SW4NE4, E2NW4 .....	120	Sec. 13, Lot 1 .....	0.90
Sec. 2, E2SE4 .....	80	Sec. 25, S2NE4, SE4NW4, NE4SW4, S2SW4, SE4 .....	400	Sec. 17, W2SW4 .....	80
Sec. 3, Lots 3,4, .....	81.96	Sec. 26, SE4SW4 .....	40	Sec. 18, S2NE4, S2NW4, SW4, N2SE4, SW4SE4, .....	440
Sec. 18, Lot 2 .....	33.64	Sec. 28, NW4NE4 .....	40	Sec. 19, W2NE4, NW4, SW4SW4 .....	280
T. 154 N., R. 30 W.		Sec. 29, NE4NE4 .....	40	Sec. 26, Lots 2, 3 .....	10.44
Sec. 36, N2NW4 .....	80	Sec. 30, E2NE4, E2SW4	160	Sec. 27, Lot 2 .....	4.87
T. 151 N., R. 31 W.		Sec. 31, S2SE4 .....	80	Sec. 30, W2NW4, SE4NW4, SW4 .....	280
Sec. 16, Lot 8 .....	1.18	Sec. 32, W2NE4, S2NW4, SW4, SE4 .....	480	Sec. 31, NW4, SW4 .....	320
T. 152 N., R. 31 W.		Sec. 33, SW4, SE4 .....	320	Sec. 36, Lot 5 .....	0.33
Sec. 16, SE4SE4 .....	40	Sec. 34, S2NE4, SE4NW4, SW4, N2SE4, SW4SE4 .....	400	T. 150 N., R. 34 W.	
T. 158 N., R. 31 W.		Sec. 35, NE4, NW4, E2SW4, SE4 .....	560	Sec. 29, Lot 8 .....	0.56
Sec. 3, Lot 1 .....	40.14	Sec. 36, NE4, NW4, SW4, SE4 .....	640	T. 158 N., R. 34 W.	
T. 158 N., R. 32 W.		Sec. 37, NE4NE4, E2SW4	160	Sec. 1, Lot 3, S2NW4, NE4SW4, NW4SE4 .....	199.51
Sec. 6, Lots 1 thru 7, S2NE4, SE4NW4, E2SW4, SE4 .....	631.85	Sec. 38, W2NE4, S2NW4, SW4, SE4 .....	480	Sec. 2, Lot 4, SW4NE4, S2NW4, NE4SW4, W2SE4 .....	279.37
Sec. 7, Lots 1,2, NE4, E2NW4, N2SE4 .....	396	Sec. 39, SW4, SE4 .....	320	Sec. 3, Lots 1, 2, 3, 4, S2NE4, S2NW4 .....	318.72
Sec. 13, Lot 2, S2NW4 ...	112	Sec. 40, S2NE4, SE4NW4, SW4, N2SE4, SW4SE4 .....	400	Sec. 4, Lots 1, 2, 4, S2NE4, SW4NW4, N2SE4, SE4SE4 .....	361.32
Sec. 18, Lot 4, SE4NE4, SE4SW4, SE4 .....	278.16	Sec. 41, NE4, NW4, E2SW4, SE4 .....	560	Sec. 5, Lots 1, 2, S2NE4, S2NW4 .....	242.34
Sec. 19, NE4NE4, S2NE4, N2SE4, SE4SE4 .....	240	Sec. 42, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 6, Lots 5, 6, SW4NE4, SE4NW4, NE4SW4, SE4 .....	342.53
Sec. 30, Lots 2,3, 4, NE4NE4, E2SW4, SE4	399.01	Sec. 43, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 7, Lot 3, NW4NE4, E2SW4, N2SE4, SW4SE4 .....	271.80
Sec. 31, Lots 1,2,3,4, NE4, E2NW4, E2SW4, NW4SE4 .....	519.08	Sec. 44, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 8, S2NE4, NE4NW4, S2NW4, SW4, SE4 .....	520
T. 159 N., R. 32 W.		Sec. 45, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 9, NE4NE4, S2NE4, E2NW4, SW4 .....	360
Sec. 7, SE4SE4 .....	40	Sec. 46, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 10, NE4, W2NW4, SE4SW4 .....	280
T. 160 N., R. 32 W.		Sec. 47, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 11, NW4NE4, N2NW4 .....	120
Sec. 31, SE4NW4 .....	40	Sec. 48, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 12, SW4SE4 .....	40
T. 166 N., R. 32 W.		Sec. 49, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 13, NE4, S2NW4, SW4, SE4 .....	560
Sec. 7, Lot 1 .....	28.90	Sec. 50, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 14, SE4NE4, SW4SW4, SE4SE4 .....	120
Sec. 18, Lot 2 .....	17.50	Sec. 51, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 15, SE4 .....	160
T. 150 N., R. 33 W.		Sec. 52, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 16, SW4 .....	160
Sec. 14, Lots 7, 8, 9 .....	2.71	Sec. 53, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520	Sec. 17, N2NW4, SW4NW4, W2SW4, SE4SW4, SE4 .....	400
Sec. 15, Lot 11 .....	2.99	Sec. 54, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
T. 158 N., R. 33 W.		Sec. 55, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 1, Lots 1, 2, 3, 4, S2NE4, S2NW4, N2SW4, SE4SW4, SE4	594.04	Sec. 56, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 2, Lots 1, 2, 3, 4, S2NE4, N2SE4 .....	308.88	Sec. 57, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 3, Lots 1, 4 .....	77.56	Sec. 58, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 4, Lots 1, 2, 3, 4, SW4NE4, S2NW4, N2SE4 .....	360	Sec. 59, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 5, Lots 1, 2, 3, S2NE4, SE4NW4, N2SW4, NW4SE4 .....	358.44	Sec. 60, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		
Sec. 6, Lots 3, 5, SE4NW4 .....	117.20	Sec. 61, NE4NE4, NW4, S2NE4, NW4, NE4SW4, S2SW4, NW4SE4, S2SE4 .....	520		

Description	Acreeage	Description	Acreeage	Description	Acreeage
Sec. 18, Lots 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	577.84	Sec. 15, NE4, NW4, SW4, SE4 .....	640	Sec. 30, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	638.48
Sec. 19, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	612.08	Sec. 17, NE4, SW4, SE4, Sec. 18, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	480 634.56	Sec. 31, Lot 1, NE4, E2NW4, E2SW4, SE4 Sec. 32, NE4, S2NW4, SW4, SE4 .....	519.80 560
Sec. 20, N2NE4, SE4NE4, SW4NW4, SW4, NW4SE4, S2SE4 Sec. 21, S2SW4 .....	440 80	Sec. 19, Lots 1, 2, 3, NE4, E2NW4, NE4SW4, NW4SE4 .....	435.94	Sec. 33, NE4, NW4, SW4, SE4 .....	640
Sec. 22, NE4NE4, SW4, SE4 .....	360	Sec. 20, SW4NE4, NW4 Sec. 21, N2NE4, N2NW4 Sec. 22, N2NE4, N2NW4, SW4SW4 .....	200 160 200	Sec. 34, NE4, NW4, SW4, SE4 .....	640
Sec. 23, NW4NW4, S2SW4 .....	120	T. 167 N., R. 34 W. Sec. 1, Lots 3, 4, S2NW4, NW4SW4, S2SW4 .....	281.05	Sec. 35, NE4, NW4, W2SW4, N2SE4, SE4SE4 .....	520
Sec. 24, N2NE4, SW4NE4, N2NW4 .....	200	Sec. 2, Lots 1, 2, 3, 4, S2NE4, SE4NW4, S2SW4, NE4SE4 .....	403.20	Sec. 36, NE4, NW4, SW4, SE4 .....	640
Sec. 25, NW4SW4, SE4SE4 .....	80	Sec. 6, Lots 1 thru 7, S2NE4, SE4NW4, E2SW4, SE4 .....	641.32	T. 168 N., R. 34 W. Sec. 25, SW4NW4 .....	40
Sec. 26, SW4, SW4SE4 ..	200	Sec. 7, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	641.92	Sec. 26, SE4NE4, SW4, W2SE4 .....	280
Sec. 27, NW4, NW4SW4, E2SE .....	280	Sec. 8, NE4, NW4, SW4, SE4 .....	640	Sec. 27, S2SW4, S2SE4 Sec. 29, S2SE4 .....	160 80
Sec. 28, NE4, NW4, NE4SW4, N2SE4 .....	440	Sec. 9, NE4, NW4, SW4, SE4 .....	640	Sec. 32, N2NE4, SW4NE4, SE4NW4, SW4 .....	320
Sec. 29, NE4, NW4, SW4, SE4 .....	640	Sec. 10, NE4, NW4, SW4, N2SE4, SE4SE4 Sec. 11, NW4, SW4, NW4SE4, S2SE4 .....	600 440	Sec. 34, NE4, NE4NW4, S2SW4, SE4 .....	440
Sec. 30, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	612.52	Sec. 12, NE4NW4, SE4SW4, NW4SE4, S2SE4 .....	200	Sec. 35, W2NE4, NW4, SW4, SE4 .....	560
Sec. 33, NW4NE4, S2NE4, N2NW4, SW4, SE4 .....	520	Sec. 13, SE4NW4, SW4, SE4 .....	360	Sec. 36, S2NW4, SW4 ....	240
Sec. 34, NE4, NE4NW4, S2NW4, NW4SW4, S2SW4, NE4SE4 .....	440	Sec. 14, NE4, NW4, SW4, SE4 .....	640	T. 148 N., R. 35 W. Sec. 36, Lot 4 .....	0.95
Sec. 35, S2NE4, N2SW4, SW4SW4, SE4SE4 .....	240	Sec. 15, E2NE4, NW4, SW4, SE4 .....	560	T. 149 N., R. 35 W. Sec. 26, Lot 1 .....	0.30
Sec. 36, SW4NW4, NW4SW4, S2SW4, S2SE4 .....	240	Sec. 16, NE4, SW4NW4, SW4, SE4, .....	520	T. 150 N., R. 35 W. Sec. 32, NW4SW4 .....	40
T. 159 N., R. 34 W. Sec. 3, SW4NE4, S2NW4, NW4SE4 .....	160	Sec. 17, W2NW4, W2SW4, SE4SW4, NE4SE4, S2SE4 .....	320	T. 166 N., R. 35 W. Sec. 1, Lots 1, 2, 3, 4, NE4SW4, S2SW4, SW4SE4 .....	320
Sec. 34, S2SW4 .....	80	Sec. 18, Lots 1, 2, 3, 4, W2NE4, E2NW4, E2SW4, SE4 .....	561.20	Sec. 2, Lots 1, 2, 3, 4, S2NE4, S2NW4, SE4 ..	480
T. 166 N., R. 34 W. Sec. 1, NE4, NW4, SW4, SE4 .....	640	Sec. 19, Lots 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	598.88	Sec. 3, E2NW4, E2SW4, SE4 .....	312.72
Sec. 2, NE4NE4, S2NE4, NW4, SW4, SE4 .....	600	Sec. 20, NE4, NW4, SW4, SE4 .....	640	Sec. 10, NE4, E2NW4, E2SW4, SE4 .....	472.72
Sec. 3, NE4, NW4, SW4, SE4 .....	640	Sec. 21, NE4, NW4, SW4, SE4 .....	640	Sec. 11, N2NE4, SE4NE4, NW4, NW4SW4, E2SE4 .....	400
Sec. 4, NE4, NW4, SW4, SE4 .....	640	Sec. 22, NE4, NW4, SW4, SE4 .....	640	Sec. 12, NE4, NW4, SW4, SE4 .....	640
Sec. 5, NE4, NW4, SW4, SE4 .....	640	Sec. 23, NE4, NW4, SW4, SE4 .....	640	Sec. 13, NE4, NW4, SW4, SE4 .....	640
Sec. 6, Lots 2, 4, NE4, E2NW4, SE4SW4, S2SE4 .....	437.93	Sec. 24, NE4, NW4, SW4, SE4 .....	640	Sec. 14, E2SE4 .....	80
Sec. 7, Lots 1, 2, 3, 4, NE4, E2NW4, E2SW4, SE4 .....	634.56	Sec. 25, NE4, NW4, SW4, SE4 .....	640	Sec. 15, NE4, E2NW4, E2SW4, NE4SE4, W2SE4 .....	432.72
Sec. 8, NE4, NW4, SW4, SE4 .....	640	Sec. 26, NE4, NW4, SW4, SE4 .....	640	Sec. 24, NE4, NW4, SW4, SE4 .....	640
Sec. 9, NE4, NW4, SW4, SE4 .....	640	Sec. 27, NE4, NW4, SW4, SE4 .....	640	Sec. 27, NE4NW4 .....	23.13
Sec. 10, NE4, NW4, SW4, SE4 .....	640	Sec. 28, NE4, NW4, SW4, SE4 .....	640	Sec. 35, Lot 2 .....	49.80
Sec. 11, NE4, NW4, SW4, SE4 .....	640	Sec. 29, NE4, NW4, N2SW4, SE4 .....	560	T. 167 N., R. 35 W. Sec. 1, Lots 1, 2, 3, 4, S2NE4, S2NW4, SW4, SE4 .....	640.68
Sec. 12, NW4NE4, SW4NE4, NW4, SW4 ..	400			Sec. 2, Lots 1, 2, 3, 4, S2NE4, S2NW4, SW4, SE4 .....	641.68
Sec. 13, NW4NW4 .....	40			Sec. 3, Lots 1, 2, 9, 10, S2NE4, SE4 .....	397.78
Sec. 14, NE4, NW4, N2SW4, SW4SW4, NW4SE4 .....	480			Sec. 10, Lots 5, 6, 7, 8, NE4, SE4 .....	475.64
				Sec. 11, NE4, NW4, SW4, SE4 .....	640

Description	Acreage	Description	Acreage
Sec. 12, NE4, NW4, SW4, SE4 .....	640	T. 151 N., R. 38W	
Sec. 13, NE4, NW4, SW4, N2SE4, SW4SE4 .....	600	Sec. 36, Lots 1, 2 .....	3.15
Sec. 14, NW4, SE4 .....	320	T. 159 N., R. 38 W.	
Sec. 15, Lots 1, 2, 3, 4, NE4, SE4 .....	482.93	Sec. 8, W2NW4 .....	80
Sec. 22, Lots 1, 2, 3, 4, NE4, SE4 .....	482.92	Sec. 9, NE4SW4, N2SE4 .....	120
Sec. 23, N2NE4, SW4NE4, SW4, SW4SE4 .....	320	Sec. 10, SW4SE4 .....	40
Sec. 24, NW4, SW4, SE4 .....	480	Sec. 24, SW4SW4, SE4SE4 .....	80
Sec. 25, NE4, NW4, SW4, SE4 .....	640	Sec. 35, Lot 4 .....	47.60
Sec. 26, NE4, NW4, N2SW4, N2SE4 .....	480	Sec. 36 Lot 1, NE4NE4 ...	87.11
Sec. 27, Lots 1, 2, 3, 4, NE4, N2SE4, SW4SE4 .....	442.92	T. 160 N., R. 38 W.	
Sec. 34, Lots 1, 2, 3, 4, S2NE4, SE4 .....	402.92	Sec. 13, NW4NW4, NW4SW4 .....	80
Sec. 35, NW4NW4, S2NW4, SW4, SE4 .....	440	Sec. 28, NW4SE4 .....	40
Sec. 36, NE4, E2NW4, E2SW4, SE4 .....	480	Sec. 33, NE4NE4 .....	40
T. 168 N., R. 35 W.		T. 152 N., R. 39 W.	
Sec. 22, SE4SE4 .....	40	Sec. 8, Lot 2 .....	0.20
Sec. 23, S2SW4 .....	80	Sec. 9, Lot 1 .....	1.00
Sec. 24, NW4SE4, S2SE4 .....	120	Sec. 10, Lot 5 .....	27.15
Sec. 25, S2NE4, SW4, SE4 .....	400	T. 153 N., R. 39 W.	
Sec. 26, NW4NW4, SE4 .....	200	Sec. 23, N2SE4 .....	80
Sec. 27, Lots 7, 8, E2NE4, SE4 .....	316.69	T. 159 N., R. 39 W.	
Sec. 34, Lots 5, 6, 7, 8, NE4, SE4 .....	473.16	Sec. 28, N2NE4 .....	80
Sec. 35, NE4, NW4, SW4, SE4 .....	640	T. 159 N., R. 40 W.	
Sec. 36, NE4, NW4, SW4, SE4 .....	640	Sec. 13, SW4SW4 .....	40
T. 148 N., R. 36 W.		T. 152 N., R. 41 W.	
Sec. 9, Lot 8 .....	0.45	Sec. 22, SW4NW4 .....	40
T. 156 N., R. 36 W.		Sec. 36, Lots 1, 8 .....	10.90
Sec. 1, Lot 4 .....	22.28		
T. 158 N., R. 36 W.			
Sec. 1, Lots 3, 4, 5, 6, 7, SW4NE4, S2NW4, SW4, W2SE4 .....	550.67		
Sec. 2, Lots 1, 2, 3, 4, 5, 6, S2NE4, N2SW4, SE4 .....	542.42		
Sec. 3, Lots 1, 2, 3, 4, 5, 6 .....	227.44		
Sec. 4, Lots 1, 2 .....	102.41		
T. 158 N., R. 37 W.			
Sec. 28, E2NE4, .....	80		
T. 159 N., R. 37 W.			
Sec. 4, S2NW4 .....	80		
Sec. 6, NE4NE4 .....	40		
Sec. 8, NE4 .....	160		
Sec. 23, SW4 .....	160		
Sec. 24, W2SW4, SE4SW4 .....	120		
Sec. 25, SE4NW4 .....	40		
Sec. 27, N2NE4 .....	80		
Sec. 30, Lots 1, 2, 3, E2NW4, NE4SW4 .....	229.90		
Sec. 31, Lots 2, 6, 7, SE4NW4, N2SE4 .....	241.22		
Sec. 32, NE4SE4 .....	40		
T. 160 N., R. 37 W.			
Sec. 5, SW4SE4 .....	40		
Sec. 7, Lots 1, 2, NE4, E2NW4 .....	307.77		
Sec. 19, SE4SW4 .....	40		

year, additional actions will be carried out to fully implement these designations. Areas and routes will be signed and barriers may be located as necessary. Also, BLM will identify appropriate routes within the areas designated as "limited to existing roads and trails" or "limited to designated roads and trails," and will produce a map that identifies such routes. In order to do this, BLM will inventory routes within these areas and will hold public meetings (to be announced) and work with local government officials in order to gather information necessary for decision-making. Any need for additional environmental analysis will be considered at the time that specific implementing actions are undertaken. ORV designations are implemented under the authority of 43 CFR 8342.

**DATES:** Implementation of the San Juan RMP ORV designations begins immediately.

**ADDRESS:** Information regarding ORV designations discussed in this notice is available at the following BLM office: Monticello Field Office, P.O. Box 7, 435 North Main, Monticello, Utah.

**FOR FURTHER INFORMATION CONTACT:** Kent E. Walter, Monticello Field Office, Utah at (435) 587-1500.

**SUPPLEMENTARY INFORMATION:** Implementation of the ORV designations made in the San Juan RMP does not supersede emergency ORV use restrictions made for the Lockhart Basin area (**Federal Register** Notice: January 2, 1998, Volume 63, Number 1) and the Comb Wash area (**Federal Register** Notice: June 20, 1990, Volume 55, Number 119). Those ORV use restrictions will remain in place until such time as the purposes provided in the notices are completed. Grand Gulch and Dark Canyon were closed to ORV use in 1970 when they were formally designated as primitive areas, and they remain closed.

**G. William Lamb,**  
State Director, Utah.  
[FR Doc. 99-2382 Filed 2-1-99; 8:45 am]  
BILLING CODE 4310-DQ-P

Dated: January 12, 1999.

**Sylvia V. Baca,**  
Acting Assistant Secretary, Land and Minerals Management.

Dated: January 14, 1999.

**Kevin Gover,**  
Assistant Secretary, Indian Affairs.  
[FR Doc. 99-2360 Filed 1-29-99; 8:45 am]  
BILLING CODE 4310-84-P

**DEPARTMENT OF THE INTERIOR**

**Bureau of Land Management**  
[UT-090-1210-00]

**AGENCY:** Bureau of Land Management (BLM).

**Off Road Vehicle (ORV) Designations; San Juan Resource Management Plan (RMP)**

**ACTION:** Notice of Implementation of Off Road Vehicle (ORV) Designations within the San Juan Resource Management Plan (RMP)

**SUMMARY:** This notice implements ORV use designations made in the 1991 Record of Decision for the San Juan RMP. The RMP identifies open, closed and limited ORV use areas for BLM-managed public lands in San Juan County, Utah, as identified on a map that was incorporated in the draft RMP, entitled "ORV Designations" and dated December, 1988. The limited category includes three types of ORV use designations: (1) limited by seasonal restrictions; (2) limited to existing roads and trails; and (3) limited to designated roads and trails. Within the upcoming

**DEPARTMENT OF THE INTERIOR**

**Minerals Management Service**

**Revision of Form MMS-2005, Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act**

**ACTION:** Extension of comment period.

**SUMMARY:** On November 9, 1998 (63 FR 60380), the Minerals Management Service (MMS) published in the **Federal Register**, a proposed revision to Form

MMS-2005, Oil and Gas Lease of Submerged Lands Under the Outer Continental Shelf Lands Act. MMS conducted two workshops to fully understand the public's concerns with the proposed changes. The workshops were held on December 10, 1998 and January 21, 1999, in New Orleans, Louisiana. A transcript from the first workshop is available on the MMS homepage ([www.mms.gov](http://www.mms.gov)) under the What's New icon. A transcript from the second workshop will be posted on the web as soon as it is available. This notice is to extend the comment period to February 22, 1999.

**FOR FURTHER INFORMATION CONTACT:** Terry Holman, 202-208-3822 or e-mail to [Terry.Holman@mms.gov](mailto:Terry.Holman@mms.gov). Comments may be sent to Terry Holman, Minerals Management Service, Mail Stop 4230, 1849 C Street, N.W., Washington, D.C. 20240 or faxed to her at 202-208-4891.

Dated: January 27, 1999.

**Cynthia Quarterman,**

*Director, Minerals Management Service.*

[FR Doc. 99-2358 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-MR-M

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### Environmental Assessment for the Proposed Air Force Memorial Preliminary Design and Park Improvements, Arlington, VA

**ACTION:** Availability of the Environmental Assessment for the proposed Air Force Memorial preliminary design and park improvements, Arlington, Virginia.

**SUMMARY:** Pursuant to Council on Environmental Quality regulations and National Park Service policy, the National Park Service announces the availability of an Environmental Assessment for the proposed Air Force Memorial (Memorial) preliminary design and park improvements, in Arlington, Virginia. The Environmental Assessment examines the Memorial's preliminary design and the associated improvements to 25 acres of parkland in an area which contains the Iwo Jima Memorial and the Netherlands Carillon, known as Arlington Ridge Park within the George Washington Memorial Parkway. The National Park Service is soliciting comments on this Environmental Assessment. These comments will be considered in evaluating it and in making decisions pursuant to the National Environmental Policy Act (NEPA).

**DATES:** The Environmental Assessment will remain available for public comment through March 22, 1999. Written comments should be received no later than March 22, 1999. Additionally, the National Park Service will hold a public meeting to discuss the Environmental Assessment on February 17, 1999, at which the public will be provided an opportunity to speak. The meeting will be held in the Arlington County Central Library auditorium, 1015 North Quincy Street, Arlington, Virginia, from 7 p.m. to 9:30 p.m. Following presentations by Federal, State, and local agencies, individuals and representatives of community and civic organizations will be able to present their comments in the order in which their requests to speak are received. Commenters may either sign up at the meeting or register in advance by calling Ms. Nancy Young at (202) 619-7097. Individuals will be allowed 3 minutes to present their comments; representatives of community and civic groups will be allowed 5 minutes. Presentation refers solely to oral comments; video and other multimedia materials will not be permitted. At the time commenters are recognized to speak, they are requested to provide three copies of their comments in writing, if possible.

**ADDRESSES:** Comments on the Environmental Assessment should be submitted to: Mr. John G. Parsons, Associate for Lands, Resources, and Planning, National Capital Region, National Park Service, 1100 Ohio Drive, SW, Room 220, Washington, DC, 20242. A limited number of copies of the Environmental Assessment are available on request. Public reading copies of the Environmental Assessment will be available at the following locations: National Capital Region, National Park Service, 1100 Ohio Drive, SW, First Floor Lobby, Washington, DC 20242; and the Air Force Memorial Foundation, 1501 Lee Highway, Arlington, Virginia 22209-1198.

**SUPPLEMENTARY INFORMATION:** On December 2, 1993, the Air Force Memorial Foundation was authorized by Federal law to establish a memorial on Federal land in the District of Columbia or its environs to honor the men and women who have served in the U.S. Air Force and its predecessor organizations. It is being established pursuant to the Commemorative Works Act, 40 U.S.C. 1001 *et seq.*

This Environmental Assessment examines the Memorial's preliminary design and the associated improvements to 25 acres of parkland. It contains alternatives including a Preferred

Alternative and a No Action Alternative. Possible mitigation measures are also described. This Environmental Assessment considers visitor use, vehicular and pedestrian circulation, and existing periodic uses of the park. Potential impacts assessed include those to the park's cultural resources: Iwo Jima Memorial and the Netherlands Carillon and related activities conducted at these locations. National Park Service requirements for this site during memorial construction and operation are also considered.

A public meeting was held December 17, 1997, and public comment was requested on draft design scenarios for this memorial (62 FR 63382) to assist the National Park Service in identifying issues to be analyzed in this Environmental Assessment. Additional subjects considered in this Environmental Assessment were generated by the National Capital Memorial Commission, the Commission of Fine Arts, and the National Capital Planning Commission in their deliberations on this memorial and during the site selection process.

**FOR FURTHER INFORMATION CONTACT:** Contact Ms. Nancy Young, (202) 619-7097.

Dated: January 27, 1999.

**Joseph M. Lawler,**

*Acting Regional Director, National Capital Region.*

[FR Doc. 99-2373 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-70-P

## DEPARTMENT OF THE INTERIOR

### National Park Service

#### National Register of Historic Places; Notification of Pending Nominations

Nominations for the following properties being considered for listing in the National Register were received by the National Park Service before January 23, 1999. Pursuant to section 60.13 of 36 CFR Part 60 written comments concerning the significance of these properties under the National Register criteria for evaluation may be forwarded to the National Register, National Park Service, 1849 C St. NW, NC400, Washington, DC 20240. Written comments should be submitted by February 17, 1999.

**Carol D. Shull**

*Keeper of the National Register.*

### ARKANSAS

#### Bradley County

Davis—Adams House, 509 N. Myrtle St., Warren, 99000224

**Desha County**

Arkansas City Commercial District, Roughly along the jct. of Desoto Ave. and Sprague St., Arkansas, 99000227

**Franklin County**

Bristow Hotel, 112 S. 2nd St., Ozark vicinity, 99000225

**Hempstead County**

Southwestern Proving Ground Airport Historic District, Hope Municipal Airport, Airport Rd., Hope, 99000230

**Izard County**

Jumbo Church of Christ, Approx. 4 mi. NW of jct. of Sylamore Rd. and Jumbo Rd., Melbourne vicinity, 99000222

**Johnson County**

Lutherville School, Cty Rd. 418, Lamar vicinity, 99000228

**Pulaski County**

Abrams House, 300 S. Pulaski St., Little Rock, 99000221

Philander Smith College Historic District, Roughly bounded by 13th, 11th, Izard, and State Sts., Little Rock, 99000229

Vaughn House, 104 Rosetta, Little Rock vicinity, 99000226

Wallace Building, 101-111 Main St., Little Rock, 99000223

**FLORIDA****Broward County**

Hollywood Boulevard Historic Business District, Along Hollywood Blvd., bet. 21st Ave. and Young Circle, Hollywood, 99000231

**IOWA****Jefferson County**

Louden, William and Mary Jane, House (Louden Machinery Company, Fairfield Iowa MPS) 501 W. Washington Ave., Fairfield, 99000220

**LOUISIANA****Concordia Parish**

Killarney, 3908 LA 569, Ferriday vicinity, 99000235

Zappe Boarding House, 107 Virginia Ave., Ferriday, 99000232

**East Baton Rouge Parish**

LSU Campus Mounds, Jct. of Dalrymple Dr. and Fieldhouse Dr. on LSU campus, Baton Rouge, 99000236

**Iberia Parish**

Evangeline Theater, 129 E. Main St., New Iberia, 99000234

**Orleans Parish**

Beauregard, Gen., Equestrian Statue, Jct. of Esplanade Ave. and Wisner Blvd., New Orleans, 99000233

**MASSACHUSETTS****Berkshire County**

South Lee Historic District, 1365-1710 Pleasant-1120-1140 Fairview St.-15-80 Willow St., Lee, 99000237

**OHIO****Cuyahoga County**

Brooklyn Centre Historic District (Brooklyn Centre MRA) Roughly bounded by I-71, Pearl Rd., and Big Creek Valley, Cleveland, 99000238

**SOUTH DAKOTA****Minnehaha County**

Thompson Farmstead, 47339 248th St., Dell Rapids vicinity, 99000239

**WISCONSIN****Columbia County**

South Dickason Boulevard Residential Historic District, Roughly along S. Dickason Blvd., from W. School St. to W. Harrison, also along S. Ludington St., Columbus, 99000240

**Eau Claire County**

First Methodist Episcopal Church, 421 S. Farwell St., Eau Claire, 99000241

**Oconto County**

Mathy Building, 126 W. Main St., Lena, 99000242

A request for REMOVAL has been received for the following resource:

**Williamson County**

Grace Episcopal Church 1314 East University, Georgetown, 86000986

[FR Doc. 99-2356 Filed 2-1-99; 8:45 am]

BILLING CODE 4310-70-P

**DEPARTMENT OF THE INTERIOR****Bureau of Reclamation****Meeting Flow Objectives for the San Joaquin River Agreement, 1999-2010, California**

**AGENCY:** Bureau of Reclamation, Interior.

**ACTION:** Notice of availability of the Final Environmental Impact Statement/Final Environmental Impact Report (FEIS/FEIR) INT # FES 99-7.

**SUMMARY:** Pursuant to the National Environmental Policy Act (NEPA) and the California Environmental Quality Act, the Bureau of Reclamation (Reclamation) and the San Joaquin River Group Authority (SJRGA) have prepared a joint FEIS/FEIR on a proposed program to acquire water identified in the San Joaquin River Agreement (SJRA) to be used to provide protective measures for fall-run chinook salmon in the San Joaquin River system and to support the San Joaquin River flow objectives of the 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. The water would be used to provide:

- A pulse flow for a 31-day period at Vernalis during April and May in

support of the Vernalis Adaptive Management Program, and

- Other flows to facilitate migration and attraction of anadromous fish, including fall attraction flows.

The affected portions of the San Joaquin River and its tributaries (Stanislaus, Tuolumne, and Merced rivers) are located in the Central Valley of California. The rivers and related storage and conveyance facilities are located in the following counties: Fresno, Madera, Mariposa, Merced, San Joaquin, Stanislaus, and Tuolumne.

Reclamation and the SJRGA prepared a Draft Environmental Impact Statement/Draft Environmental Impact Report (DEIS/DEIR) and circulated it on September 25, 1998, for a 45-day review. The FEIS/FEIR presents and describes the environmental effects of three alternatives, including no action, and it includes all comments received on the DEIS/DEIR and responses to those comments.

**DATES:** No Federal decision will be made on the proposed action until March 5, 1999. After the 30-day waiting period, Reclamation will complete a Record of Decision. It is expected that the Board of Directors of the SJRGA will certify the EIS/EIR and approve the project on February 19, 1999, following completion of the 10-day responsible agency review period.

**ADDRESSES:** Copies of the FEIS/FEIR may be obtained from Mr. Michael Delamore, Bureau of Reclamation, 2666 N. Grove Industrial Drive, Suite 106, Fresno, CA 93727, or by calling (209) 487-5039. See **SUPPLEMENTARY INFORMATION** section for a list of the locations where copies of the FEIS/FEIR are available for public inspection and review.

**FOR FURTHER INFORMATION CONTACT:** Mr. Michael Delamore, Bureau of Reclamation, at (209) 487-5039; or Mr. Dan Fults, Friant Water Users Authority, at (916) 441-1931.

**SUPPLEMENTARY INFORMATION:** The proposed action involves providing water supplies to meet flow requirements for fall-run chinook salmon and other environmental needs on the San Joaquin River. The SJRGA, consisting of several water districts in the San Joaquin River basin, is working with State and Federal Government agencies to address needs on the San Joaquin River system, including increased instream flows. The SJRA provides protective measures equivalent to the Vernalis flow objectives of the State Water Resources Control Board's 1995 Water Quality Control Plan. Debate over the flow objectives led to a proactive problem-solving process to

develop an adaptive fishery management plan [the Vernalis Adaptive Management Program (VAMP)] and the water supplies (from willing sellers on the San Joaquin River system) to support the plan. The SJRA identifies where the water to support the VAMP and other flow needs would be obtained, specifically from the SJRGA whose members are making the water available. The water would be used during the period 1999–2010; the flows would vary, depending on hydrologic conditions.

The water supply program consists of three components:

(1) A 31-day pulse flow in April–May to support the VAMP that would require up to 110,000 acre-feet annually;

(2) Additional water for a fall attraction flow for salmon in October (12,500 acre-feet) from Merced Irrigation District; and

(3) Additional water from Oakdale Irrigation District (26,000 acre-feet less up to 11,000 acre-feet contributed by Oakdale to the 31-day pulse flow). This additional water would be used for such purposes as ramping around the pulse flows, temperature control, water quality, and protection of salmon redds during periods of low flow.

A total of 137,500 acre-feet of water per year could be provided, and most of this (up to 92 percent) is expected to come directly from surface water sources, including reservoir storage, changes in diversions, and release patterns from reservoirs. Other sources of the water include groundwater, tailwater recovery, and conservation.

Copies of FEIS/FEIR are available for public inspection and review at the following locations:

- Modesto Irrigation District, 1234 Eleventh Street, Modesto, CA 95252; telephone (209) 526–7360.
- Bureau of Reclamation, Program Analysis Office, Room 7456, 1849 C Street, NW, Washington, DC 20240; telephone (202) 208–4662.
- Bureau of Reclamation, Denver Office Library, Building 67, Room 167, Denver Federal Center, 6th and Kipling, Denver, CO 80225; telephone (303) 445–2072.
- Bureau of Reclamation, Attention: MP–140, 2800 Cottage Way, Sacramento, CA 95825–1898; telephone (916) 978–5100.
- Natural Resources Library, U.S. Department of the Interior, 1849 C Street, NW, Main Interior Building, Washington, DC 20240–0001.
- California State Library at 914 Capitol Mall in Sacramento, CA 94237.
- Fresno County Public Library at 2420 Mariposa Street in Fresno, CA 93721.

- Merced County Library at 2100 O Street in Merced, CA 95340–3637.
- Merced County, Los Banos Branch Library at 1312 South Seventh Street in Los Banos, CA 93635.
- Modesto City Library at 1500 I Street in Modesto, CA 95354–1220.
- Sacramento Public Library at 828 I Street in Sacramento, CA 95814–2589.
- Stockton-San Joaquin County Public Library at 605 North El Dorado Street in Stockton, CA 95202–1999.
- University of California Berkeley, Government Documents Library at 350 Library Annex in Berkeley, CA 94720.
- University of California Davis at Shields Library in Davis, CA 95616.

Dated: January 25, 1999.

**Roger K. Patterson,**

*Regional Director.*

[FR Doc. 99–2431 Filed 2–1–99; 8:45 am]

BILLING CODE 4310–94–P

## INTERNATIONAL TRADE COMMISSION

### [Investigation No. 731–TA–44 (Review)]

#### SORBITOL FROM FRANCE

**AGENCY:** United States International Trade Commission.

**ACTION:** Scheduling of an expedited five-year review concerning the antidumping duty order on sorbitol from France.

**SUMMARY:** The Commission hereby gives notice of the scheduling of an expedited review pursuant to section 751(c)(3) of the Tariff Act of 1930 (19 U.S.C. § 1675(c)(3)) (the Act) to determine whether revocation of the antidumping duty order on sorbitol from France would be likely to lead to continuation or recurrence of material injury within a reasonably foreseeable time. For further information concerning the conduct of this review and rules of general application, consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subparts A, D, E, and F (19 CFR part 207). Recent amendments to the Rules of Practice and Procedure pertinent to five-year reviews, including the text of subpart F of part 207, are published at 63 F.R. 30599, June 5, 1998, and may be downloaded from the Commission's World Wide Web site at <http://www.usitc.gov/rules.htm>.

**EFFECTIVE DATE:** January 7, 1999.

**FOR FURTHER INFORMATION CONTACT:** Robert Carr (202–205–3402), Office of Investigations, U.S. International Trade Commission, 500 E Street SW,

Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202–205–1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (<http://www.usitc.gov>).

#### SUPPLEMENTARY INFORMATION:

**Background.**—On January 7, 1999, the Commission determined that the domestic interested party group response to its notice of institution (63 F.R. 52757, Oct. 1, 1998) of the subject five-year review was adequate and that the respondent interested party group response was inadequate. The Commission did not find any other circumstances that would warrant conducting a full review.<sup>1</sup> Accordingly, the Commission determined that it would conduct an expedited review pursuant to section 751(c)(3) of the Act.<sup>2</sup>

**Staff report.**—A staff report containing information concerning the subject matter of the review will be placed in the nonpublic record on February 11, 1999, and made available to persons on the Administrative Protective Order service list for this review. A public version will be issued thereafter, pursuant to section 207.62(d)(4) of the Commission's rules.

**Written submissions.**—As provided in section 207.62(d) of the Commission's rules, interested parties that are parties to the review and that have provided individually adequate responses to the notice of institution,<sup>3</sup> and any party other than an interested party to the review may file written comments with the Secretary on what determination the Commission should reach in the review. Comments are due on or before February 16, 1999, and may not contain new factual information. Any person that is neither a party to the five-year review nor an interested party may submit a brief written statement (which shall not contain any new factual information) pertinent to the review by February 16, 1999. If comments contain business proprietary information (BPI), they must conform with the requirements of sections 201.6, 207.3,

<sup>1</sup> A record of the Commissioners' votes and statements are available from the Office of the Secretary and at the Commission's web site.

<sup>2</sup> Commissioner Koplán dissenting.

<sup>3</sup> The Commission has found the responses submitted by Archer Daniels Midland Co. and SPI Polyols to be individually adequate. Comments from other interested parties will not be accepted (see 19 CFR 207.62(d)(2)).

and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

In accordance with sections 201.16(c) and 207.3 of the rules, each document filed by a party to the review must be served on all other parties to the review (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

**Determination.**—The Commission has determined to exercise its authority to extend the review period by up to 90 days pursuant to 19 U.S.C. § 1675(c)(5)(B).

**Authority:** This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.62 of the Commission's rules.

Issued: January 27, 1999.

By order of the Commission.

**Donna R. Koehnke,**  
Secretary.

[FR Doc. 99-2374 Filed 2-1-99; 8:45 am]

BILLING CODE 7020-02-P

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## DEPARTMENT OF JUSTICE

### Federal Bureau of Investigation

#### **Criminal Justice Information Services (CJIS) Division; Agency Information Collection Activities: Proposed Collection: Comment Request**

**ACTION:** Notice of Information Collection Under Review: Age, Sex, and Race of Persons Arrested (18 Years of Age and Over) and Age, Sex, and Race of Persons Arrested (18 Years of Age).

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until April 5, 1999.

Request written comments and suggestions from the public and affected agencies concerning the proposed collection of information. Comments should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agencies estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques of other forms of information technology, e.g., permitting electronic submission of responses.

Comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time, should be directed to Greg Scarbro (phone number and address listed below). Additional information as well as copies of the proposed information collection instrument with instructions are available by contacting Greg Scarbro, Unit Chief, telephone 304-625-4830, FBI, CJIS Division, Statistical Unit, E-3, 1000 Custer Hollow Road, Clarksburg, WV 26306.

Overview of this information collection:

(1) Type of information collection: Extension of Current Collection.

(2) The title of the form/collection: Age, Sex, and Race of Persons Arrested (18 Years of Age and Over) and Age, Sex, and Race of Persons Arrested (Under 18 Years of Age).

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form: 1-708; 1-708a. Federal Bureau of Investigation, Department of Justice.

(4) Affected public who will be asked or required to respond, as well as brief abstract. Primary: Local and State Law Enforcement Agencies. This collection is needed to collect information on the age, sex, and race of all persons arrested throughout the United States. Data are tabulated and published in the annual *Crime in the United States*.

(5) The FBI UCR Program is currently reviewing its race and ethnicity data collection in compliance with the Office of Management and Budget's *Revisions for the Standards for the Classification of Federal Data on Race and Ethnicity*.

(6) An estimate of the total number of respondents and the amount of time estimated for an average respondent to reply: 17,145 agencies with 411,480 responses (including zero reports); and with an average of 30 minutes a month devoted to compilation of data for this information collection.

(7) An estimate of the total public burden (in hours) associated with this collection: 205,740 hours annually.

If additional information is required contact: Mr. Robert B. Briggs, Clearance

Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530.

Dated: January 28, 1999.

**Robert B. Briggs,**

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99-2439 Filed 2-1-99; 8:45 am]

BILLING CODE 4410-02-M

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## DEPARTMENT OF JUSTICE

### Office of Justice Programs, Bureau of Justice Statistics

#### **Agency Information Collection Activities: Proposed Collection; Comment Request**

**ACTION:** Notice of information Collection Under Review; National Crime Victimization Survey, Police Public Contact Survey (Revision of a currently approved collection).

The Department of Justice, Office of Justice Programs, Bureau of Justice Statistics, has submitted the following information collection request for review and clearance in accordance with the Paperwork Reduction Act of 1995. This proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until April 5, 1999.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions or additional information, please contact Lawrence Greenfeld, (202) 616-3281, Bureau of Justice Statistics, Office of Justice Statistics, U.S. Department of Justice, 810 7th Street, NW, Washington, DC 20531. Written comments and suggestions from the public and affected agencies concerning the proposed collection of information should address one or more of the following four points:

(1) Evaluate whether the proposed collection of information is necessary for proper performance of the functions of the agency/component, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's/component's estimate of the burden of the collection of information including the validity of the methodology and assumptions used;

(3) Enhance the quality, utility, and clarity of the information to be collected; and

(4) Minimize the burden of the collection of information on those who

are to respond, including through the use of appropriate automated electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

Overview of this information:

(1) *Type of information collection:* Regular collection. (Revision of a currently approved collection).

(2) *The title of the form/collection:* National Crime Victimization Survey, Police Public Contact Supplement.

(3) *The agency form number, if any, and the applicable component of the department sponsoring the collection:* PPCS-1.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Eligible respondents to the survey must be age 12 or older. The Police Public Contact Supplement fulfills the mandate set forth by the Violent Crime Control and Law Enforcement Act of 1994 to collect, evaluate, and publish data on the use of the excessive force by law enforcement personnel. The survey will be conducted as a supplement to the National Crime Victimization Survey in all sample households for a six (6) month period.

*Other:* None.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* 94,500 respondents at an average of 0.05 hours (1 minute each) in addition to the 55 minutes to answer the NCVS questionnaire.

(6) An estimate of the total public burden (in hours) associated with the collection: 4,734 total hours for the Police Contact questionnaire and 88,282 total hours for the NCVS for a grand total of 93,016 hours.

If additional information is required, contact: Mrs. Brenda E. Dyer, Deputy Clearance Officer, United States Department of Justice, Information Management and Security Staff, Justice Management Division, Suite 850, Washington Center, 1001 G Street, NW, Washington, DC 20530, or via facsimile at (202) 514-1534.

Dated: January 28, 1999.

**Robert B. Briggs,**

*Department Clearance Officer, United States Department of Justice.*

[FR Doc. 99-2440 Filed 2-1-99; 8:45 am]

BILLING CODE 4410-18-M

## DEPARTMENT OF JUSTICE

### National Institute of Justice

[OJP (NIJ)-1207]

RIN 1121-ZB42

#### National Institute of Justice Announcement of the Fourth Meeting of the National Commission on the Future of DNA Evidence

**AGENCY:** Office of Justice Programs, National Institute of Justice, Justice.

**ACTION:** Notice of meeting.

**SUMMARY:** Announcement of the fourth meeting of the National Commission on the Future of DNA Evidence.

**SUPPLEMENTARY INFORMATION:** The fourth meeting of the National Commission on the Future of DNA Evidence will take place beginning on Sunday, February 28, 1999, from 1:00 PM-6:00 PM CST and will continue on Monday, March 1, 1999, beginning at 9:00 AM CST and ending at 4:00 PM CST. The meeting will take place at the Hotel Adolphus, 1321 Commerce, Dallas, TX 75202, Phone: 214-742-8200.

The National Commission on the Future of DNA Evidence, established pursuant to Section 3(2)A of the Federal Advisory Committee Act, 5 U.S.C. App. 2, will meet to carry out its advisory functions under Sections 201-202 of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. This meeting will be open to the public.

**FOR FURTHER INFORMATION CONTACT:** Christopher H. Asplen, AUSA, Executive Director (202) 616-8123.

**Authority:** This action is authorized under the Omnibus Crime Control and Safe Streets Act of 1968, §§ 201-02, as amended, 42 U.S.C. 3721-23 (1994).

#### Background

The purpose of the National Commission on the Future of DNA Evidence is to provide the Attorney General with recommendations on the use of current and future DNA methods, applications and technologies in the operation of the criminal justice system, from the Crime scene to the courtroom. Over the course of its Charter, the Commission will review critical policy issues regarding DNA evidence and provide recommended courses of action to improve its use as a tool of investigation and adjudication in criminal cases.

The Commission will address issues in five specific areas: (1) the use of DNA in postconviction relief cases, (2) legal concerns including *Daubert* challenges and the scope of discovery in DNA cases, (3) criteria for training and

technical assistance for criminal justice professionals involved in the identification, collection and preservation of DNA evidence at the crime scene, (4) essential laboratory capabilities in the face of emerging technologies, and (5) the impact of future technological developments in the use of DNA in the criminal justice system. Each topic will be the focus of the in-depth analysis by separate working groups comprised of prominent professionals who will report back to the Commission.

**Jeremy Travis,**

*Director, National Institute of Justice.*

[FR Doc. 99-2444 Filed 2-1-99; 8:45 am]

BILLING CODE 4410-18-P

## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** U.S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

**SUMMARY:** The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

#### *Information Pertaining to the Requirement To Be Submitted*

1. *The title of the information collection:* NRC Form 241, "Report of Proposed Activities in Non-Agreement States."

2. *Current OMB approval number:* 3150-0013.

3. How often the collection is required: NRC Form 241 must be submitted each time an Agreement State licensee wants to engage in or revise its activities involving the use of radioactive byproduct material in a non-Agreement State. The NRC may waive the requirements for filing additional copies of NRC Form 241 during the remainder of the calendar year following receipt of the initial form from a person engaging in activities under the general license.

4. *Who is required or asked to report:* Any persons who hold a specific license from an Agreement State and want to conduct the same activity in non-Agreement States under the general license in 10 CFR 150.20.

5. *The number of annual respondents:* The NRC annually receives approximately 4,600 responses from Agreement States associated with NRC Form 241. These responses include 200 initial reciprocity requests on NRC Form 241, and 1,100 revisions and 3,300 clarifications of the information submitted on the forms.

6. *The number of hours needed annually to complete the requirement or request:* 1,200 hours.

7. *Abstract:* Under the reciprocity provisions of 10 CFR Part 150, any Agreement State licensee who engages in activities (use of radioactive byproduct material) in non-Agreement States under the general license in Section 150.20 is required to file four copies of NRC Form 241, "Report of Proposed Activities in Non-Agreement States," and four copies of its Agreement State license at least 3 days before engaging in each such activity. This mandatory notification permits NRC to schedule inspections of the activities to determine whether the activities are being conducted in accordance with requirements for protection of the public health and safety.

Submit, by April 5, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo. Shelton, U.S. Nuclear Regulatory Commission, T-6 F33, Washington, DC, 20555-0001, by telephone at 301-415-7233, or by Internet electronic mail at [BJS1@NRC.GOV](mailto:BJS1@NRC.GOV).

Dated at Rockville, Maryland, this 27th day of January 1999.

For the Nuclear Regulatory Commission.

**Brenda Jo Shelton,**  
NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99-2422 Filed 2-1-99; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Agency Information Collection Activities: Proposed Collection; Comment Request

**AGENCY:** U. S. Nuclear Regulatory Commission (NRC).

**ACTION:** Notice of pending NRC action to submit an information collection request to OMB and solicitation of public comment.

**SUMMARY:** The NRC is preparing a submittal to OMB for review of continued approval of information collections under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. Chapter 35).

#### *Information Pertaining To the Requirement To Be Submitted*

1. *The title of the information collection:* NRC Form 483, "Registration Certificate—*In Vitro* Testing with Byproduct Material under General License."

2. *Current OMB approval number:* 3150-0038.

3. *How often the collection is required:* There is a one-time submittal of information to receive a validated copy of NRC Form 483 with an assigned registration number. In addition, any changes in the information reported on NRC Form 483 must be reported in writing to the Commission within 30 days after the effective date of such change.

4. *Who is required or asked to report:* Any physician, veterinarian in the practice of veterinary medicine, clinical laboratory or hospital which desires a general license to receive, acquire, possess, transfer, or use specified units of byproduct material in certain *in vitro* clinical or laboratory tests.

5. *The number of annual respondents:* 364 respondents (104 registration certificates from NRC licensees and 260 registration certificates from Agreement State licensees).

6. *The number of hours needed annually to complete the requirement or request:* 42 hours or approximately 7 minutes per NRC or Agreement State licensee.

7. *Abstract:* Section 31.11 of 10 CFR establishes a general license authorizing any physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital to possess certain small quantities of byproduct material for *in vitro* clinical or laboratory tests not involving the internal or external administration of the byproduct material or the radiation therefrom to human beings or animals. Possession of byproduct material under 10 CFR 31.11 is not authorized until the physician, clinical laboratory, veterinarian in the practice of veterinary medicine, or hospital has filed NRC Form 483 and received from the Commission a validated copy of NRC Form 483 with a registration number.

Submit, by April 5, 1999, comments that address the following questions:

1. Is the proposed collection of information necessary for the NRC to properly perform its functions? Does the information have practical utility?
2. Is the burden estimate accurate?
3. Is there a way to enhance the quality, utility, and clarity of the information to be collected?
4. How can the burden of the information collection be minimized, including the use of automated collection techniques or other forms of information technology?

A copy of the draft supporting statement may be viewed free of charge at the NRC Public Document Room, 2120 L Street, NW (lower level), Washington, DC. OMB clearance requests are available at the NRC worldwide web site (<http://www.nrc.gov/NRC/PUBLIC/OMB/index.html>). The document will be available on the NRC home page site for 60 days after the signature date of this notice.

Comments and questions about the information collection requirements may be directed to the NRC Clearance Officer, Brenda Jo Shelton, U.S. Nuclear Regulatory Commission, T-6 F33, Washington, DC, 20555-0001, by telephone at 301-415-7233, or by Internet electronic mail at [BJS1@NRC.GOV](mailto:BJS1@NRC.GOV).

Dated at Rockville, Maryland, this 27th day of January 1999.

For the Nuclear Regulatory Commission.

**Brenda Jo Shelton,**  
NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99-2423 Filed 2-1-99; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

[Docket No. 030-34318, License No. 06-30361-01, EA 98-521]

### Special Testing Laboratories, Inc., P.O. Box 200, Bethel, Connecticut 06801-0200; Confirmatory Order Modifying License and Rescinding Order of December 23, 1998 (Effective Immediately)

#### I

Special Testing Laboratories, Inc. (Special Testing or Licensee) is the holder of Byproduct Nuclear Material License No. 06-30361-01 (License) issued by the Nuclear Regulatory Commission (NRC or Commission) pursuant to 10 CFR Part 30. The License authorizes possession and use of Troxler Electronics Laboratories, Campbell Pacific Nuclear, Humbolt Scientific, Seamen Nuclear, or Soiltest nuclear gauges. Mr. Richard A. Speciale (Mr. Speciale) is the President and Radiation Safety Officer of Special Testing Laboratories. The License was issued on August 6, 1997, and is due to expire on August 31, 2007. However, by Order Suspending License dated December 23, 1998, the License was suspended by the NRC for violations of the Commission's requirements as described therein.

#### II

By Letter dated December 23, 1998, the Licensee requested an enforcement hearing and moved to set aside the immediate effectiveness of the Order Suspending License. Further, during several telephone conversations with the NRC between December 23, 1998 and January 8, 1999, the Licensee requested that the Order Suspending License be relaxed. By a letter dated December 31, 1998, Mr. Richard A. Speciale, the Licensee's Director and Radiation Safety Officer, voluntarily relinquished his position of Radiation Safety Officer to Mr. Richard C. Speciale, the Licensee's current President, and committed not to speak to or direct Licensee employees involved in NRC-licensed activities. In a letter dated January 4, 1999, Mr. Richard C. Speciale informed the NRC that he understood the License requirements, that he would comply with the License requirements, and that audits would be performed by an auditor independent of the Licensee.

Based on the Licensee's commitments and the circumstances in this case, the NRC has concluded that the Order Suspending License may be rescinded provided that a series of conditions, as described in Section IV below, are

agreed upon and implemented by the Licensee. By letter dated January 8, 1999, the NRC sent the Licensee a list of the specific conditions and formally requested the Licensee's consent to confirming the commitments through an Order. On January 11, 1999, the Licensee, by its Director, Richard A. Speciale, and its President, Richard C. Speciale, signed and returned its consent to issuance of this Order agreeing that: (1) its request for a hearing on the Order Suspending License be withdrawn; (2) the conditions, as described in Section IV below, be incorporated into the License; (3) this Order be immediately effective; (4) its right to a hearing on this Order be waived; and (5) nothing in this Order shall preclude the NRC from taking further enforcement action against the Licensee and/or Richard A. Speciale as an individual, upon completion of the ongoing NRC investigation.

#### III

Implementation of the commitments will provide assurance that sufficient resources will be applied to the radiation safety program, and that the program will be conducted safely and in accordance with NRC requirements. I find that the Licensee's commitments as set forth in Section IV are acceptable and necessary and conclude that with these commitments the public health and safety are reasonably assured. In view of the foregoing, I have determined that the public health and safety require that the Licensee's commitments be confirmed by this Order and that the NRC's Order Suspending License be rescinded. Based on the above and the Licensee's consent, this Order is immediately effective upon issuance.

#### IV

Accordingly, pursuant to Sections 81, 161b, 161i, 161o, 182 and 186 of the Atomic Energy Act of 1954, as amended, and the Commission's regulations in 10 CFR 2.202 and 10 CFR Part 2.202, *It is hereby ordered, effective immediately, that license no. 06-30361-01 is modified as follows:*

A. The NRC's Order Suspending License dated December 23, 1998, shall be rescinded.

B. Mr. Richard C. Speciale shall replace Mr. Richard A. Speciale as the Licensee's Radiation Safety Officer. As evidence of this Licensee management change, the Licensee shall provide the NRC with written documentation, as follows:

1. A delegation of authority from Mr. Richard A. Speciale to Mr. Richard C. Speciale, which states that Mr. Richard C. Speciale has the requisite and

unqualified authority to communicate with, and direct, Licensee employees regarding NRC regulations and License provisions and to enforce these requirements, including the ability to terminate any unsafe operation involving the use of NRC-licensed material or activities that violate the License or NRC requirements.

2. A directive to all current employees that they are not to look for or take direction from Mr. Richard A. Speciale regarding NRC-licensed activities, and that any and all direction is to be provided solely by Richard C. Speciale. Within 7 days of providing the directive, the Licensee shall confirm that all current employees have received the directive.

3. A signed statement as to how Mr. Richard A. Speciale will effectively be removed from control of NRC-licensed activities, including his agreement to refrain from any efforts to direct, control or influence in any way and to any extent, directly or indirectly, the conduct of licensed activities.

4. A signed statement, under oath or affirmation, from Mr. Richard C. Speciale certifying that:

a. He will direct NRC-licensed operations independent from any involvement or interference by Mr. Richard A. Speciale;

b. He understands the License conditions and all NRC requirements relating to the License, including the NRC's deliberate misconduct rule;

c. He understands that the NRC expects meticulous compliance with its requirements; and

d. He intends to comply with License conditions and all NRC requirements in every respect.

5. A signed statement describing how Mr. Richard C. Speciale will inform all gauge users of NRC and License requirements and direct them to comply with such requirements. Within 7 days of providing the signed statement, the Licensee will confirm that Richard C. Speciale has so informed and directed all employees.

C. The Licensee shall notify the NRC immediately if Mr. Richard A. Speciale attempts to influence Mr. Richard C. Speciale or any other Licensee employee in the conduct of NRC-licensed activities.

D. The Licensee shall fully cooperate with the NRC with regard to inspection or investigation of NRC-licensed activities, including the provision of complete and accurate records and responding to the NRC Office of Investigations subpoena dated November 18, 1998. In addition, all records related to licensed activities shall be maintained in their original

form and shall not be removed or altered in any way.

E. The Licensee shall retain the services of an independent individual or organization (consultant) to perform eight quarterly audits of the Licensee's radiation safety program. After conducting four audits, the Regional Administrator, NRC Region I, may consider, at the request of the Licensee, relief of the audit requirements based on Licensee performance. The consultant shall be independent of the Licensee's organization and is to be experienced in, or capable of, evaluating the effectiveness of management and the implementation of a radiation safety program for gauging operations. NRC has approved the use of Q/C Resource as a consultant; however, if the Licensee chooses to change the consultant, the Licensee shall notify the NRC seven days in advance of a change. At a minimum, each audit shall:

1. Evaluate the effectiveness of the Licensee's radiation safety program and compliance with NRC requirements;
2. Evaluate the understanding of the Licensee's Radiation Safety Officer of radiation safety and NRC requirements;
3. Evaluate the adequacy of the Licensee's corrective actions for any violations or audit findings previously identified by the NRC or consultant;
4. Make recommendations as necessary for improvements in management oversight of NRC-licensed activities;
5. Physically observe gauging operations in the field; and
6. Evaluate whether Mr. Richard A. Speciale is or has been involved in NRC-licensed activities since the effective date of this Order.

F. Within 7 days of the date of this Confirmatory Order, the Licensee shall provide a copy of this Order to the consultant, to all current, and, for the duration of these commitments, to all future Licensee employees.

G. Within 30 days of the date of this Confirmatory Order, the first audit shall be completed. The Licensee shall ensure that the consultant submits the results of the audit, including any deficiencies identified, to NRC Region I at the same time the consultant provides the results to the Licensee.

H. Within every three months thereafter, an audit shall be completed. The Licensee shall ensure that the consultant submits the results of the audit, including any deficiencies identified, to NRC Region I at the same time the consultant provides the results to the Licensee.

I. Within 30 days of the completion of each audit, the Licensee shall submit to NRC Region I its corrective actions for

any identified deficiencies in the audit reports. Alternatively, if the Licensee does not believe that corrective actions should be taken, the Licensee shall provide justification for its position to the NRC.

J. For purposes of the above conditions, the Licensee shall send all documents, and provide notifications and confirmations, required by this modification to the Director, Division of Nuclear Material Safety, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406-1415.

K. The Regional Administrator, Region I, may relax the above conditions for good cause.

#### V

Nothing in this Order will be deemed to preclude the NRC from taking further enforcement action against the Licensee and/or Richard A. Speciale as an individual, upon the completion of the ongoing NRC investigation. In addition, if the Deputy Executive Director for Regulatory Effectiveness concludes that a substantial breach of any conditions of the Confirmatory Order has occurred, the NRC may issue an Order Suspending License.

#### VI

Any person adversely affected by this Confirmatory Order, other than the Licensee, may request a hearing within 20 days of its issuance. Where good cause is shown, consideration will be given to extending the time to request a hearing. A request for extension of time must be made in writing to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and include a statement of good cause for the extension. Any request for a hearing shall be submitted to the Secretary, U.S. Nuclear Regulatory Commission, ATTN: Rulemakings and Adjudications Staff, Washington, DC 20555. Copies also shall be sent to the Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, Washington, DC 20555, to the Associate General Counsel for Hearings, Enforcement, and Administrations at the same address, to the Regional Administrator, NRC Region I, 475 Allendale Road, King of Prussia, PA 19406-1415, and to the Licensee. If such a person requests a hearing, that person shall set forth with particularity the manner in which his interest is adversely affected by this Order and shall address the criteria set forth in 10 CFR 2.714(d).

If a hearing is requested by a person whose interest is adversely affected, the Commission will issue an Order designating the time and place of any

hearing. If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained.

In the absence of any request for hearing, or written approval of an extension of time in which to request a hearing, the provisions specified in Section IV above shall be final 20 days from the date of this Order without further order or proceedings. If an extension of time for requesting a hearing has been approved, the provisions specified in Section IV shall be final when the extension expires if a hearing request has not been received. *An answer or a request for hearing shall not stay the immediate effectiveness of this order.*

Dated this 22nd day of January, 1999.

For the Nuclear Regulatory Commission.

**James Lieberman,**

*Director, Office of Enforcement.*

[FR Doc. 99-2421 Filed 2-1-99; 8:45 am]

BILLING CODE 7590-01-P

## NUCLEAR REGULATORY COMMISSION

### Sunshine Act Meeting

**AGENCY HOLDING THE MEETING:** Nuclear Regulatory Commission.

**DATE:** Weeks of February 1, 8, 15, and 22, 1999.

**PLACE:** Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

**STATUS:** Public and Closed.

**MATTERS TO BE CONSIDERED:**

*Week of February 1*

Tuesday, February 2

11:30 a.m.—Discussion of Intergovernmental issues (Closed-Ex. 9b).

Wednesday, February 3

9:30 a.m.—Affirmation Session (Public Meeting) (if needed).

1:00 p.m.—Meeting with Advisory Committee on Reactor Safeguards (ACRS) (Public Meeting) (Contact: John Larkins, 301-415-7360).

*Week of February 8—Tentative*

Monday, February 8

2:00 p.m.—Briefing on HLW Program Viability Assessment (Public Meeting).

Tuesday, February 9

9:00 a.m.—Briefing on Fire Protection Issues (Public Meeting).

12:00 m.—Affirmation Session (Public Meeting) (if needed).

Thursday, February 11  
9:00 a.m.—Briefing on Y2K Issues  
(Public Meeting).

*Week of February 15—Tentative*

There are no meetings scheduled for the Week of February 15.

*Week of February 22—Tentative*

There are no meetings scheduled for the Week of February 22.

\* The schedule for Commission meetings is subject to change on short notice. To verify the status of meetings call (recording)—(301) 415-1292.

Contact person for more information: Bill Hill (301) 415-1661.

The NRC Commission Meeting Schedule can be found on the Internet at:

<http://www.nrc.gov/SECY/smj/schedule.htm>

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](mailto:wmh@nrc.gov) or [dkw@nrc.gov](mailto:dkw@nrc.gov).

Dated: January 29, 1999.

**William M. Hill, Jr.,**  
*Secy Tracking Officer, Office of the Secretary.*

[FR Doc. 99-2547 Filed 1-29-99; 2:52 pm]

BILLING CODE 7590-01-M

**UNITED STATES OFFICE OF PERSONNEL MANAGEMENT**

**The National Partnership Council; Meeting**

**AGENCY:** Office of Personnel Management.

**ACTION:** Notice of meeting.

**TIME AND DATE:** 1:30 p.m., February 10, 1999.

**PLACE:** OPM Conference Center, Room 1350, U.S. Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Washington, DC. The conference center is located on the first floor.

**STATUS:** This meeting will be open to the public. Seating will be available on a

first-come, first-served basis. Individuals with special access needs wishing to attend should contact OPM at the number shown below to obtain appropriate accommodations.

**MATTERS TO BE CONSIDERED:** The National Partnership Council will hear a presentation by the U.S. Forest Service on the status of their partnership and partnership activities. The meeting will also consider any necessary administrative items in line with the NPC 1999 Strategic Plan and Calendar.

**CONTACT PERSON FOR MORE INFORMATION:** Jeff Sumberg, Director, Center for Partnership and Labor-Management Relations, Office of Personnel Management, Theodore Roosevelt Building, 1900 E Street, NW., Room 7H28, Washington, DC 20415-2000, (202) 606-2930.

Office of Personnel Management.

**Janice R. Lachance,**

*Director.*

[FR Doc. 99-2405 Filed 2-1-99; 8:45 am]

BILLING CODE 6325-01-P

**RAILROAD RETIREMENT BOARD**

**Proposed Collection; Comment Request**

**SUMMARY:** In accordance with the requirement of Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 which provides opportunity for public comment on new or revised data collections, the Railroad Retirement Board (RRB) will publish periodic summaries of proposed data collections.

*Comments are Invited on:* (a) Whether the proposed information collection is necessary for the proper performance of the functions of the agency, including whether the information has practical utility; (b) the accuracy of the RRB's estimate of the burden of the collection of the information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; and (d) ways to minimize the burden related to the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

*Title and Purpose of information collection:* Employee Non-Covered Service Pension Questionnaire; OMB 3220-0154. Section 215(a)(7) of the Social Security Act provides for a reduction in social security benefits

based on employment not covered under the Social Security Act or the Railroad Retirement Act (RRA). This provision applies a different social security benefit formula to most workers who are first eligible after 1985 to both a pension based in whole or in part on noncovered employment and a social security retirement or disability benefit. There is a guarantee provision that limits the reduction in the social security benefit to one-half of the portion of the pension based on noncovered employment after 1956. Section 8011 of Pub. L. 100-647 changed the effective date of the onset from the first month of eligibility to the first month of concurrent entitlement to the noncovered service benefit and the RRA benefit.

Section 3(a)(1) of the RRA provides that the Tier I benefit of an employee annuity will be equal to the amount (before any reduction for age or deduction for work) the employee would receive if he or she would have been entitled to a like benefit under the Social Security Act. The reduction for a noncovered service pension also applies to a Tier I portion of employees under the RRA where the annuity or noncovered service pension begins after 1985. Since the amount of a Tier I benefit of a spouse is one-half of the employee's Tier I, the spouse annuity is also affected by the employee's noncovered service pension reduction of his or her Tier I benefit.

The RRB utilizes Form G-209, Employee Noncovered Service Pension Questionnaire, to obtain needed information from railroad retirement employee applicants or annuitants about the receipt of a pension based on employment not covered under the Railroad Retirement Act or the Social Security Act. It is used as both a supplement to the employee annuity application, and as an independent questionnaire to be completed when an individual who is already receiving an employee annuity becomes entitled to a pension. One response is requested of each respondent. Completion is required to obtain or retain benefits. The RRB proposes a minor non-burden impacting editorial change to Form G-209.

*Estimate of Annual Respondent Burden*

The estimated annual respondent burden is as follows:

Form #(s)	Annual responses	Time (Min)	Burden (Hrs)
G-209 (partial questionnaire) .....	100	1	2

Form #(s)	Annual responses	Time (Min)	Burden (Hrs)
G-209 (full questionnaire) .....	400	8	53
Total .....	500	.....	55

*Additional information or comments:*  
To request more information or to obtain a copy of the information collection justification, forms, and/or supporting material, please call the RRB Clearance Officer at (312) 751-3363. Comments regarding the information collection should be addressed to Ronald J. Hodapp, Railroad Retirement Board, 844 N. Rush Street, Chicago, Illinois 60611-2092. Written comments should be received within 60 days of this notice.

**Chuck Mierzwa,**  
Clearance Officer.

[FR Doc. 99-2433 Filed 2-1-99; 8:45 am]

BILLING CODE 7905-01-M

## SECURITIES AND EXCHANGE COMMISSION

[Rel. No. IC-23668; 812-11264]

### Nasdaq-100 Trust, Series 1, Nasdaq-Amex Investment Product Services, Inc., and Alps Mutual Funds Services, Inc.; Notice of Application

January 27, 1999.

**AGENCY:** Securities and Exchange Commission ("Commission" or "SEC").

**ACTION:** Notice of application for an order under (i) section 6(c) of the Investment Company Act of 1940 (the "Act") for an exemption from sections 4(2) 14(a), 22(d), 24(d), and 26(a)(2)(C) of the Act and rule 22c-1 under the Act; (ii) sections 6(c) and 17(b) of the Act for an exemption from sections 17(a) (1) and (2) of the Act; and (iii) section 17(d) of the Act and rule 17d-1 under the Act to permit certain joint transactions.

**APPLICANTS:** Nasdaq-100 Trust, Series 1 ("Trust"), Nasdaq-Amex Investment Product Services, Inc. (together with its successors in interest<sup>1</sup> and with any person, directly or indirectly, controlling, controlled by, or under common control with, Nasdaq-Amex Investment Product Services, Inc., "Sponsor"), and ALPS Mutual Funds Services, Inc. ("Distributor").

**SUMMARY OF APPLICATION:** Applicants request an order that would (i) permit the Trust, a unit investment trust whose

portfolio will consist of the component stocks of the Nasdaq-100 Index ("Index"), to issue non-redeemable securities ("Nasdaq-100 Shares"); (ii) permit secondary market transactions in Nasdaq-100 Shares at negotiated prices; (iii) permit dealers to sell Nasdaq-100 Shares to purchasers in the secondary market unaccompanied by a prospectus, when prospectus delivery is not required by the Securities Act of 1933 ("Securities Act"); (iv) permit certain expenses associated with the creation and maintenance of the Trust to be borne by the Trust rather than the Sponsor; (v) exempt the Sponsor from the Act's requirement that it purchase, or place with others, \$100,000 worth of Nasdaq-100 Shares; (vi) permit affiliated persons of the trust to deposit securities into, and receive securities from, the Trust in connection with the purchase and redemption of Nasdaq-100 Shares; and (vii) permit the Trust to reimburse the Sponsor for payment of an annual licensing fee to The Nasdaq Stock Market, Inc. ("Nasdaq").

**FILING DATES:** the application was filed on August 19, 1998. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in this notice.

**HEARING OR NOTIFICATION OF HEARING:** An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on February 19, 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 may request notification of a hearing by writing to the SEC's Secretary.

**ADDRESSES:** Secretary, SEC, 450 Fifth Street, N.W., Washington, D.C. 20549. Trust and Sponsor, c/o John L. Jacobs, Vice President, The Nasdaq Stock Market, Inc., 1735 K Street, N.W., Washington, D.C. 20006-1500; and Distributor, c/o James V. Hyatt, General Counsel, 370 17th Street, Suite 3100, Denver, Colorado 80202.

**FOR FURTHER INFORMATION CONTACT:** Timothy R. Kane, Senior Counsel, at (202) 942-0651, or Mary Kay Frech, Branch Chief, at (202) 942-0564 (Division of Investment Management, Office of Investment Company Regulation).

**SUPPLEMENTARY INFORMATION:** The following is a summary of the application. The complete application may be obtained for a fee from the SEC's Public Reference Branch, 450 Fifth Street, N.W., Washington D.C. 20549 (tel. (202) 942-8090).

### Applicants' Representations

1. The Trust is a unit investment trust ("UIT") that will be organized under the laws of the State of New York. The Sponsor is a wholly-owned subsidiary of Nasdaq. The Bank of New York will act as trustee to the Trust ("Trustee"). The Distributor, a registered broker-dealer, will serve as principal underwriter of the Trust on an agency basis.

2. The Trust will hold a portfolio of securities (the "Portfolio Securities") consisting of substantially all of the securities in substantially the same weighting as the component securities of the Nasdaq-100 Index (the "Index Securities"). The Index is a "modified capitalization-weighted" index of securities issued by the 100 largest and most actively traded non-financial companies listed on the Nasdaq National Market Tier. The Index was first published in 1985.

3. Nasdaq-100 Shares, units of beneficial interest in the Trust, are designed to provide investors with an instrument that closely tracks the Index, trades like a share of common stock, and pays periodic dividends proportionate to those paid by the Portfolio Securities.<sup>2</sup> Applicant believe that Nasdaq-100 Shares will afford significant benefits in the public interest. Applicants expect the Trust to be able to track the Index more closely than certain other index products and, unlike open-end index funds, trade at negotiated prices throughout the business day. Applicants also state that Nasdaq-100 Shares will compete with comparable products available on

<sup>1</sup> "Successors in interest" means any entity or entities that result from a reorganization into another jurisdiction or a change in the type of business organization.

<sup>2</sup> The Trust will make quarterly distribution of an amount representing the dividends accumulated on Portfolio Securities during each quarter, net of fees and expenses, if any.

foreign exchanges and attract capital to the U.S. equity markets.

4. The Trustees will make adjustments to the Portfolio Securities to reflect changes made by Nasdaq to the composition and weighting of the Index Securities.<sup>3</sup> All adjustments to the Portfolio Securities made by the Trustee will be set forth in the trust agreement and will be non-discretionary.

5. The Trustee will be paid a "Trustee's Fee" ranging from 0.06% to 0.10% of the net asset value ("NAV") of the Trust on an annualized basis, with the minimum fee amount not to fall below \$180,000.<sup>4</sup> The Sponsor has undertaken, up to and including the fiscal year of the Trust ending on September 30, 2000, to reimburse the Trust or assume payment on behalf of the Trust for ordinary operating expenses of the Trust that exceed 0.18% of the daily NAV of the Trust.<sup>5</sup> The Sponsor retains the ability to be repaid by the Trust to the extent that subsequently during the fiscal year expenses fall below the 0.18% per year level on any given day. Trust fees and expenses will be paid first out of income received by the Trust in the form of dividends and other distributions on the Portfolio Securities.<sup>6</sup> Nasdaq has granted the Sponsor a license to use the Index and certain trademarks of Nasdaq. The Sponsor will pay Nasdaq an annual licensing fee and will, after September 30, 1999, seek reimbursement from the Trust for this fee. The Sponsor will pay the Distributor a flat annual fee. The Sponsor will not seek from the Trust reimbursement for this annual fee without obtaining prior exemptive relief from the Commission.

6. Nasdaq-100 Shares will be issued in aggregations of 50,000 shares ("Creation Units"). The price of a Creation Unit would be approximately \$4,035,000 (based on the value of the Index on December 14, 1998). All orders to purchase Creation Units must be delivered through a party that has executed a Nasdaq-100 participant

<sup>3</sup>Nasdaq determines, comprises, and calculates the Index without regard to the Trust.

<sup>4</sup>To the extent that the amount of the Trustee's compensation is less than the minimum annual fee, the Sponsor will pay the amount of the shortfall.

<sup>5</sup>For purposes of this undertaking, "ordinary operating expenses" will not include taxes, brokerage commissions, and extraordinary non-recurring expenses.

<sup>6</sup>Applicants expect that the income of the Trust may be insufficient to pay the fees and expenses of the Trust. In such circumstances, the Trustee will sell Portfolio Securities to generate sufficient cash to pay the Trust fees and expenses in excess of Trust income. The Trustee is ordinarily required to sell Portfolio Securities whenever the Trustee determines that accrued fees and expenses exceed dividends and other Trust accrued income on a projected basis by more than 0.01% of the NAV of the Trust.

agreement with the Distributor and Trustee and is either (i) a participant in the Continuous Net Settlement ("CNS") System of the National Securities Clearing Corporation ("NSCC") ("Nasdaq-100 Clearing Process") or (ii) a Depository Trust Company ("DTC") participant.

7. An investor wishing to purchase a Creation Unit from the Trust will have to transfer to the Trustee a "Portfolio Deposit" consisting of: (i) A portfolio of securities substantially similar in composition and weighting to the Index Securities ("Deposit Securities"); (ii) a cash payment equal to the dividends accrued on the Portfolio Securities since the last divided payment on the Portfolio Securities, net of expenses and liabilities ("Income Net of Expense Amount"); and (iii) a cash payment or credit to equalize any differences between the market value of the Deposit Securities and the NAV of the Trust on a per Creation Unit basis (the "Balancing Amount").<sup>7</sup> (The Balancing Amount and the Income Net of Expense Amount together constitute the "Cash Component.") An investor making a Portfolio Deposit will be charged a service fee ("Transaction Fee"), paid to the Trustee, to defray the Trustee's costs in processing securities deposited into the Trust.<sup>8</sup>

<sup>7</sup>At the close the market on each business day, the Trustee will calculate the NAV of the Trust and then divide the NAV by the number of outstanding Nasdaq-100 Shares in Creation Unit size aggregations, resulting in an NAV per Creation Unit. The Trustee will then calculate the required number of shares of the Index Securities, and the amount of cash, comprising a Portfolio Deposit for the following business day.

The Sponsor will make available each business day a list of the names and the required number of shares for each of the Deposit Securities in the current Portfolio Deposit, as well as the Income Net of Expense Amount effective through and including the previous business day, per outstanding Nasdaq-100 Share.

The cash equivalent of an Index Security may be included in the Cash Component of a Portfolio Deposit in lieu of the security if (i) the Trustee determines that an Index Security is likely to be unavailable or available in insufficient quantity for inclusion in a Portfolio Deposit (for example, when the security is subject to a trading halt or stop order, or the subject of a tender offer), or (ii) a particular investor is restricted from investing or engaging in transactions in the Index Security (for example, when the investor is a broker-dealer restricted by regulation or internal policy from investing in securities issued by a company on whose board of directors one of its principals serves, or when the investor is a broker-dealer and the security is on its "restricted list").

<sup>8</sup>The Transaction Fee will be \$1,000 per day, regardless of the number of Creation Units purchased on that day by the investor. The Transaction Fee may be subsequently changed by the Trustee with the Sponsor's consent, but it will not exceed 0.10% of the value of a Creation Unit. For purchases of Creation Units outside the Nasdaq-100 Clearing Process, the Transaction Fee will be one to four times greater. The amount of the Transaction Fee will be disclosed in the prospectus for the Trust.

8. Orders to purchase Creation Units will be placed with the Distributor, who will be responsible for transmitting the orders to the Trustee.<sup>9</sup> The Distributor will issue confirmations of acceptance, issue delivery instructions to the Trustee to implement the delivery of Creation Units, and maintain records of the orders and the confirmations. The Distributor also will be responsible for delivering prospectuses to purchasers of Creation Units and may provide certain other administrative services, such as those related to state securities law compliance.

9. Persons purchasing Creation Units from the Trust may hold the Nasdaq-100 Shares or sell some or all of them in the secondary market. Nasdaq-100 Shares will be listed on the American Stock Exchange, LLC ("AMEX") and traded in the secondary market as individual units (i.e., in less than Creation Unit size aggregations) in the same manner as other equity securities. An AMEX specialist will be assigned to make a market in Nasdaq-100 Shares. The price of Nasdaq-100 Shares on the AMEX will be based on a current bid/offer market and would be approximately \$80.70 per Nasdaq-100 Share (based on the value of the Index as of December 14, 1998). Transactions involving the sale of Nasdaq-100 Shares will be subject to customary brokerage commissions and charges. Applicants expect that the price at which Nasdaq-100 Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Units at their NAV, which should ensure that Nasdaq-100 Shares will not trade at a material discount or premium in relation to their NAV.

10. Applicants expect that purchasers of Creation Units will include institutional investors and arbitrageurs (which could include institutional investors). The AMEX specialist, in providing for a fair and orderly secondary market for Nasdaq-100 Shares, also may purchase Nasdaq-100 Shares for use in its market-making activities on the AMEX. Applicants expect that secondary market purchasers of Nasdaq-100 Shares will include both institutional and retail investors.<sup>10</sup>

11. Applicants will make available a standard Nasdaq-100 Shares product

<sup>9</sup>The procedures for processing a purchase order will depend upon whether the transaction is settled through NSCC or DTC.

<sup>10</sup>Nasdaq-100 Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Nasdaq-100 Shares. Records reflecting the beneficial owners of Nasdaq-100 Shares will be maintained by DTC or its participants.

description ("Product Description") to AMEX members and member organizations for distribution to investors purchasing Nasdaq-100 Shares in accordance with AMEX Rule 1000. The purpose of the Product Description is to provide a brief and readily understandable description of the salient aspects of Nasdaq-100 Shares. The Product Description will advise investors that a prospectus for Nasdaq-100 Shares is available without charge upon request from the investor's account executive. Applicants expect that purchases of Nasdaq-100 Shares through a non-member broker-dealer in a transaction away from the AMEX would not constitute a significant portion of the market activity in Nasdaq-100 Shares.

12. Nasdaq-100 Shares will not be individually redeemable, except upon termination of the Trust. Nasdaq-100 Shares will only be redeemable in Creation Unit-size aggregations through the Trust. To redeem, an investor will have to accumulate enough Nasdaq-100 Shares to constitute a Creation Unit. An investor redeeming a Creation Unit will receive a portfolio of securities typically identical in composition and weighting to the securities portion of a Portfolio Deposit as of the date the redemption request was made. An investor may receive the cash equivalent of an Index Security (i) when the Trustee determines that an Index Security is likely to be unavailable or available in insufficient quantity for delivery by the Trust; (ii) upon the request of the redeeming investor; or (iii) upon notice of the termination of the Trust. A redeeming investor may receive or may pay an amount equal to the Income Net of Expense Amount, plus or minus the Balancing Amount. A redeeming investor will pay a Transaction Fee calculated in the same manner as a Transaction Fee payable in connection with the purchase of a Creation Unit.<sup>11</sup> The Trustee will transfer the securities and cash to the redeeming investor within three business days of receipt of the request for redemption.

13. Because the Trust will ordinarily redeem Creation Units in kind, the Trust will not have to maintain cash reserves for redemptions. This will allow the assets of the Trust to be committed as fully as possible to tracking the Index, enabling the Trust to track the Index more closely than other investment products that must allocate a greater portion of their assets for cash redemptions.

14. The Trust will terminate on the earlier of (i) 125 years from the date the

initial Portfolio Deposit is received by the Trustee for deposit into the corpus of the Trust, or (ii) the date 20 years after the death of the last survivor of fifteen persons named in the trust agreement. The Trust will also terminate if (i) Nasdaq-100 Shares are de-listed from the AMEX and are not subsequently re-listed on a national securities exchange registered under the Securities Exchange Act of 1934 or a quotation medium operated by a national securities association; or (ii) either the Sponsor or the Trustee resigns or is removed, and a successor is not appointed. The Trust may terminate if: (i) 66⅔% of the holders of the outstanding Nasdaq-100 Shares agree to terminate it; (ii) the DTC is unable or unwilling to continue to perform its functions and a comparable replacement is unavailable; (iii) NSCC no longer provides clearance services with respect to the Nasdaq-100 Shares, or if the Trustee is no longer a participant in NSCC; (iv) Nasdaq ceases to publish the Index; or (v) the license agreement is terminated. In addition, the Sponsor will have the discretionary right to direct the Trustee to terminate the Trust if at any time (i) after six months following and prior to three years following the initial receipt of Portfolio Deposits by the Trust, the NAV of the Trust falls below \$150,000,000; or (ii) after three years, the NAV is less than \$350,000,000, adjusted annually for inflation. The Sponsor may also direct the Trustee to terminate the Trust if within 90 days from the initial receipt of Portfolio Deposits the NAV of the Trust is less than \$100,000.

15. Within a reasonable time after the Trust's termination, the Trustee will use its best efforts to sell all Portfolio Securities not previously distributed to investors redeeming Creation Units. Nasdaq-100 Shares not redeemed prior to termination will be redeemed in cash at NAV based on the proceeds from the sale of the Portfolio Securities.

#### Applicants' Legal Analysis

1. Applicants request an order under section 6(c) of the Act granting an exemption from sections 4(2), 14(a), 22(d), 24(d), and 26(a)(2)(C) of the Act and rule 22c-1 under the Act; under sections 6(c) and 17(b) of the Act granting an exemption from sections 17(a)(1) and (2) of the Act; and under rule 17d-1 under the Act to permit certain joint transactions.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security, or transaction, or any class of persons, securities, or transactions, if and to the extent that such exemption is necessary or

appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

#### Section 4(2) of the Act

3. Section 4(2) of the Act defines a UIT as an investment company that, among other things, issues only redeemable securities. Because Nasdaq-100 Shares will not be individually redeemable, applicants request an order that would permit the Trust to register and operate as a UIT. Applicants state that investors may purchase Nasdaq-100 Shares in Creation Units from the Trust and redeem Creation Units. Applicants further state that because the market price of Creation Units will be disciplined by arbitrage opportunities, investors should be able to sell Nasdaq-100 Shares in the secondary market at approximately their NAV.

#### Section 14(a) of the Act

4. Section 14(a) of the Act provides, in pertinent part, that no registered investment company may make an initial public offering of its securities unless it has a net worth of at least \$100,000, or provision is made in connection with the registration of its securities that (i) firm agreements to purchase \$100,000 of its securities will have been made by not more than 25 persons, and (ii) all proceeds, including sales loads, will be refunded to investors if the investment company's net worth is less than \$100,000 within 90 days after the effective date of the registration statement. Applicants state that section 14(a) was designed to address the formation of undercapitalized investment companies.

5. Rule 14a-3 under the Act exempts from section 14(a) UITs that invest only in "eligible trust securities," which do not include equity securities, subject to certain safeguards, including the refund of any sales load collected from investors. Applicants will comply in all respects with rule 14a-3, except that the Trust will not restrict its investments to eligible trust securities and the Trustee will not refund the Transaction Fee. Applicants contend that the Trust's investment in equity securities does not negate the effectiveness of the rule's safeguards nor subject investors to any greater risk of loss due to investment in an undercapitalized investment company. With respect to the Transaction Fee, applicants assert that it is not a sales load, and therefore is not covered by the rule's refund provision. Applicants note that the Transaction Fee will be paid not by retail investors, but by institutional and other

<sup>11</sup> See note 8, supra.

sophisticated, well-capitalized investors who can afford the approximately \$4,035,000 purchase price of a Creation Unit and who do not require the protections of section 14(a) of the Act.

*Section 22(d) of the Act and Rule 22c-1 Under the Act*

6. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security that is being currently offered to the public by or through an underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming, or repurchasing a redeemable security do so only at a price based on its NAV next computed after receipt of a tender of the security for redemption or of an order to purchase or sell the security. Applicants state that secondary market trading in Nasdaq-100 Shares will take place at negotiated prices, not at a current offering price described in the prospectus, and not at a price based on NAV. Thus, purchases and sales of Nasdaq-100 Shares in the secondary market will not comply with section 22(d) and rule 22c-1. Applicants request an exemption from these provisions.

7. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Nasdaq-100 Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (i) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers; (ii) prevent unjust discrimination or preferential treatment among buyers resulting from sales at different prices; and (iii) assure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

8. Applicants believe that none of these purposes will be thwarted by permitting Nasdaq-100 Shares to trade in the secondary market at negotiated prices. Applicants state (i) that secondary market trading in Nasdaq-100 Shares does not involve the Trust as a party and cannot result in dilution of an investment in Nasdaq-100 Shares; and (ii) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as

supply and demand, not as a result of unjust or discriminatory manipulation. Therefore, applicants assert that secondary market transactions in Nasdaq-100 Shares will not lead to discrimination or preferential treatment among purchases. Finally, applicants contend that the proposed distribution system will be orderly because arbitrage activity will ensure that the difference between the market price of Nasdaq-100 Shares and their NAV remains narrow.

*Section 24(d) of the Act*

9. Section 24(d) of the Act provides, in pertinent part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by a UIT. Applicants request an exemption from section 24(d) to permit dealers in Nasdaq-100 Shares to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>12</sup> Applicants state that the imposition of prospectus delivery requirements on dealers in the secondary market will materially impede the success of Nasdaq-100 Shares.

10. Applicants state that the secondary market for Nasdaq-100 Shares is significantly different from the typical secondary market for UIT securities, which is usually maintained by the sponsor. Nasdaq-100 Shares will be listed on a national securities exchange and will be traded in a manner similar to the shares of common stock issued by operating companies and closed-end investment companies. Dealers selling shares of operating companies and closed-end investment companies in the

<sup>12</sup> Applicants state that persons purchasing Creation Units will be cautioned in the prospectus that some activities on their part may, depending on the circumstances, result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm or its client may be deemed a statutory underwriter if it takes Creation Units after placing an order with the Distributor, breaks them down into the constituent Nasdaq-100 Shares, and sells Nasdaq-100 Shares directly to its customers; or if chooses to couple the creation of a supply of new Nasdaq-100 Shares with an active selling effort involving solicitation of secondary market demand for Nasdaq-100 Shares. The prospectus will state that whether a person is an underwriter depends upon all the facts and circumstances pertaining to that person's activities. The prospectus also will state that broker-dealer firms should also note that dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary trading transactions), and thus dealing with Nasdaq-100 Shares that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

secondary market generally are not required to deliver a prospectus to the purchaser.

11. Applicants contend that Nasdaq-100 Shares, as a listed security, merit a reduction in the compliance costs and regulatory burdens resulting from the imposition of prospectus delivery obligations in the secondary market. Because Nasdaq-100 Shares will be exchange-listed, prospective investors will have access to several types of market information about the product. Applicants state that quotations, last sale price, and volume information will be continually available on a real time basis through the consolidated tape and will be available throughout the day on brokers' computer screens and other electronic services, such as Quotron. The previous day's price and volume information also will be published in the financial section of newspapers. The Sponsor also will publish daily, on a per Nasdaq-100 Shares basis, the amount of accumulated dividends, net of accrued expenses.

12. Investors also will receive the Product Description. Applicants state that, while not intended as a substitute for a prospectus, the Product Description will contain pertinent information about Nasdaq-100 Shares. Applicants also note that Nasdaq-100 Shares will be readily understandable to retail investors as a product that tracks the Nasdaq-100 Index, which is well known to most investors and widely recognized.

*Section 26(a)(2)(C) of the Act*

13. Section 26(a)(2)(C) of the Act requires, among other things, that a UIT's trust indenture prohibit payments to the trust's depositor (in the case of the Trust, the Sponsor), and any affiliated person of the depositor, except payments for performing certain administrative services. Applicants request an exemption from section 26(a)(2)(C) to permit the Trust to reimburse the Sponsor for certain licensing, registration, and marketing expenses.

14. Applicants state that, ordinarily, a sponsor of a UIT has several sources of income in connection with the creation of the trust. Applicants assert, however, that under the proposed structure of the Trust, the usual sources of income are not available because the Sponsor will not impose a sales load, maintain a secondary market, or deposit Index Securities into the Trust. Although AMEX, an affiliate of the Sponsor, will earn some income on the trading fees imposed on transactions on that exchange, applicants expect that the fees will generate substantially less

revenue than what would have been generated by a normal sales charge on secondary market trades of Nasdaq-100 Shares.<sup>13</sup> Applicants contend that the abuse sought to be remedied by section 26(a)(2)(C) of the Act—"double dipping" by UIT sponsors collecting money from their captive trusts as well as the profits already generated by sales charges and other sources—will not be present if the requested exemption is granted.

15. Applicants contend that permitting the Trust to reimburse the Sponsor for the Trust's expenses (discussed above) would be no more disadvantageous to the holders of Nasdaq-100 Shares than allowing the expenses to be imposed indirectly as offsets to sales loads and other charges, as is done by typical UITs. Applicants state that the Trust will pay the Sponsor only its actual out-of-pocket expenses and no component of profit will be included. Finally, applicants state that the payment is capped at 20 basis points of the Trust's NAV on an annualized basis, with any expenses in excess of that amount absorbed by the Sponsor.

#### *Section 17(a) of the Act*

16. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such person, from selling any security to or purchasing any security from the company. Because purchases and redemptions of Creation Units will be "in kind" rather than cash transactions, section 17(a) may prohibit affiliated persons of the Trust from purchasing or redeeming Creation Units. Because the definition of "affiliated person" of another person in section 2(a)(3) of the Act includes any person owning five percent or more of an issuer's outstanding voting securities, every purchaser of a Creation Unit will be affiliated with the Trust so long as fewer than twenty Creation Units are extant. Applicants request an exemption from section 17(a) under sections 6(c) and 17(b), to permit affiliated persons of the Trust to purchase and redeem Creation Units.

17. Section 17(b) authorizes the Commission to exempt a proposed transaction from section 17(a) if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching, and the proposed transaction is consistent with the

policies of the registered investment company and the general provisions of the Act. Applicants contend that no useful purpose would be served by prohibiting affiliated persons of the Trust from purchasing or redeeming Creation Units. The composition of a Portfolio Deposit made by a purchaser or given to a redeeming investor will be the same regardless of the investor's identity, and will be valued under the same objective standards applied to valuing the Portfolio Securities. Therefore, applicants state that "in kind" purchases and redemptions will afford no opportunity for an affiliated person of the Trust to effect a transaction detrimental to the other holders of Nasdaq-100 Shares. Applicants also believe that "in kind" purchases and redemptions will not result in abusive self-dealing or overreaching by affiliated persons of the Trust.

#### *Section 17(d) of the Act and Rule 17d-1 Under the Act*

18. Section 17(d) of the Act and rule 17d-1 under the Act prohibit any affiliated person of, or principal underwriter for, a registered investment company, or any affiliated person of the affiliated person or the principal underwriter, acting as principal, from effecting any transaction in connection with any joint enterprise or other arrangement or profit-sharing plan in which the investment company participates, unless an application regarding the joint transaction has been filed with the Commission and granted by order. Under rule 17d-1, in passing upon such applications, the Commission considers whether the participation of the registered investment company in the joint transaction is consistent with the provisions, policies and purposes of the Act and the extent to which such participation is on a basis different or less advantageous than that of other participants.

19. Section 2(a)(3)(F) of the Act defines an "affiliated person" of another person to include, in the case of an unincorporated investment company not having a board of directors, its depositor. Applicants state that the Sponsor may be deemed an affiliated person of the Trust because it has borne all aspects of the role of depositor in structuring and creating the Trust other than actually depositing the Index Securities into the Trust. Moreover, because the Sponsor is a wholly-owned subsidiary of Nasdaq, the Nasdaq may be deemed to be an affiliated person of an affiliated person of the Trust.

20. Applicants request an order under rule 17d-1 that would permit the Trust to reimburse the Sponsor for the payment to Nasdaq of an annual license fee under a license agreement. Applicants believe that relief is necessary because the Trust's undertaking to reimburse the Sponsor might be deemed a joint enterprise or other joint arrangement in which the Trust is a participant, in contravention of section 17(d) of the Act and rule 17d-1.

21. The license agreement allows applicants to use the Index as a basis for Nasdaq-100 Shares and to use certain of Nasdaq's trade name and trademark rights. Applicants believe that Nasdaq is a valuable name that is well-known to investors and that investors will desire to invest in an instrument that closely mirrors the Index. In view of this, applicants state that it is necessary to obtain from Nasdaq the above-mentioned license agreement so that appropriate reference to Nasdaq and Nasdaq-100 Shares may be made in materials describing Nasdaq-100 Shares and the Trust. Applicants assert that the terms and provisions of the license agreement are comparable to the terms and provisions of other similar license agreements and that the annual license fee is for fair value, is in an amount comparable to that which would be charged by Nasdaq for similar arrangements, and is in an amount comparable to that charged by licensors in connection with the formation of other UITs based on other indices. For these reasons, applicants state that the proposed license fee arrangement satisfies the standards of section 17(d) and rule 17d-1.

#### **Applicant's Conditions**

Applicants agree that the order granting the requested relief will be subject to the following conditions:

1. Applicants will not register a new series of the Trust, whether identical or similar to the Nasdaq-100 Trust, Series 1, by means of filing a post-effective amendment to the Trust's registration statement or by any other means, unless applicants have requested and received with respect to such new series, either exemptive relief from the Commission or a no-action position from the Division of Investment Management of the Commission.

2. The Trust prospectus and the Product Description will clearly disclose that, for purposes of the Act, Nasdaq-100 Shares are issued by the Trust and that the acquisition of Nasdaq-100 Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act.

<sup>13</sup> Effective November 2, 1998, Nasdaq (the Sponsor's parent) and the AMEX became separate subsidiaries of the Nasdaq-Amex Market Group, Inc., a newly-created subsidiary of the National Association of Securities Dealers, Inc.

For the Commission, by the Division of Investment Management, pursuant to delegated authority.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2410 Filed 2-1-99; 8:45 am]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### USA Talks.com, Inc.; Order of Suspension of Trading

January 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of current and accurate information concerning the securities of USA Talks.com, Inc. ("USA Talks") because of questions regarding the accuracy of assertions by USA Talks in statements made to the market makers of the stock of USA Talks, to other broker-dealers, and to investors concerning, among other things, the status and extent of USA Talks' business operations.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above-listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above-listed company is suspended for the period from 9:30 a.m. EST, January 29, 1999, through 11:59 p.m. EST, February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2521 Filed 1-29-99; 2:25 pm]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### Citron, Inc.; Order of Suspension of Trading

January 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Citron, Inc. ("Citron"), a Texas corporation that purports to be an internet marketing company. Questions have been raised about the adequacy and accuracy of publicly-disseminated information concerning, among other things, the business prospects and future earnings of Citron.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST, January 29, 1999 through 11:59 p.m. EST, on February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2522 Filed 1-29-99; 2:25 pm]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### Electronic Transfer Associates, Inc.; Order of Suspension of Trading

January 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Electronic Transfer Associates, Inc. ("ETA"), a Colorado corporation that purports to be an internet-related sales company. Questions have been raised about the adequacy and accuracy of publicly-disseminated information concerning, among other things, the business prospects and future earnings of ETA.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST, January 29, 1999 through 11:59 p.m. EST, on February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2523 Filed 1-29-99; 2:25 pm]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### Invest Holdings Group, Inc.; Order of Suspension of Trading

January 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Invest Holdings Group, Inc. ("IHG"), a Colorado corporation that purports to develop and sell health maintenance products. Questions have been raised about the adequacy and accuracy of publicly-disseminated information concerning, among other things, the efficacy of IHG's products and its business relationship with Citron, Inc.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST, January 29, 1999 through 11:59 p.m. EST, on February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2524 Filed 1-29-99; 2:25 pm]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### Polus, Inc.; Order of Suspension of Trading

January 29, 1999.

It appears to the Securities and Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Polus, Inc. ("Polus"), a Colorado corporation that has no apparent operations. Questions have been raised about (1) the lack of meaningful publicly-available financial information, and (2) the adequacy and accuracy of publicly-disseminated information concerning, among other things, a merger involving Smartek, Inc., of which it is the majority owner.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m. EST, January 29, 1999 through 11:59 p.m. EST, on February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2525 Filed 1-29-99; 2:25 pm]

BILLING CODE 8010-01-M

## SECURITIES AND EXCHANGE COMMISSION

[File No. 500-1]

### Smartek, Inc., Order of Suspension of Trading

January 29, 1999.

It appears to the Securities of Exchange Commission that there is a lack of adequate and accurate current information concerning the securities of Smartek, Inc. ("Smartek"), and Idaho corporation involved in wholesale men swear and federally subsidized housing. Questions have been raised about (1) the lack of meaningful publicly-available financial information, and (2) the adequacy and accuracy of publicly-disseminated information concerning, among other things, a merger.

The Commission is of the opinion that the public interest and the protection of investors require a suspension of trading in the securities of the above listed company.

Therefore, it is ordered, pursuant to Section 12(k) of the Securities Exchange Act of 1934, that trading in the above listed company is suspended for the period from 9:30 a.m., EST, January 29, 1999 through 11:59 p.m. EST, on February 11, 1999.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-2526 Filed 1-29-99; 8:45 am]

BILLING CODE 8010-01-M

## SOCIAL SECURITY ADMINISTRATION

### Agency Information Collection Activities: Proposed Request and Request for Emergency Review

In compliance with Pub. L. 104-13, the Paperwork Reduction Act of 1995, SSA is providing notice of its information collection packages that require submission to the Office of Management and Budget (OMB).

I. Following is a list of information collections for which we are seeking OMB approval.

1. *Employee Work Activity Report—0960-0483.* The data collected by the Social Security Administration on Form SSA-3033 is reviewed and evaluated to determine if the claimant meets the disability requirements of the law, when the claimant returns to work after the alleged or established onset date. When a possible unsuccessful work attempt or nonspecific subsidy is involved (and the information cannot be obtained through telephone contact), Form SSA-3033 will be used to request a description, by mail, of the employee's work effort. The respondents are employers of Old-Age, Survivors and Disability Insurance and Supplemental Security Income disability applicants and beneficiaries.

*Number of Respondents:* 12,500.

*Frequency of Response:* 1.

*Average Burden Per Response:* 15 minutes.

*Estimated Annual Burden:* 3,125 hours.

2. *Talking and Listening to Customers (Customer Comment System)—0960-NEW.* SSA is developing a customer feedback system to capture customer complaints and compliments. To develop a system that is most useful, we need to collect opinions from all of SSA's market segments, including SSA customers and potential customers. SSA will conduct focus groups to solicit opinions on the proposed Customer Comment System. SSA needs this information to ensure that customer concerns and expectations are considered in the design of the Customer Comment System.

*Number of Respondents:* 100.

*Frequency of Response:* 1.

*Average Burden Per Response:* 90 minutes.

*Estimated Annual Burden:* 150 hours.

SSA is soliciting comments on the accuracy of the agency's burden estimate; the need for the information; its practical utility; ways to enhance its quality, utility and clarity; and on ways to minimize burden on respondents, including the use of automated collection techniques or other forms of information technology.

Written comments and recommendations regarding these information collections should be sent within 60 days from the date of this publication, directly to the SSA Reports Clearance Officer at the address listed at the end of the notices.

II. The information collection listed below has been submitted to OMB for emergency clearance. OMB approval has been requested by February 19, 1998.

0960-NEW. Pub. L. 105-277 authorizes SSA to conduct a Medicare buy-in demonstration project to evaluate means to promote the Medicare buy-in programs targeted to elderly and disabled individuals under titles XVIII and XIX of the Social Security Act. A lack of awareness about the Medicare buy-in programs appears to be one of the major obstacles to enrollments. Other obstacles to enrollment include the confusion of potential eligibles as to how to apply for these programs and a preference for dealing with SSA field offices rather than with local Medicaid offices.

SSA will screen respondents voluntarily for potential Medicare Part B buy-in eligibility using a screening guide developed for this purpose. The screening guide will collect information from SSA beneficiaries regarding income, resources, marital status and living arrangements and also ask questions about their awareness of Medicare Part B buy-in programs. SSA will gather this information to identify and overcome obstacles to Medicare Part B buy-in enrollments and to screen for potential eligibility for Medicare Part B benefits. The screening guide will be in use from March 1, 1999 through December 31, 1999.

*Number of Respondents:* 130,000.

*Frequency of Response:* 1.

*Average Burden Per Response:* 20 minutes.

*Estimated Annual Burden:* 43,334 hours.

Written comments and recommendations regarding the emergency clearance should be directed to the OMB Desk Officer and SSA Reports Clearance Officer at the following addresses:

(OMB)

Attn: Lori Schack, New Executive Office Building, Room 10230, 725 17th St., NW, Washington, DC 20503

(SSA)

Social Security Administration, DCFAM, Attn: Frederick W. Brickenkamp, 6401 Security Blvd., 1-A-21 Operations Bldg., Baltimore, MD 21235

You can obtain a copy of the collection instruments and/or the OMB clearance packages by calling the SSA Reports Clearance Officer on (410) 965-4145 or by writing to him at the address listed above.

Dated: January 27, 1999.

**Frederick W. Brickenkamp,**

*Reports Clearance Officer, Social Security Administration.*

[FR Doc. 99-2413 Filed 2-1-99; 8:45 am]

BILLING CODE 4190-29-P

**DEPARTMENT OF STATE**

[Public Notice No. 2964]

**Shipping Coordinating Committee  
International Maritime Organization  
(IMO) Legal Committee; Notice of  
Meeting**

The U.S. Shipping Coordinating Committee (SHC) will conduct an open meeting at 1:00 p.m., on Friday, February 12, 1999, in Room 2415 at U.S. Coast Guard Headquarters, 2100 Second Street, S.W., Washington, D.C. The purpose of this meeting is to prepare for a Diplomatic Conference on the International Maritime Organization's Draft Convention on Arrest of Ships, which will be held March 01-12, 1999, in Geneva. This meeting will be a further opportunity for interested members of the public to express their views on the Draft Convention.

Members of the public are invited to attend the SHC meeting, up to the seating capacity of the room.

For further information, or to submit views in advance of the meeting, please contact Captain Malcolm J. Williams, Jr., or Lieutenant William G. Respires, U.S. Coast Guard (G-LMI), 2100 Second Street, SW, Washington, D.C. 20593; telephone (202) 267-1527; fax (202) 267-4496.

Dated: January 27, 1999.

**Stephen M. Miller,***Executive Secretary, Shipping Coordinating Committee.*

[FR Doc. 99-2464 Filed 1-28-99; 4:44 pm]

BILLING CODE 4710-07-P

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Air Traffic Procedures Advisory  
Committee****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of meeting.

**SUMMARY:** The FAA is issuing this notice to advise the public that a meeting of the Federal Aviation Administration Air Traffic Procedures Advisory Committee (ATPAC) will be held to review present air traffic control procedures and practices for standardization, clarification, and upgrading of terminology and procedures.

**DATES:** The meeting will be held from April 19-22, 1999, from 9 a.m. to 5 p.m. each day.

**ADDRESSES:** The meeting will be held in the MacCraken room, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC.

**FOR FURTHER INFORMATION CONTACT:** Mr. Eric Harrell, Executive Director, ATPAC, En Route/Terminal Operations and Procedures Division, 800 Independence Avenue, SW., Washington, DC 20591, telephone (202) 267-3725.

**SUPPLEMENTARY INFORMATION:** Pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. 2), notice is hereby given of a meeting of the ATPAC to be held April 19 through April 22, 1999, in the MacCracken Room, Federal Aviation Administration, 800 Independence Avenue, SW, Washington, DC.

The agenda for this meeting will cover: a continuation of the Committee's review of present air traffic control procedures and practices for standardization, clarification, and upgrading of terminology and procedures. It will also include:

1. Approval of Minutes.
2. Submission and Discussion of Areas of Concern.
3. Discussion of Potential Safety Items.
4. Report from Executive Director.
5. Items of Interest.
6. Discussion and agreement of location and dates for subsequent meetings.

Attendance is open to the interested public but limited to the space available. With the approval of the Chairperson, members of the public may present oral statements at the meeting. Persons desiring to attend and persons desiring to present oral statements should notify the person listed above not later than April 16, 1999. The next quarterly meeting of the FAA ATPAC is planned to be held from July 26-29, 1999, in Osh Kosh, Wisconsin.

Any member of the public may present a written statement to the Committee at any time at the address given above.

**Eric Harrell,***Executive Director, Air Traffic Procedures Advisory Committee.*

[FR Doc. 99-2420 Filed 2-1-99; 8:45 am]

BILLING CODE 4910-13-M

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Aviation Rulemaking Advisory  
Committee Meeting****AGENCY:** Federal Aviation Administration (FAA), DOT.**ACTION:** Notice of public meeting.

**SUMMARY:** This notice announces a public meeting of the FAA's Aviation

Rulemaking Advisory Committee to discuss rotorcraft issues.

**DATES:** The meeting will be held on February 24, 1999, 11 a.m. CST.

**ADDRESSES:** The meeting will be held at the Wyndham Anatole, Miro Room, 2201 Stemmons Freeway, Dallas TX 75207, telephone 214-748-1200.

**FOR FURTHER INFORMATION CONTACT:** Angela Anderson, Office of Rulemaking, ARM-200, 800 Independence Avenue, SW, Washington, DC 20591, telephone (202) 267-9681.

**SUPPLEMENTARY INFORMATION:** The referenced meeting is announced pursuant to Section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92-463; 5 U.S.C. App. II).

The agenda will include:

- Status reports for the following.
- a. Rotorcraft External Load Combination Safety Requirements.
  - b. Normal Category Gross Weight and Passenger Issues.
  - c. Critical Parts.
  - d. Performance and Handling Qualities Working Group.

Attendance is open to the public but will be limited to the space available. The public must make arrangements to present oral statements at the meeting. Written statements may be presented to the committee at any time by providing 16 copies to the Assistant Chair or by providing the copies to him at the meeting. In addition, sign and oral interpretation, as well as a listening device, can be made available at the meeting if requested 10 calendar days before the meeting. Arrangements may be made by contacting the person listed under the heading **FOR FURTHER INFORMATION CONTACT**.

Issued in Fort Worth, Texas, on January 26, 1999.

**Mark R. Schilling,***Assistant Executive Director for Rotorcraft Issues, Aviation Rulemaking Advisory Committee.*

[FR Doc. 99-2418 Filed 2-1-99; 8:45 am]

BILLING CODE 4910-13-M

**DEPARTMENT OF TRANSPORTATION****Federal Aviation Administration****Public Hearing To Receive Public  
Comments Concerning the  
Implementation of the Noise  
Abatement Measures in the Part 150  
Noise Compatibility Plan Update and  
Aviation Related Industrial  
Development for Toledo Express  
Airport**

**AGENCY:** Federal Aviation Administration (FAA), DOT.

**ACTION:** Notice of public hearing.

**SUMMARY:** The Federal Aviation Administration (FAA) is issuing this notice to advise the public that a Public Hearing will be held concerning the environmental impact of implementing the Noise Abatement Measures described in the Part 150 Noise Compatibility Plan Update and aviation related industrial development for Toledo Express Airport. The Part 150 is currently under review. This hearing is being held pursuant to the requirements of the National Environmental Policy Act of 1969 (Pub. L. 91-190) and other laws as applicable.

**DATES:** March 10, 1999, 5:00 p.m.–8:00 p.m.

**ADDRESSES:** Angola Gardens, 7001 Angola Road, Holland OH.

**POINT OF CONTACT:** Mr. Wally Welter, Environmental Specialist, FAA Great Lakes Region, Air Traffic Division, AGL-520.V, 2300 East Devon Avenue, Des Plaines, IL 60018.

**SUPPLEMENTARY INFORMATION:** A Draft Environmental Impact Statement (DEIS) has been prepared and will be available for public review and comment. This document will be available 30 days prior to the hearing at the following locations.

(1) Federal Aviation Administration, Air Traffic Division Office, 2300 East Devon Avenue, Des Plaines, IL 60018,

(2) Toledo-Lucas County Port Authority, Toledo Express Airport, 11013 Airport Highway, Swanton, OH 43558,

(3) Toledo-Lucas County Port Authority, One Maritime Plaza, Toledo, OH 43604,

(4) Toledo-Lucas County Public Library, 1032 South McCord Road, Holland, OH 43528,

(5) Swanton Public Library, 305 Chestnut Street, Swanton, OH 43558.

The purpose of the hearing is to consider the social, economic, and environmental effects of the proposed actions. The public will be afforded the opportunity to present, for the official record, oral and/or written testimony pertinent to the intent of the hearing. Additional written comments should be submitted no later than March 12, 1999. Written statements should be submitted to Mr. Wally Welter, Environmental Specialist, FAA Great Lakes Region, AGL-520V, Air Traffic Division, 2300 East Devon Avenue, Des Plaines, IL 60018.

Issued in Des Plaines, Illinois on January 22, 1999.

**David B. Johnson,**

*Acting Manager, Air Traffic Division.*

[FR Doc. 99-2419 Filed 2-1-99; 8:45 am]

**BILLING CODE 4910-13-M**

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### Notice of Intent To Rule on Application To Impose and Use the Revenue From a Passenger Facility Charge (PFC) at Easterwood Airport, College Station, TX

**AGENCY:** Federal Aviation Administration (FAA) DOT.

**ACTION:** Notice of intent to rule on application.

**SUMMARY:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Easterwood Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Public Law 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

**DATES:** Comments must be received on or before March 4, 1999.

**ADDRESSES:** Comments on this application may be mailed or delivered in triplicate copies to the FAA at the following address: Mr. Ben Guttery, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, Fort Worth, Texas 76193-0610.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. Harry Raisor, Director of Aviation, at the following address: Mr. Harry Raisor, Director of Aviation, Texas A&M University, 1 McKenzie Terminal Blvd, Suite 112, College Station, Texas 77845-1583.

Air carriers and foreign air carriers may submit copies of the written comments previously provided to the Airport under Section 158.23 of Part 158.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ben Guttery, Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, Fort Worth, Texas 76193-0610, (817) 222-5614.

The application may be reviewed in person at this same location.

**SUPPLEMENTARY INFORMATION:** The FAA proposes to rule and invites public comment on the application to impose and use the revenue from a PFC at Easterwood Airport under the provisions of the Aviation Safety and Capacity Expansion Act of 1990 (Title IX of the Omnibus Budget Reconciliation Act of 1990) (Pub. L. 101-508) and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On January 19, 1999, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Airport was substantially complete within the requirements of Section 158.25 of Part 158. The FAA will approve or disapprove the application, in whole or in part, no later than May 15, 1999.

The following is a brief overview of the application.

*Level of the proposed PFC:* \$3.00.

*Proposed charge effective date:* June 1, 2000.

*Proposed charge expiration date:* May 1, 2004.

*Total estimated PFC revenue:* \$951,400.00.

*PFC application number:* 99-03-C-00-CLL.

Brief description of proposed projects:

#### Projects To Impose and Use PFC'S

Airfield Safety Improvement, Terminal Roof Replacement, Perimeter Road (Phase 1), and PFC Administrative Costs.

Proposed class or classes of air carriers to be exempted from collecting PFC's:

None.

Any person may inspect the application in person at the FAA office listed above under **FOR FURTHER INFORMATION CONTACT** and at the FAA regional Airports office located at: Federal Aviation Administration, Southwest Region, Airports Division, Planning and Programming Branch, ASW-610D, 2601 Meacham Blvd., Fort Worth, Texas 76137-4298.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Easterwood Airport.

Issued in Fort Worth, Texas on January 19, 1999.

**Edward N. Agnew,**

*Acting Manager, Airports Division.*

[FR Doc. 99-2417 Filed 2-1-99; 8:45 am]

**BILLING CODE 4910-13-M**

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration**

[Docket RSPA-98-4957; Notice 2]

**Request for Comments and OMB Approval****AGENCY:** Research and Special Programs Administration, DOT.**SUMMARY:** In accordance with the Paperwork Reduction Act of 1995, RSPA is publishing this notice in the **Federal Register** to announce the Research and Special Programs Administration's (RSPA) intention to request renewal of an information collection in support of the Office of Pipeline Safety (OPS) for Excess Flow Valves (EFV) Customer Notification.**DATES:** Comments on this notice must be received on or before April 5, 1999 to ensure consideration.**FOR FURTHER INFORMATION CONTACT:** Marvin Fell, Office of Pipeline Safety, Research and Special Programs Administration, Department of Transportation, 400 Seventh Street, SW., Washington, DC 20950, telephone (202) 366-1640 or e-mail marvin.fell@rspa.dot.gov.**SUPPLEMENTARY INFORMATION:***Title:* Excess Flow Valves, Customer Notification.*OMB Number:* 2137-0593.*Abstract:* 49 U.S.C. 60110 directed DOT to prescribe regulations requiring operators to notify customers in writing about EFV availability, the safety benefits derived from installation, and the costs associated with installation. The regulations provide that, except where installation is already required, the operator will install an EFV that meet prescribed performance criteria at the customer's request, if the customer pays for the installation.*Estimate of Burden:* The average burden hours per response is.*Respondents:* Gas Distribution Pipeline Operators.*Estimated Number of Respondents:* 1,590.*Estimated Total Annual Burden on Respondents:* 82,500 hours.**ADDRESSES:** Copies of this information collection can be reviewed at the Dockets Facility, Plaza 401, U.S. Department of Transportation, 400 Seventh St., SW., Washington, DC, 10:00 A.M. to 4:00 P.M. Monday through Friday excluding Federal holidays.*Comments are invited on:* (a) the need for the proposed collection of information for the proper performance of the functions of the agency, including

whether the information will have practical utility; (b) the accuracy of the agency's estimate of the burden of the proposed collection of information including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; and (d) ways to minimize the burden of the collection of information on those who are to respond, including the use of appropriate automated, electronic, mechanical, or other technological collection techniques.

Send comments to Dockets Facility, Plaza 401, U.S. Department of Transportation, 400 Seventh St., SW., Washington, DC 20590-0001 or by e-mail to ops.comments@rspa.dot.gov. All comments to this notice will be summarized and included in the request for OMB approval. All comments will be a matter of public record.

Issued in Washington, DC, on January 27, 1999.

**Richard B. Felder,***Associate Administrator for Pipeline Safety.*

[FR Doc. 99-2414 Filed 2-1-99; 8:45 am]

BILLING CODE 4910-60-P

**DEPARTMENT OF TRANSPORTATION****Research and Special Programs Administration (RSPA), DOT**

[Docket No. RSPA-98-4034; Notice 17]

**Pipeline Safety: Natural Gas Pipeline Company of America Approved for Pipeline Risk Management Demonstration Program****AGENCY:** Office of Pipeline Safety, DOT.**ACTION:** Notice; Correction.**SUMMARY:** RSPA published a document in the **Federal Register** of January 7, 1999, regarding approval of Natural Gas Pipe Line Company of America for the Pipeline Risk Management Demonstration Program. The document contained errors in reference to the Notice Number and the title of the project evaluation document.**FOR FURTHER INFORMATION CONTACT:** Elizabeth Callsen, OPS, (202) 355-4572.**Correction**In the **Federal Register** issue of January 7, 1999, in FR Doc. 99-291, the corrections are as follows:

On page 1067, in the fourth line of the title, correct the Notice number to read: Notice 17.

On page 1068, second paragraph, correct item (4) to read:

"OPS Project Review Team Evaluation of Natural Gas Pipeline Company Demonstration Project".

Issued in Washington, DC, on January 25, 1999.

**Richard B. Felder,***Associate Administrator for Pipeline Safety.*

[FR Doc. 99-2416 Filed 2-1-99; 8:45 am]

BILLING CODE 4910-60-P

**DEPARTMENT OF VETERANS AFFAIRS**

[OMB Control No. 2900-0496]

**Agency Information Collection Activities Under OMB Review****AGENCY:** Veterans Benefits Administration, Department of Veterans Affairs.**ACTION:** Notice.**SUMMARY:** In compliance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C., 3501 et seq.), this notice announces that the Veterans Benefits Administration (VBA), Department of Veterans Affairs, has submitted the collection of information abstracted below to the Office of Management and Budget (OMB) for review and comment. The PRA submission describes the nature of the information collection and its expected cost and burden; it includes the actual data collection instrument.**DATES:** Comments must be submitted on or before March 3, 1999.**FOR FURTHER INFORMATION OR A COPY OF THE SUBMISSION CONTACT:** Ron Taylor, Information Management Service (045A4), Department of Veterans Affairs, 810 Vermont Avenue, NW, Washington, DC 20420, (202) 273-8015 or FAX (202) 273-5981. Please refer to "OMB Control No. 2900-0496."**SUPPLEMENTARY INFORMATION:***Title:* Claim for Veterans Mortgage Life Insurance, VA Form 29-0549.*OMB Control Number:* 2900-0496.*Type of Review:* Extension of a currently approved collection.*Abstract:* The form is used by the mortgage holder to claim the proceeds of Veterans Mortgage Life Insurance and to provide the information needed to authorize payment of the insurance. The information requested is required by law, Title 38, U.S.C., Section 2106, and is used by VA to process the mortgage holder's claim.An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The **Federal Register** Notice with a 60-day comment period soliciting comments on this collection of information was published on October 22, 1998 at pages 56702-56703.*Affected Public:* Individuals or Households.

*Estimated Annual Burden:* 250 hours.  
*Estimated Average Burden Per Respondent:* 60 minutes.  
*Frequency of Response:* On occasion.  
*Estimated Number of Respondents:* 250.  
Send comments and recommendations concerning any

aspect of the information collection to VA's OMB Desk Officer, Allison Eydt, OMB Human Resources and Housing Branch, New Executive Office Building, Room 10235, Washington, DC 20503 (202) 395-4650. Please refer to "OMB Control No. 2900-0496" in any correspondence.

Dated: December 31, 1998.  
By direction of the Secretary.

**Genie McCully,**

*Program Analyst, Information Management Service.*

[FR Doc. 99-2385 Filed 2-1-99; 8:45 am]

BILLING CODE 8320-01-P

# Corrections

Federal Register

Vol. 64, No. 21

Tuesday, February 2, 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 COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Parts 600 and 660

[Docket No. 981231333-8333-01; I.D. 121498A]

RIN 0648-AM12

#### Magnuson Act Provisions; Foreign Fishing; Fisheries off West Coast States and the Western Pacific; Pacific Coast Groundfish Fishery; Annual Specifications and Management Measures

##### Correction

In rule document 98-34851, beginning on page 1316, in the issue of Friday, January 8, 1999, make the following corrections:

1. On page 1336, in the table 5, in the "Cumulative trip limit" column, under the fifth entry add "8,618 kg".
2. On page 1336, in the third table, the heading "Table 6--TDS Complex" should read "Table 6--DTS Complex".
3. On page 1337, in table 6, the heading "TDS Complex--Continued" should read "DTS Complex--Continued".

[FR Doc. C8-34851 Filed 2-1-99; 8:45 am]

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 39

[Docket No. 98-ANE-01-AD; Amendment 39-10947; AD 98-26-07]

RIN 2120-AA64

#### Airworthiness Directives; Rolls-Royce Limited, Bristol Engines Division, Viper Models Mk.521 and Mk.522 Turbojet Engines

##### Correction

In rule document 98-33243 beginning on page 7001 in the issue of Friday, December 18, 1998, make the following correction:

##### § 39.13 [Corrected]

On page 70002, in the first column, in the last line, "1998" should read "1999".

[FR Doc. C8-33243 Filed 2-1-99; 8:45 am]

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Airspace Docket No. 98-ANM-19]

#### Proposed Establishment of Class D Airspace and Modification of Class E Airspace; Bozeman, MT

##### Correction

In proposed rule document 99-385 beginning on page 1142 in the issue of January 8, 1999, make the following correction:

##### § 71.1 [Corrected]

On page 1143, in the first column, in the airspace designations for **ANM MT D Bozeman, MT [New]**, in the fifth line, "44-mile" should read "4.4-mile".

[FR Doc. C9-385 Filed 2-1-99; 8:45 am]

BILLING CODE 1505-01-D

## DEPARTMENT OF TRANSPORTATION

### Federal Aviation Administration

#### 14 CFR Part 71

[Airspace Docket No. 98-AGL-70]

#### Proposed Modification of Class E Airspace; Tiffin, OH

##### Correction

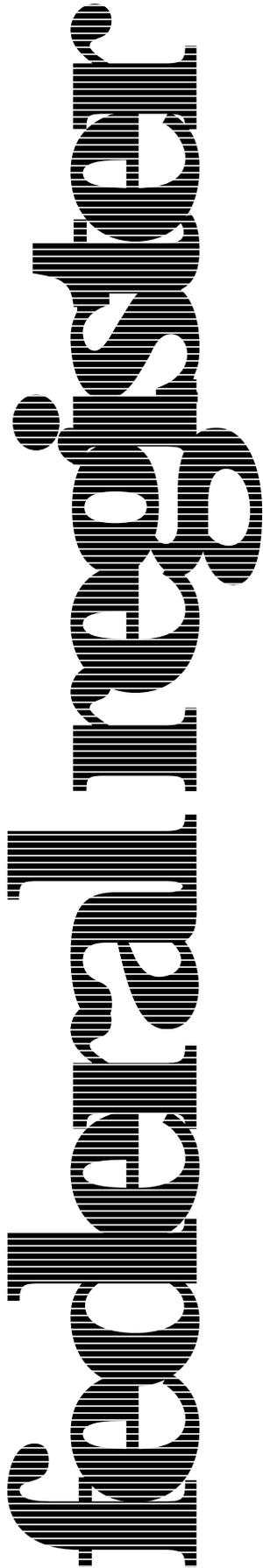
In proposed rule document 99-501 beginning on page 1559 in the issue of Monday, January 11, 1999, make the following correction:

##### § 71.1 [Corrected]

On page 1560, in the first column, in the airspace designations for **AGL OH E5 Tiffin, OH [Revised]**, in the second line, "(Lat. 40°05'35"N., long. 83°12'46"W)" should read "(Lat. 41°05'38"N., long. 83°12'46"W)".

[FR Doc. C9-501 Filed 2-1-99; 8:45 am]

BILLING CODE 1505-01-D



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Tuesday  
February 2, 1999

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**Part II**

**Department of  
Transportation**

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Office of the Secretary

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**49 CFR Parts 23 and 26  
Participation by Disadvantaged Business  
Enterprises in Department of  
Transportation Programs; Final Rule**

**DEPARTMENT OF TRANSPORTATION****Office of the Secretary****49 CFR Parts 23 and 26**

[Docket OST-97-2550; Notice 97-5]

RIN 2105-AB92

**Participation by Disadvantaged Business Enterprises in Department of Transportation Programs**

AGENCY: Office of the Secretary, DOT.

ACTION: Final rule.

**SUMMARY:** This final rule revises the Department of Transportation's regulations for its disadvantaged business enterprise (DBE) program. The DBE program is intended to remedy past and current discrimination against disadvantaged business enterprises, ensure a "level playing field" and foster equal opportunity in DOT-assisted contracts, improve the flexibility and efficiency of the DBE program, and reduce burdens on small businesses. This final rule replaces the former DBE regulation, which now contains only the rules for the separate DBE program for airport concessions, with a new regulation. The new regulation reflects President Clinton's policy to mend, not end, affirmative action programs. It modifies the Department's DBE program in light of developments in case law requiring "narrow tailoring" of such programs and last year's Congressional debate concerning the continuation of the DBE program. It responds to comments on the Department's December 1992 notice of proposed rulemaking (NPRM) and its May 1997 supplemental notice of proposed rulemaking (SNPRM).

**DATES:** This rule is effective March 4, 1999. Comments on Paperwork Reduction Act matters should be received by April 5, 1999; however, late-filed comments will be considered to the extent practicable.

**ADDRESSES:** Persons wishing to comment on Paperwork Reduction Act matters (see discussion at end of preamble) should send comments to Docket Clerk, Docket No. OST-97-2550, Department of Transportation, 400 7th Street, SW., Room 4107, Washington, DC 20590. We emphasize that the docket is open only with respect to Paperwork Reduction Act matters, and the Department is not accepting comments on other aspects of the regulation. We request that, in order to minimize burdens on the docket clerk's staff, commenters send three copies of their comments to the docket. Commenters wishing to have their

submissions acknowledged should include a stamped, self-addressed postcard with their comments. The docket clerk will date stamp the postcard and return it to the commenter. Comments will be available for inspection at the above address from 10 a.m. to 5:00 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Robert C. Ashby, Deputy Assistant General Counsel for Regulation and Enforcement, Department of Transportation, 400 7th Street, SW., Room 10424, Washington, DC 20590, phone numbers (202) 366-9306 (voice), (202) 366-9313 (fax), (202) 755-7687 (TDD), bob.ashby@ost.dot.gov (email); or David J. Goldberg, Office of Environmental, Civil Rights and General Law, Department of Transportation, 400 7th Street, SW., Room 5432, Washington, DC 20590, phone number (202) 366-8023 (voice), (202) 366-8536 (fax).

**SUPPLEMENTARY INFORMATION:****Background**

The Department has the important responsibility of ensuring that firms competing for DOT-assisted contracts are not disadvantaged by unlawful discrimination. For eighteen years, the Department's most important tool for meeting this responsibility has been its Disadvantaged Business Enterprise (DBE) program. This program began in 1980. Originally, the program was a minority/women's business enterprise program established by regulation under the authority of Title VI of the Civil Rights Act of 1964 and other nondiscrimination statutes that apply to DOT financial assistance programs. See 49 CFR part 23.

In 1983, Congress enacted, and President Reagan signed, the first statutory DBE provision. This statute applied primarily to small firms owned and controlled by minorities in the Department's highway and transit programs. Firms owned and controlled by women, and the Department's airport program, remained under the original 1980 regulatory provisions. In 1987, Congress enacted, and President Reagan signed, statutes expanding the program to airports and to women-owned firms. In 1991 (for highway and transit programs) and 1992 (for airport programs), Congress enacted, and President Bush signed, statutes reauthorizing the expanded DBE program.

After each statutory amendment, and at other times to resolve program issues, the Department amended part 23. The result has been that part 23 has become

a patchwork quilt of a regulation. In addition, years of interpretation by various grantees and different DOT offices has created confusion and inconsistency in program administration. These problems, particularly in the area of certification, were criticized in General Accounting Office reports. The Department's desire to improve program administration and make the rule a more unified whole led to our publication of a December 1992 notice of proposed rulemaking (NPRM).

The Department received about 600 comments on this NPRM. The Department carefully reviewed these comments and, by early 1995, had prepared a draft final rule responding to them. However, in light of the Supreme Court's June 1995 decision in *Adarand v. Peña* and the Administration's review of affirmative action programs, the Department conducted further review of the DBE program. As a result, rather than issuing a final rule, we issued a supplemental notice of proposed rulemaking (SNPRM) in May 1997. This SNPRM incorporated responses to the comments on the 1992 NPRM and proposed further changes in the program, primarily in response to the "narrow tailoring" requirements of *Adarand*. We received about 300 comments on the SNPRM. The Department has carefully considered these comments, and the final rule responds to them. The final rule also specifically complies with the requirements that the courts have established for a narrowly tailored affirmative action program.

At the same time that the Department was working on this final rule, Congress once again considered reauthorization of the DBE program. In both the House and the Senate, opponents of affirmative action sponsored amendments that would have effectively ended the program. In both cases, bipartisan majorities defeated the amendments. The final highway/transit authorization legislation, known as the Transportation Equity Act for the 21st Century (TEA-21), retains the DBE program. In shaping this final rule, the Department has listened carefully to what both supporters and opponents of the program have said in Congressional debates.

**Key Points of the Final Rule**

This discussion reviews and responds to the SNPRM comments and the Congressional debates on certain key issues. Congressional debate references are to the *Congressional Record* for March 5 and 6, 1998, for the Senate debate and April 1, 1998, for the House debate, unless otherwise noted.

### 1. Quotas and Set-Asides

*SNPRM Comments:* Most comments on this issue came from non-DBE contractors, who argued that the program was a *de facto* quota program. Many of these contractors said that recipients insisted that they meet numerical goals regardless of other considerations, and that the recipients did not take showings of good faith efforts seriously. Some non-DBE contractor organizations argued, in addition, that the program was a quota program because it was based on a statute that had a 10 percent target for the use of businesses defined by a racial classification.

*Congressional Debate:* Opponents of the DBE program generally asserted that it created quotas or set-asides. Senator McConnell described the entire program, particularly the provision that "not less than 10 percent" of authorized funds go to DBEs, as

\* \* \* a \$17.3 billion quota. In other words, if the government decides that you are the preferred race and gender, then you are able to compete for \$17.3 billion of taxpayer-funded highway contracts. But, if you are the wrong race and gender, then—too bad—you can't compete for that \$17 billion pot. (S1936).

The "not less than 10 percent" language also led opponents, such as Senator Ashcroft, to label the program a "set-aside," (S1405), a term also employed in testimony provided by a law professor from California who said that the statute "imposes a set-aside that's required regardless of the availability of race-neutral solutions." (S1407). Senator Gorton said that the DBE statute provides that "those not defined as disadvantaged in our society are absolutely barred and prohibited from getting certain governmental contracts." (S1415).

On the other hand, supporters of the program were adamant that it was not a quota program. Senator Baucus argued that the program, as implemented by DOT, allows substantial flexibility to recipients and contractors. Recipients could have an overall goal other than 10 percent under current rules, he pointed out. Senator Kerry of Massachusetts added that what the statute does is to "set a national goal. And it is appropriate in this country to set national goals for what we will do to try to break down the walls of discrimination. \* \* \*" (S1408). He also alluded to the flexibility of the Secretary to permit overall goals of less than 10 percent. Senator Robb stated:

I want to stress at the outset that this program is not a "quota program," as some have suggested. There is a great difference

[between] an aspirational goal and a rigid numerical requirement. Quotas utilize rigid numerical requirements as a means of implementing a program. The DBE program uses aspirational goals. (S1425).

With respect to individual contract goals, Senator Baucus said, "once a goal is established for a contract, each contractor must make a good-faith effort to meet the goal—not mathematically required, not quota required, but a good faith effort to meet it." (S1402). Senator Baucus pointed to provisions of the SNPRM concerning overall goals, means of meeting them, and good-faith efforts as further narrowly tailoring the program. The SNPRM confirms, he said, that "contract goals are not binding. If a contractor makes good faith efforts to find qualified women or minority-owned subcontractors, but fails to meet the goal, there is no penalty." (S1403). Senator Robb added that "Contract goals are not operated as quotas because they require that the prime contractor make 'good faith efforts' to find DBEs. If a prime contractor cannot find qualified and competitive DBEs, the goal can be waived." (S1425).

One of the Senators who addressed the quota/set-aside issue in the most detail was Senator Domenici. He concluded that "I do not agree that this minority business program we have in this ISTEA bill before us is a program that mandates quotas and mandates set-asides." (S1426). He made this statement, in part, on the basis of March 5, 1998, letter to him signed by Secretary of Transportation Rodney Slater and Attorney General Janet Reno. In relevant part, this letter (which Senator Domenici inserted into the record) read as follows:

The 10 percent figure contained in the statute is not a mandatory set aside or rigid quota. First, the statute explicitly provides that the Secretary of Transportation may waive the goal for any reason \* \* \* Second, in no way is the 10 percent figure imposed on any state or locality \* \* \* Moreover, state agencies are permitted to waive goals when achievement on a particular contract or even for a specific year is not possible. The DBE program does not set aside a certain percentage of contracts or dollars for a specific set of contractors. Nor does the DBE program require recipients to use set-asides. The DBE program is a goals program which encourages participation without imposing rigid requirements of any type. Neither the Department's current nor proposed regulations permit the use of quotas. The DBE program does not use any rigid numerical requirements that would mandate a fixed number of dollars or contracts for DBEs. (S1427).

The debate in the House proceeded in similar terms. Opponents of the DBE program, such as Representative

Roukema (H2000), Representative Cox (H2004) and Speaker Gingrich (H2009) said the legislation constituted a quota, while proponents, such as Representatives Tauscher (H2001), Poshard (H2003), Bonior (H2004) and Menendez (H2004) said the program did not involve quotas or set-asides.

*DOT Response:* The DOT DBE program is not a quota or set-aside program, and it is not intended to operate as one. To make this point unmistakably clear, the Department has added explicitly worded new or amended provisions to the rule.

Section 26.41 makes clear that the 10 percent statutory goal contained in ISTEA and TEA-21 is an aspirational goal at the national level. It does not set any funds aside for any person or group. It does not require any recipient or contractor to have 10 percent (or any other percentage) DBE goals or participation. Unlike former part 23, it does not require recipients to take any special administrative steps (e.g., providing a special justification to DOT) if their annual overall goal is less than 10 percent. Recipients must set goals consistent with their own circumstances (see § 26.45). There is no direct link between the national 10 percent aspirational goal and the way a recipient operates its program. The Department will use the 10 percent goal as a means of evaluating the overall performance of the DBE program nationwide. For example, if nationwide DBE participation were to drop precipitously, the Department would reevaluate its efforts to ensure nondiscriminatory access to DOT-assisted contracting opportunities.

Section 26.43 states flatly that recipients are prohibited from using quotas under any circumstances. The section also prohibits set-asides except in the most extreme circumstances where no other approach could be expected to redress egregious discrimination. Section 26.45 makes clear that in setting overall goals, recipients aspire to achieving only the amount of DBE participation that would be obtained in a nondiscriminatory market. Recipients are not to simply pick a number representing a policy objective or responding to any particular constituency.

Section 26.53 also outlines what bidders must do to be responsive and responsible on DOT-assisted contracts having contract goals. They must make good faith efforts to meet these goals. Bidders can meet this requirement either by having enough DBE participation to meet the goal or by documenting good faith efforts, even if those efforts did not actually achieve the

goal. These means of meeting contract goal requirements are fully equivalent. Recipients are prohibited from denying a contract to a bidder simply because it did not obtain enough DBE participation to meet the goal. Recipients must seriously consider bidders' documentation of good faith efforts. To make certain that bidders' showings are taken seriously, the rule requires recipients to offer administrative reconsideration to bidders whose good faith efforts showings are initially rejected.

These provisions leave no room for doubt: there is no place for quotas in the DOT DBE program. In the Department's oversight, we will take care to ensure that recipients implement the program consistent with the intent of Congress and these regulatory prohibitions.

## 2. Sanctions for Recipients Who Fail To Meet Overall Goals

*SNPRM Comments:* The issue of sanctions for recipients who fail to meet overall goals was not a subject of comments on the SNPRM. Since the Department has never imposed such sanctions, this absence of comment is not surprising.

*Congressional Debate:* DBE program opponents asserted, in connection with their argument that the DBE program is a quota program, that the Department could impose sanctions for failure to meet goals. "The goals have requirements and the real threat of sanctions," Senator McConnell said. (S1488). Citing a provision of a Federal Highway Administration (FHWA) manual saying that if "a state has violated or failed to comply with Federal laws or \* \* \* regulations," FHWA could withhold Federal funding, Senator McConnell said,

In other words, there are sanctions. The same threats appear in \* \* \* the Federal transportation regulations \* \* \* When the Federal government is wielding that kind of weapon from on high, it does not have to punish them. A 10 percent quota is still a quota, even if the States always comply and no one is formally punished. (Id.)

Defenders of the DBE program pointed out that the Department had never punished a recipient for failing to meet an overall goal (e.g., Rep. Tauscher, H2001; Senator Boxer, S1433). Senator Domenici asked Secretary Slater and Attorney General Reno whether there are sanctions, penalties, or fines that may be (or ever have been) imposed on a recipient who does not meet DBE program goals. He entered the following reply in the record:

No state has ever been sanctioned by DOT for not meeting its goals. Nothing in the

statute or regulations imposes sanctions on any state recipient that has attempted in good faith, but failed, to meet its self-imposed goals. (S1427).

Senator Lieberman added that if states fail to meet their own goals, "there is no Federal sanction or enforcement mechanism." (S1493).

*DOT Response:* The Department has never sanctioned a recipient for failing to meet an overall goal. We do not intend to do so. To eliminate any confusion, we have added a new provision (§ 26.47) that explicitly states that a recipient cannot be penalized, or treated by the Department as being in noncompliance with the rule, simply because its DBE participation falls short of its overall goal. For example, if a recipient's overall goal is 12 percent, and its participation is 8 percent, the Department cannot and will not penalize the recipient simply because its actual DBE participation rate was less than its goal.

Overall goals are not quotas, and the Department does not sanction recipients because their participation levels fall short of their overall goals. Of course, if a recipient does not have a DBE program, does not set a DBE goal, does not implement its DBE program in good faith, or discriminates in the way it operates its program, it can be found in noncompliance. But its noncompliance would never be having failed to "make a number."

## 3. Economic Disadvantage

*SNPRM Comments:* Some commenters favored eliminating the presumption of economic disadvantage, saying that applicants should have to prove their economic disadvantage. Other commenters favored obtaining additional financial information from applicants so that, even if the presumption remained in force, recipients would have a better idea of whether applicants really were disadvantaged. The question of the standard for determining disadvantage generated substantial comment, with some commenters favoring, and others objecting to, the proposed use of a personal net worth standard to assist recipients in determining whether an applicant was economically disadvantaged. There was also disagreement among commenters concerning the level at which such a standard should be set (e.g., \$750,000, or something higher or lower). These comments, and the Department's response to them, are further discussed in the section-by-section analysis for § 26.67.

*Congressional Debate:* The Congress debated the topic of who is regarded as

economically disadvantaged under the statute. DBE opponents, including Senators Ashcroft (S1405) and McConnell (S1418) and Representative Cox (H2004), asserted that outrageously rich people could be eligible to participate as DBEs, frequently using the Sultan of Brunei as an example. The basic thrust of their argument was that if the program does not exclude wealthy members of the designated groups—meaning those who are not, in fact, disadvantaged—then it is "overinclusive" and therefore not narrowly tailored. Senator McConnell added that, because the Department's SNPRM did not include a specific dollar amount for a cap on personal net worth, it would not be effective. (S1486). On the other hand, DBE program supporters cited the SNPRM's proposed net worth cap as an effective device to stop wealthy people from participating in the program. These included Minority Leader Daschle (with a reference to a letter from the Associate Attorney General, S1413), Senator Baucus (S1414, S1423), Senator Lieberman (S1493), Senator Boxer (S1433), and Senator Moseley-Braun, who responded to the Sultan of Brunei example by noting that the program was directed primarily at U.S. citizens (S1420).

*DOT Response:* The final rule (§ 26.67) specifically imposes a personal net worth cap of \$750,000. This means that, regardless of race, gender or the size of their business, any individual whose personal net worth exceeds \$750,000 is not considered economically disadvantaged and is not eligible for the DBE program. The provision also makes it much easier for recipients to determine whether an individual's net worth exceeds the cap. Applicants will have to submit a statement of personal net worth and supporting documentation to the recipient with their applications. If the information shows net worth above the cap, the recipient would rebut the presumption based on the information in the application itself and the individual would not be eligible for the program. In such a case, it would not be necessary for a third party to challenge the economic disadvantage of an applicant in order to rebut the presumption. While there have been very few documented cases of wealthy individuals seeking to take advantage of the Department's program, the revised provisions of part 26 virtually eliminate even the possibility of this type of abuse.

## 4. Social Disadvantage

*SNPRM Comments:* A few commenters suggested that the

presumption of social disadvantage, as well as that of economic disadvantage, be eliminated, so that applicants would have to demonstrate both elements of disadvantage. Any presumption of disadvantage tied to a racial classification, in the view of some of these commenters, undermined the constitutionality of the program. Other commenters noted that persons who are not members of the presumptively disadvantaged groups can be eligible and, in some cases, suggested that the criteria for evaluating such applications be clarified.

*Congressional Debate:* The presumption of social disadvantage drew fire from DBE program opponents because it was allegedly overinclusive. For example, Senator McConnell produced a map illustrating the over 100 countries of origin leading to inclusion in one of the presumed socially disadvantaged groups, pointing out that people from some countries (e.g., Pakistan) are presumed to be socially disadvantaged while those from other countries (e.g., Poland) are not. (S1418). Senator McConnell said that there was no basis for selecting this definition over any other. (Id.) Senator Hatch also listed the countries from which Asian-Pacific Americans and Subcontinent Asian-Americans can originate, suggesting that it was inappropriate to create "all kinds of special interest groups who are vying for these programs." (S1411).

DBE proponents responded that discrimination against minorities and women in general, and against specific minorities in particular (e.g., African Americans) was very real and formed a basis for the presumption of social disadvantage (see discussion below concerning the existence of discrimination). Senator Baucus also noted that this presumption could be overcome. (S1402).

Opponents also charged that the presumption of social disadvantage was underinclusive; that is, "you underinclude people who have a right to be included in the bid process." (Senator McConnell, S1399). The people who are not included who have a right to be, in the view of opponents, are white males (e.g., Senator Sessions' reference to testimony from Adarand Constructors' owner, S1400). Senator Kennedy disagreed with this assertion, saying

Of course, this program doesn't just help women and minorities. It extends a helping hand to firms owned by white males, as well. They can be certified to [participate] if they prove that they have been disadvantaged. Just ask Randy Pech—owner of the Adarand

Construction Firm—because he is currently seeking certification. (S1482).

Senator Domenici was interested in the same question, and entered into the record the following response from Secretary Slater and Attorney General Reno:

Any individual owning a business may demonstrate that he is socially and economically disadvantaged, even if that individual is not a woman or a minority. Both the current and proposed regulations provide detailed guidance to recipients to assist them in making individual determinations of disadvantaged status. And, in fact, businesses owned by white males have qualified for DBE status. (S1427).

*DOT Response:* By having passed the DBE statutory provision, after lengthy and specific debate, Congress has once again determined that members of the designated groups should be presumed socially disadvantaged. All of these groups are specifically incorporated by reference in the legislation that Congress debated and approved. This presumption (i.e., a determination that it is not necessary for group members to prove individually that they have been the subject of discrimination or disadvantage) is based on the understanding of Members of Congress about the discrimination that members of these groups have faced. The presumption is rebuttable in the DOT program. If a recipient or third party determines that there is a reasonable basis for concluding that an individual from one of the designated groups is not socially disadvantaged, it can pursue a proceeding under § 26.87 to remove the presumption. Likewise, a white male, or anyone else who is not presumed to be disadvantaged, can make an individual showing of social and economic disadvantage and participate in the program on the same basis as any other disadvantaged individual (see § 26.67).

##### 5. The "Low-Bid System"

*SNPRM Comments:* Non-DBE contractors expressed concern that a variety of provisions under the program and the SNPRM adversely affected the low-bid system, including contract goals, evaluation credits, and good faith efforts guidance concerning prime contractors' handling of subcontractor prices and consideration of other bidders' success in meeting goals.

*Congressional Debate:* Opponents of the DBE program assert that the program results in white male contractors not receiving contracts they would otherwise expect to receive. Senator Sessions cited the statement of the Adarand company to this effect. (S1400). Senator Ashcroft said that "if two bids come in from two

subcontractors, one owned by a white male and the other by a racial minority, and the bids are the same, or even close, the job will go to the minority-owned company, not the low bidder." (S1405). Senator Gorton inserted into the record letters from a Spokane subcontractor asserting that, in a number of cases, it had lost subcontracts to DBE firms despite having a lower quote. (S1415–16). Representative Roukema also cited examples of firms who made similar assertions. (H2000).

In contrast, DBE program proponents argued that the program was about leveling the playing field for DBEs. Senator Moseley-Braun cited letters from her constituents for the point that

\* \* \* the DBE program is not about taking away contracts from qualified male-owned businesses and handing them over to unqualified female-owned firms. The program is not about denying contracts to Caucasian low bidders in favor of higher bids that happen to have been submitted by Hispanics or African Americans or Asians or women. (S1420).

Without such a program, her constituents' letters said, they would lose the chance to compete. (Id.). Citing testimony from a Judiciary Committee hearing, Senator Kennedy noted that it was the experience of some DBEs that white male prime contractors had accepted higher bids from other firms to avoid working with DBEs. (S1430).

Why would a general contractor accept a higher bid? It doesn't make sense unless you remember that the traditional business network doesn't include women or minorities \* \* \* [A woman business owner testified] that some general contractors would rather lose money than deal with female contractors. (Id.)

*DOT Response:* For the most part, statutory low-bid requirements exist only at the prime contracting level. That is, state and local governments, in awarding prime contracts, must select the low bidder in many procurements (there may be exceptions in some types of purchases). Nothing in this regulation requires, under any circumstances, a recipient to accept a higher bid for a prime contract from a DBE when a non-DBE has presented a lower bid. This rule does not interfere with recipients' implementation of state and local low-bid legislation.

The selection of subcontractors by a prime contractor is typically not subject to any low-bid requirements under state or local law. Prime contractors have unfettered discretion to select any subcontractor they wish. Price is clearly a key factor, but nothing legally compels a prime contractor to hire the subcontractor who makes the lowest quote. Other factors, such as the prime

contractor's familiarity and experience with a subcontractor, the quality of a subcontractor's work, the word-of-mouth reputation of the subcontractor in the prime contracting community, or the prime's comfort or discomfort with dealing with a particular subcontractor can be as or more important than price in some situations. It is in this context that § 26.53 requires that prime contractors make good faith efforts to achieve DBE contract goals. The rule does not require that recipients ignore price or quality, let alone obtain a certain amount of DBE participation without regard to other considerations. The good faith efforts requirements are intended to ensure that prime contractors cannot simply refuse to consider qualified, competitive DBE subcontractors. At the same time, the good faith efforts waiver of contract goals serves as a safeguard to ensure that prime contractors will not be forced into accepting an unreasonable or excessive quote from a DBE subcontractor.

#### 6. Constitutionality

*SNPRM Comments:* Non-DBE contractors and their groups argued that the SNPRM proposals, particularly with respect to overall goals and the use of race-conscious measures, failed to meet the *Adarand* narrow tailoring test. Many of these commenters said that the overall goals were suspect because they did not adequately consider the capacity of DBEs to perform contracts and *Adarand* requires that race-conscious measures may be used only after a recipient has demonstrated that race-neutral means have failed. The use of presumptions based on racial classifications was viewed as intrinsically unconstitutional by these commenters, many of whom cited the language of Judge Kane's decision in the *Adarand* remand to this effect. Some commenters also contended that, absent recipient-specific findings of compelling need, the program could not be constitutional. They said that existing information alleging compelling interest—such as various disparity studies or information compiled by the Department of Justice—was inadequate to meet the compelling interest test. DBEs and recipients who commented defended the constitutionality of the program, often citing experience with discrimination in the marketplace and contending that the SNPRM succeeded in narrowly tailoring the program.

*Congressional Debate:* Proponents and opponents of the DBE program extensively debated the constitutionality of the DBE statutory provision and the entire DBE program. Generally, opponents argued that the

Supreme Court and District Court decisions in *Adarand* rendered the program unconstitutional, while proponents said that the decisions did not have that effect.

Proponents and opponents of the DBE program agreed that the Supreme Court's *Adarand* decision established a two-part test for the constitutionality of a program that uses a racial classification. The program must be based on a compelling governmental interest and be narrowly tailored to further that interest (e.g., Senator McConnell, S1396; Senator Baucus, S1403). Opponents relied on the finding of a Colorado district court on remand that the program was not narrowly tailored and was thus unconstitutional (Senator McConnell, S 1396; Senator Ashcroft, S1405). Proponents replied that the remand decision represented the views of only one district court (Senator Baucus, S1403), that it failed to properly apply the reasoning of the Supreme Court decision with respect to narrow tailoring (Senator Domenici, S1425), and that the Department's forthcoming regulations would ensure that the program was narrowly tailored (see discussion below).

#### A. Compelling Interest

(1) *Existence of Discrimination.* Proponents (and some opponents) of the DBE provision said that discrimination and/or disadvantage with respect to minorities and/or women persists. In the House, these included Representative Roukema (H2000-01), Representative Norton (H2003), Representative Poshard (H2003), Representative Menendez (H2004), Representative Davis of Illinois (H2005), Representative Boswell (H2005), Representative Lampson (H2006), Representative Kennedy (H2006), Representative Jackson-Lee (H2006), Representative Edwards (H2007), Representative Andrews (H2007), Representative Rodriguez (H2008), Representative Towns (H2010), Representative Dixon (H2010), and Representative Millender-McDonald (H2011). DBE opponents typically remained silent on this point, neither affirming nor denying the existence of discrimination against women and minorities.

There was a similar pattern in the Senate debates. Opponents typically did not address the present existence of discrimination or disadvantage with respect to minorities and women or its continuing effects, spoke of such discrimination as something that existed in the past (Senator Sessions, S1399; Senator Hatch, S1411), or asserted that race-based disadvantage or

discrimination no longer exists (Senator Ashcroft, S1406).

The Senators who said that such discrimination persists included Senator Baucus (S1403, S1413, S1496), Senator Warner (S1403), Senator Kerry (S1408), Senator Wellstone (S1410), Senator Moseley-Braun (S1419-20), Senator Robb (S1422); Senator Brownback (S1423-24), Senator Domenici (S1425-26), Senator Kennedy (S1429-30, S1482), Senator Specter (S1485), Senator McCain (S1489), Senator Lautenberg (S1490), Senator Durbin (S1491), Senator Daschle (S1492), Senator Lieberman (S1493), Senator Bingaman (S1494), Senator Murray (S1495), and Senator Dorgan (S1495).

(2) *Evidence of discrimination or disadvantage.* In comments on the passage of the TEA-21 conference report in the Senate, Senator Chafee noted a Colorado Department of Transportation disparity study that found a disproportionately small number of women- and minority-owned contractors participating in that state's highway construction industry. More than 99 percent of contracts went to firms owned by white men. (Congressional Record, May 22, 1998; S5413). In the House discussion of the conference report, Representative Norton presented an extensive summary of relevant evidence of discrimination forming the basis for a compelling need for the DBE program. (H3957).

Throughout the debate, the Members who affirmed the existence of discrimination and/or disadvantage asserted a number of factual bases for concluding that the DBE program was necessary. This information is largely drawn from the Senate debate; the briefer House debate contains less detail.

Senator Baucus cited disparities between the earnings of women and men and between the percentage of small businesses women own and the percentage of Federal procurement dollars they receive. He also noted that minorities make up 20 percent of the population, own 9 percent of construction businesses, and get only 4 percent of construction receipts. (S1403). Finally, Senator Baucus, via a letter from the Associate Attorney General, cited to numerous Congressional findings concerning the effects of discrimination in the construction industry and in DOT-assisted programs. (S1413).

Senator Kerry added that women own 9.2 percent of the nation's construction firms but their companies earn only about half of what is earned by male-owned firms. (S1409). Senator Robb

commented that the evidence of racially based disadvantage is "compelling and disturbing." He continued, stating that, "White-owned construction firms receive 50 times as many loan dollars as African-American owned firms that have identical equity." (S1422). Senator Kennedy said that the playing field for women and minorities and other victims of discrimination was still not level. Job discrimination against minorities and the "glass ceiling" for women still persisted, he said, adding that "Nowhere is the deck stacked more heavily against women and minorities than in the construction industry." (S1429). He cited a number of instances in which minority or female contractors encountered overt discrimination in trying to get work. (S1429-30).

Senator Lautenberg said that, for transportation-related contracts, minority-owned firms get only 61 cents for every dollar of work that white male-owned businesses receive. The comparable figure for women-owned firms was 48 cents. He also mentioned that "women-owned businesses have a lower rate of loan delinquency, yet still have far greater difficulty in obtaining loans." (S1490). He then spoke of the continuing effects of past discrimination:

Jim Crow laws were wiped off the books over 30 years ago. However, their pernicious effects on the construction industry remain. Transportation construction has historically relied on the old boy network which, until the last decade, was almost exclusively a white, old boy network. \* \* \* This is an industry that relies heavily on business friendships and relationships established decades, sometimes generations, ago—years before minority-owned firms were even allowed to compete. (Id.)

Senator Durbin referred to recent studies concerning job bias against minorities and women. (S1491). Senator Lieberman referred generally to previous Congressional committee findings and testimony concerning still-existing barriers to full participation for minorities and women. (S1493). He also cited the May 1996 Department of Justice survey of discrimination and its effects in business and contracting. He referred to a recent study in Denver showing that African Americans were 3 times, and Hispanics 1.5 times, more likely than whites to be rejected for business loans. Senator Daschle summed up by saying, "[t]here is clearly a compelling interest in addressing the pervasive discrimination that has characterized the highway construction industry." (S1492).

Throughout the portion of the debate described above, many of the Members stressed that goal-based programs like

the DBE program were the only effective way to combat the continuing effects of discrimination.

Senator Baucus cited the experience of Michigan, in which DBE participation in the state-funded portion of the highway program fell to zero in a nine-month period after the state terminated its DBE program, while the Federal DBE program in Michigan was able to maintain 12.7 percent participation. (S1404). Senator Kerry also raised the Michigan example, and went on to cite similar sharp decreases in DBE participation when Louisiana, Hillsborough County, Florida, and San Jose, California, eliminated affirmative action programs covering state- and locally-funded programs. Senator Kerry asked rhetorically:

\* \* \* is that just the economy of our country speaking, an economy at one moment that is capable of having 12 percent and at another moment, where they lose the incentive to do so, to drop down to zero, to drop down by 99 percent, to drop down by 80 percent, to have .4 at the State level while at the Federal level there are 12 percent? You could not have a more compelling interest if you tried. \* \* \* (S1409-10).

Senator Moseley-Braun added the examples of Arizona, Arkansas, Rhode Island, and Delaware to the jurisdictions cited by other members where state-funded projects without a DBE program have significantly less DBE participation than Federally funded projects subject to the DBE program. She added, "Where there are no DBE programs, women- and minority-owned small businesses are shut out of highway construction." (S1420-21). Senator Kennedy added Nebraska, Missouri, Tampa and Philadelphia to the list of jurisdictions that experienced precipitous drops in DBE participation after goals programs ended. (S1429-30; S1482). He also cited comments from DBE companies that goal programs were needed to surmount discrimination-related barriers. (S1482). Senator Domenici repeated many of the same points as previous DBE proponents concerning the basis for concluding that the program was needed (S1426), as did Senator Kempthorne. (S1494).

Senator Robb emphasized that the DBE program was essential to combating discrimination and ensuring economic opportunity, explicitly linking the fall-off in DBE participation to continuing discrimination:

Where DBE programs at the State level have been eliminated, participation by qualified women and qualified minorities in government transportation contracts has plummeted. There is no way to know whether this discrimination is intentional or subconscious, but the effect is the same. This

experience demonstrates the sad but inescapable truth that, when it comes to providing economic opportunities to women and minorities, passivity equals inequality. (S1422).

3. *Narrow tailoring.*—DBE proponents cited the Department's proposed DBE rule as the vehicle that would ensure that the DBE program would be narrowly tailored. They cited features of the SNPRM including a new mechanism for calculation of overall goals, giving priority to race-neutral measures in meeting goals, a greater emphasis on good faith efforts, DBE diversification, added flexibility for recipients, net worth provisions, ability to challenge presumptions of social and economic disadvantage, and flexibility in goal-setting. In comments on the Senate consideration of the TEA-21 conference report, Senator Baucus concluded by saying:

As I explained in my statements during the debate on the McConnell amendment \* \* \* the program is narrowly tailored, both under the current and the new regulations, which emphasize flexible goals tied to the capacity of firms in the local market, the use of race-neutral measures, and the appropriate use of waivers for good faith efforts. (Congressional Record, May 22, 1998; S5414).

Following Senator Baucus' remarks, Senator Chafee, Chairman of the committee of jurisdiction, requested that he be associated with Senator Baucus' remarks on constitutionality. (S5414).

DBE opponents denied that regulatory change could result in a narrowly tailored program. Senator Smith said "The administration's attempt to comply with the Court's decision by fiddling around with the DOT regulations does not meet the constitutional litmus test." (S1398). The most frequent argument against the efficacy of regulatory change was that a racial classification is inherently unable to be narrowly tailored. (Senator Sessions, S1399-1400; Senator Ashcroft, S1407).

*DOT Response:* The 1998 debate over DBE legislation was the most thorough in which Congress has engaged since the beginning of the program. The record of this debate clearly supports the Department's view that there is a compelling governmental interest in remedying discrimination and its effects in DOT-assisted contracting. Congress clearly determined that real, pervasive, and injurious discrimination exists. Congress backed up that determination with reference to a wide range of factual material, including private and public contracting, DOT-assisted and state- and locally-funded programs and the financing of the contracting industry. By retaining the DBE statutory provisions

against this factual background, Congress clearly found that there was a compelling governmental interest in having the program.

The courts, including the court in the *Adarand Constructors Inc. v. Peña*, 965 F.Supp. 1556 (D. Colo., 1997) and the court in *In re: Sherbrooke Sodding*, 6-96-CV-41 (D. Minn. 1998), agree that Congress has the power to legislate on a nationwide basis to address nationwide problems. Congress has a unique role as the national legislature to look at the whole of the United States for the basis to find a compelling governmental interest supporting the use of race-based remedies. Congress is not required to make particularized findings of discrimination in individual localities to which a nationwide program may apply. Nor is Congress required to find that the Federal government itself has discriminated before applying a race-conscious remedy. (Id. at 1573).

Having reviewed the extensive evidence of discrimination and its relationship to DOT-assisted contracting, the District Court in *Adarand* determined that current and previous DBE provisions were a "considered response by Congress to the effects of discrimination on the ability of minorities to participate in the mainstream of federal contracting." (Id. at 1576). The court stated that "Congress has a strong basis in evidence for enacting the challenged statutes, which thus serve a 'compelling governmental interest.'" (Id. at 1577). The extensive Congressional debate and information supporting the enactment of the 1998 DBE provision significantly strengthens the existing basis for declaring that this program serves a compelling governmental interest.

The basis for District Court's view that the program at issue in *Adarand* is unconstitutional is stated most clearly in the following passage:

Contrary to the [Supreme] Court's pronouncement that strict scrutiny is not 'fatal in fact,' I find it difficult to envisage a race-based classification that is narrowly tailored. By its very nature, such [a] program is both underinclusive and overinclusive. (Id. at 1580).

By underinclusive, the court said it meant that caucasians and members of non-designated minority groups are excluded. By overinclusive, it said it meant that all the members of the designated groups are presumed to be economically and/or socially disadvantaged, without Congress having inquired whether a particular entity seeking a racial preference has suffered from the effects of past discrimination (citing the Supreme Court's *Crosby*

decision, which concerned the powers of state and local governments to use race-based remedies). (Id.)

As Senator Domenici pointed out (S1425), the key words in the District Court's opinion are "Contrary to the [Supreme] Court's pronouncement. \* \* \*" The District Court's analysis departs markedly from the controlling decision of the Supreme Court on this issue (*Adarand v. Peña*, 515 U.S. 200 (1995)). The Supreme Court's language with which the District Court disagreed is the following:

Finally, we wish to dispel the notion that strict scrutiny is "strict in theory, but fatal in fact." [citation omitted] The unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it \* \* \* When race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the "narrow tailoring" test this Court has set out in previous cases. (515 U.S. at 237).

The Supreme Court evidently considers the "not fatal in fact" language to have continuing vitality, having cited it in a subsequent case (*U.S. v. Virginia*, 518 U.S. 515, note 6 (1996)).

Under the District Court's analysis, Congress could never use a race-based classification, no matter how compelling the need, because any such classification would intrinsically fail to be narrowly tailored. This approach effectively moots the determination of whether there is a compelling governmental interest. The Supreme Court's approach, by contrast, permits a racial classification to be used, given the existence of a compelling interest, if it is narrowly tailored.

What is the test for narrow tailoring? As set forth in *United States v. Paradise*, 480 U.S. 149, 171 (1987), the test includes several factors: "the necessity for relief and the efficacy of alternative remedies; the flexibility and duration of the relief, including the availability of waiver provisions; the relationship of the goals to the relevant labor market; and the impact of the relief on the rights of third parties." In *Adarand*, the Supreme Court specifically invited inquiry into whether there was any consideration of the use of race-neutral means to increase minority business participation (related to the efficacy of alternative remedies) and whether the program was appropriately limited so that it will not last longer than the discrimination it is designed to eliminate (related to the duration of relief). (515 U.S. at 238).

This final rule successfully addresses each element of this test:

- *The necessity of relief.* Throughout the debate on the compelling governmental interest, the bipartisan majority of both houses of Congress repeatedly described the necessity of the DBE program's goal-based approach to remedying the effects of discrimination in DOT-assisted contracting. The most significant evidence demonstrating the necessity of a goal-oriented program is the evidence cited of the fall-off in DBE participation in state contracting when goal-oriented programs end, compared to participation rates in the Federal DBE program.

- *Efficacy of alternative remedies.* This element of the narrow tailoring standard is related to the Supreme Court's inquiry concerning race-neutral programs. Under § 26.51 of this rule, recipients are required to meet the maximum feasible portion of their overall goals by using race-neutral measures. Recipients are not required to have contract goals on each contract. Instead, they are instructed to use contract goals only for any portion of their overall goal they cannot meet through race-neutral measures. Contract goals are intended as a safety net to be used when race-neutral means are not effective to ensure that a recipient can achieve "level playing field." Moreover, the regulations provide that recipients must reduce the use of contract goals when other means are sufficient to meet their overall goals. This ensures that race-conscious relief is used only to the extent necessary and is replaced by race-neutral as quickly as possible.

- *Flexibility of relief.* Flexibility is built into the program in a variety of ways. Recipients set their own goals, based on local market conditions; their goals are not imposed by the federal government nor do recipients have to tie them to any uniform national percentage. (§ 26.45). Recipients also choose their own method for goal setting and can choose to base the goal on the evidence that they believe best reflects their market conditions. (§ 26.45). Recipients have broad discretion to choose whether or not to use a goal on any given contract, and if they do choose to use a contract goal, they are free to set it at any level they believe is appropriate for the type and location of the specific work involved. (§ 26.51). The rule also ensures flexibility for contractors by requiring that any contract goal be waived entirely for a prime contractor that demonstrates that it made good faith efforts but was still unable to meet the goal. (§ 26.53). The rule also allows recipients that believe they can achieve equal opportunity for DBEs through different approaches to get waivers releasing

them from almost any of the specific requirements of the rule. (§ 26.103). Recipients can also get exemptions from the rule if they have unique circumstances that make complying with the rule impractical. (§ 26.103).

- *Duration of relief.* The TEA-21 DBE program will end in 2004 unless reauthorized by the Congress. In each successive reauthorization bill for the surface transportation and airport programs, Congress will have the opportunity to examine the current state of transportation contracting and determine whether the DBE program statutes are still necessary to remedy the continuing effects of discrimination. In addition, the duration of relief for individuals and firms are limited by the personal net worth threshold and business size caps. When an individual's personal wealth grows beyond the threshold, he or she will lose the presumption of disadvantage. (§ 26.67). Similarly, when a firm's receipts grows beyond the small business size standards, it loses its eligibility to participate in the program. (§ 26.65). Finally, to ensure that race-conscious remedies are not used any longer than absolutely necessary, § 26.51 requires recipients to reduce the use of contract goals and rely on race-neutral measures to the extent that they are effective.

- *Relationship of goals to the relevant market.* The overall goal setting provisions of § 26.45 require that recipient set overall goals based on demonstrable evidence of the relative availability of ready, willing and able DBEs in the areas from which each recipient obtains contractors. These provisions ensure that there is as close a fit as possible between the goals set by each recipient and the realities of its relevant market. When a recipient sets contract goals, § 26.51 provides that these goals are to be set realistically in relation to the availability of DBEs for the type and location of work involved.

- *Impact of relief on the rights of third parties.* The legitimate interests of third parties (e.g., prime contractors, non-DBE subcontractors) are only minimally impacted by the DBE program, since the program is aimed at replicating a market in which there are no effects of discrimination and the program affects only a relatively small percentage of total federal-aid funds. The design of the overall and contract goal provisions ensures that the use of race-conscious remedies having the potential to affect the interests of third parties is limited to the extent necessary to counter the effects of discrimination. Individual prime contractors are further protected from suffering any undue

burdens by § 26.51, which prevents a prime contractor from losing a contract if it made good faith efforts but was still unable to meet a goal. Non-DBE firms are also protected by § 26.33, which directs recipients to take appropriate steps to address areas of overconcentration of DBE firms in certain types of work that could unduly burden non-DBE firms seeking the same type of work.

- *Inclusion of appropriate beneficiaries.* The certification provisions of Subparts D and E, and particularly the social and economic disadvantage provisions of § 26.67, ensure that only firms owned and controlled by individuals who are in fact socially and economically disadvantaged can participate in the program. Eligibility provisions guard against overinclusiveness by ensuring that individuals with too great net worth are not presumed disadvantaged and by permitting the recipient—on its own initiative or as the result of a complaint—to follow procedures to rebut the presumption of social and/or economic disadvantage. They guard against underinclusiveness by permitting any business owner, including a white male, to demonstrate social and economic disadvantage on an individual basis.

### Section-by-Section Analysis

#### Section 26.1 What Are the Objectives of This Part?

There were relatively few comments on this section of the SNPRM, most of which agreed with the proposed language. We have adopted the suggestion of some commenters that specific reference be made to the role of the DBE program in helping DBEs overcome barriers (e.g., access to capital and bonding) to equal participation. We have also added a specific reference to the role of the program in creating a level playing field on which DBEs can compete fairly for DOT-assisted contracts. Some non-DBE contractors urged that language be added to explicitly oppose "reverse discrimination." The rule clearly states that nondiscrimination is the program's first objective and the Department reiterates here that it opposes unlawful discrimination of any kind.

#### Section 26.3 To Whom Does This Part Apply?

This provision is unchanged from the SNPRM, except for references to the new TEA-21 statutory provisions. A few commenters wanted this provision to apply to Federal Railroad Administration (FRA) programs, as did

the original version of former part 23. However, FRA does not have specific statutory authority for a DBE program parallel to the TEA-21 language. One commenter asked if the language saying that DBE requirements do not apply to contracts without any DOT funding is inconsistent with Federal Transit Administration (FTA) guidance on applicability. While the structure of the FTA program is such that FTA funds are commingled with local funds in many transit authority contracts (e.g., any contract involving FTA operating assistance funds), to which DBE requirements would apply, a contract which is funded entirely with local funds—and without any Federal funds—would not be subject to requirements under this rule.

#### Section 26.5 What Do The Terms Used in This Part Mean?

There were relatively few comments on the definitions proposed in the SNPRM. One commenter wanted to substitute the term "historically underutilized business" for DBE. Given the continued use of the DBE term in Congressional consideration of the program, the continued use of the "socially and economically disadvantaged individuals" language in the statute, and the familiarity of concerned parties with the DBE term, we do not believe changing the term would be a good idea.

A few commenters asked for additional definitions or elaboration of existing definitions (e.g., "form of arrangement," "financial assistance program," "commercially useful function"). These terms are either already defined sufficiently or are best understood in context of the operational sections in which they are embedded, and abstract definitions in this section would not add much to anyone's ability to make the program work well. Consequently, we are not adding them. Otherwise the final rule adopts the SNPRM proposals for definitions with only minor editorial changes.

The Department has added, for the sake of clarity and consistency with other Federal programs, definitions of the terms Alaskan native, Alaskan native corporation (ANC), Indian tribe, immediate family member, Native Hawaiian, Native Hawaiian organization, principal place of business, primary industry classification, and tribally-owned concern. These definitions are taken from the SBA's new small disadvantaged business program regulation (13 CFR § 124.3). The definitions of the designated groups included in the definition of "socially

and economically disadvantaged individual" also derive from the SBA regulations, as the Department's DBE statutes require. We believe these will be useful terms of art in implementing the DBE program.

A few commenters requested definitions for the terms "race-conscious" and "race-neutral," and we have provided definitions. A race-conscious program is one that focuses on, and provides benefits only for, DBEs. The use of contract goals is the primary example of a race-conscious measure in the DBE program. A race-neutral program is one that, while benefiting DBEs, is not solely focused on DBE firms. For example, small business outreach programs, technical assistance programs, and prompt payment clauses can assist a wide variety of small businesses, not just DBEs.

#### *Section 26.7 What Discriminatory Actions Are Forbidden?*

One commenter wanted to add prohibitions of discrimination based on age, disability and religion. The Department is not doing so, because discrimination on these grounds is already prohibited by other statutes (e.g., the Americans with Disabilities Act with respect to disability). Also, statutes which form the basis for this rule focus on race, color, national origin, and sex. Congress determined that remedial action focused on these areas is necessary. These grounds for discrimination are also most relevant to problems in the DBE program that have been alleged to exist (e.g., disparate treatment of DBE certification applicants by race or sex). Some opponents of the program said that the DBE program discriminates against non-DBEs. However, the Department believes that the program is constitutional and does not violate equal protection requirements. A reference to DOT Title VI regulations has been deleted as unnecessary; otherwise, this provision is the same as in the SNPRM.

#### *Section 26.9 How Does the Department Issue Guidance and Interpretations Under This Part?*

Commenters, most of whom were recipients, focused on two issues in this section. First, a majority of the comments favored the "coordination mechanism" concept for ensuring consistent DOT guidance and interpretations. The few that disagreed with this approach did so out of a concern that the mechanism would add delays to the process. These commenters favored additional training

or an 800 number hot line to speed up the process.

We believe that proper coordination of interpretations and guidance is vital to the successful implementation of this rule. As the preambles to the 1992 and 1997 proposed rules mentioned, inconsistent implementation of part 23 has been a continuing problem, which has been criticized by a General Accounting Office report and which has created unnecessary difficulty for recipients, contractors, and the Department itself. A process for ensuring that the Department speaks with one voice on DBE implementation matters, and for letting the public know when DOT has spoken, will greatly improve the service we give our customers.

We do not believe this coordination process will result in significant delays in providing guidance. Nor will it inhibit the ability of DOT staff and customers to communicate with one another. For example, the process does not apply to informal advice provided by staff to recipients or contractors over the phone or in a letter or e-mail. It does maintain, however, the important distinction between informal staff assistance on one hand and a binding institutional position on the other.

For clarity in the process, we have modified the language of the rule text to make clear that interpretations and guidance are binding, official Departmental positions if the Secretary signs them or if the document includes a statement that they have been reviewed and approved by the General Counsel. The General Counsel will consult fully with all concerned offices as part of this review process.

We intend to post significant guidance documents and interpretations on the Department's web site to make them widely and quickly available. As some commenters suggested, we are also continuing to consider forming an advisory committee (or working group of an existing committee) to facilitate customer input into DBE program matters. This is separate from the coordination mechanism, however, which is an internal DOT process.

The rule's provisions regarding exemptions and waivers, previously found in the SNPRM's § 26.9 (c) and (d), are now included as a separate section at § 26.15.

#### *Section 26.11 What Records do Recipients Keep and Report?*

The Department asked, in the SNPRM, whether it would be advisable to have one standard reporting form for information about the DBE program. Currently, each operating

administration (OA) has its own reporting form and requirements. Virtually all the commenters that addressed this issue favored a single, DOT-wide reporting form. Commenters also had a wide variety of suggestions for what data should be reported, formats, and retention periods.

The Department is adopting the suggestion of having a single reporting form, which we believe will reduce administrative burdens for recipients, particularly those who receive funds from more than one OA. Because we do not want to delay the issuance of this rule while a form is being developed, we are reserving the date on which this single form requirement will go into effect. We will take comments on the specifics of reporting into account and consult with interested parties as we devise the form, which will be published subsequently in Appendix B to this rule. The Appendix will also address the issues of reporting frequency and record retention periods. Meanwhile, recipients will continue to report as directed by the concerned OA(s), using existing reporting forms.

The rule is also adding a requirement that recipients develop and maintain a "bidders" list. The bidders list is intended to be a count of all firms that are participating, or attempting to participate, on DOT-assisted contracts. The list must include all firms that bid on prime contracts or bid or quote subcontracts on DOT-assisted projects, including both DBEs and non-DBEs. Bidders lists appear to be a promising method for accurately determining the availability of DBE and non-DBE firms and the Department believes that developing bidders data will be useful for recipients. Creating and maintaining a bidders list will give recipients another valuable way to measure the relative availability of ready, willing and able DBEs when setting their overall goals. (See § 26.45). We realize that identifying subcontractors, particularly non-DBEs and all subcontractors that were unsuccessful in their attempts to obtain contracts, may well be a difficult task for many recipients. Mindful of that potential burden, the rule will not impose any procedural requirements for how the data is collected. Recipients are free to choose whether or not they wish to gather this data through their existing bidding and reporting processes. Recipients are encouraged to make use of all of the data already available to them and all methods of reporting and communication with their contracting community that they already have in place. In addition, the Department suggests that recipients consider using a widely publicized public notice or a

widely disseminated survey to encourage all firms that have bid or quoted contracts to make themselves known to recipients.

Once recipients have created the list of bidders, they will have to supplement that information with the age of each firm (since establishment) and the annual gross receipts of the firm (or an average of its annual gross receipts). Recipients can gather this additional information by sending a questionnaire to the firms on the list, or by any other means that the recipient believes will yield reliable information. The recipient's plan for how to create and maintain the list and gather the required information must be included in its DBE program.

*Section 26.13 What Assurances Must Recipients and Contractors Make?*

There were few comments on this section. Most of these supported the proposal. One comment suggested specific mention of prompt payment, but in view of the substantive requirements on this subject, we do not believe such a mention is needed. Some commenters favored requiring additional public participation as part of the assurance for recipients. Again, given substantive provisions of this rule concerning public participation, we do not believe that repetition here is needed. One commenter said that incorporating the requirements of part 26 in the contract was confusing, since many provisions of part 26 apply only to recipients. We have rewritten the assurance for contractors in response to this concern, specifying that contractors are responsible only for carrying out the requirements of part 26 that apply to them.

*Section 26.15 How Can Recipients Apply for Exemptions or Waivers?*

There has been some confusion as to this rule's distinction between exemption and waiver. Put simply, exemptions are for unique situations that are most likely not to be either generally applicable to all recipients or to have been contemplated in the rulemaking process. If such a situation occurs and it makes it impractical for a particular recipient to comply with a provision of part 26, the recipient should apply for an exemption from that provision. The waiver provision, by contrast, is not designed for extraordinary circumstances where a recipient may not be able to comply with part 26. Waiver is for a situation where a recipient believes that it can better accomplish the objectives of the DBE program through means other than the specific provisions of part 26.

There were a number of comments about the proposed program waiver provision. Most commenters on this issue favored the proposal, believing it could add flexibility to the way recipients implement the DBE program. A few commenters were concerned that too liberal use of the waiver provision might undermine the goals of the rule.

The Department believes that the waiver provision is an important aspect of the DBE program. The provision ensures that the Department and a recipient can work together to respond to any unique local circumstances. Recipients are encouraged to carefully review the circumstances in their own jurisdictions to determine what mechanisms are best suited to achieving compliance with the overall objectives of the DBE program. If a recipient believes it is appropriate to operate its program differently from the way that a provision of Subpart B or C provides, including, but not limited to, any provisions regarding administrative requirements, overall or contract goals, good faith efforts or counting provisions, it can apply for a waiver. For example, waiver requests could pertain to such subjects as the use of a race-conscious measure other than a contract goal, different ways of counting DBE participation in certain industries, use of separate overall or contract goals to address demonstrated discrimination against specific categories of socially and economically disadvantaged individuals, the use or wording of assurances, differences in information collection requirements and methods, etc.

The Department will, of course, carefully review any applications for waivers to make sure that innovative state or local programs are able to meet the objectives of the statutes and regulation. Decisions on waiver requests are made by the Secretary. This authority has not been delegated to other officials. The waiver provision, which the Department believes will help assist recipients to "narrowly tailor" the program to state and local circumstances and ensure nondiscrimination, remains in the final rule.

*Section 26.21 Who Must Have a DBE Program?*

The only substantive comment concerning this provision asked that Federal Railroad Administration (FRA) programs be included. The Department is not including FRA programs under this rule because FRA does not have a specific DBE program statute parallel to those covering the Federal Aviation Administration (FAA), FTA, and

FHWA. FRA could consider issuing a rule similar to part 26 under its own, separate statutory authority. The Department shortened paragraph (b)(1) to make it easier to understand. Within 180 days of the effective date of this rule, all recipients with existing programs must submit revised programs to the relevant OA for approval. The only changes from existing programs that recipients would have to make are changes needed to accommodate differences between former part 23 and part 26. Future new recipients would, of course, submit a DBE program as part of the approval process for financial assistance.

*Section 26.23 What is the Requirement for a Policy Statement?*

*Section 26.25 What is the Requirement for a Liaison Officer?*

*Section 26.27 What Efforts Must Recipients Make Concerning DBE Financial Institutions?*

There were no substantive comments concerning §§ 26.23–26.27, and the Department is adopting them as proposed.

*Section 26.29 What Prompt Payment Mechanisms Must Recipients Have?*

There was substantial comment on the issue of prompt payment. A majority of commenters supported the concept of prompt payment provisions. Some recipients pointed out that they already had prompt payment provisions on the books. DBEs generally supported mandating prompt payment provisions though they, as well as other commenters, recognized that slow payment is a problem affecting many subcontractors, not just DBEs. Some of these comments suggested making prompt payment requirements applicable to subcontracts in general, not just DBE subcontracts. Some recipients were concerned about getting in the middle of disputes between prime contractors and subcontractors. Some commenters wanted the Department to mandate prompt payment provisions, while others preferred that their use by recipients remain optional.

Having considered the variety of views expressed on this subject, the Department believes that prompt payment provisions are an important race-neutral mechanism that can benefit DBEs and all other small businesses. Under part 26, all recipients must include a provision in their contracts requiring prime contractors to make prompt payments to their subcontractors, DBE and non-DBE alike. It is clear that DBE subcontractors are significantly—and, to the extent that

they tend to be smaller than non-DBEs, disproportionately—affected by late payments from prime contractors. Lack of prompt payment constitutes a very real barrier to the ability of DBEs to compete in the marketplace. It is appropriate for the Department to require recipients to take reasonable steps to deal with this barrier. We recognize that delayed payments do not affect only DBE contractors; a prompt payment requirement applying to all subcontracts is an excellent example of a race-neutral measure that will assist DBEs, and we are therefore requiring that recipients' prompt payment mechanisms apply to all subcontracts on Federally-assisted contracts.

Paragraph (a) of this section requires recipients to put into their DBE programs a requirement for a prompt payment contract clause. This clause would appear in every prime contract on which there are subcontracting possibilities, and it would obligate the prime contractor to pay subcontractors within a given number of days from the receipt of each payment the recipient makes to the prime contractor. Payment is required only for satisfactory completion of the subcontractor's work. The clause would also apply to the return of retainage from the prime to the subcontractor. Retainage would have to be returned within a given number of days from the time the subcontractor's work had been satisfactorily completed, even if the prime contract had not yet been completed. A majority of commenters on the retainage issue favored a requirement of this kind.

The number of days involved would be selected by the recipient, subject to OA approval as part of the recipient's DBE program. In approving these time frames, the OAs will consider whether they are realistic and sufficiently brief to ensure genuinely prompt payment. Recipients who already operate under prompt payment statutes may use their existing authority in implementing this requirement. It may be necessary to add to existing contract clauses in some cases (e.g., if existing prompt payment requirements do not cover retainage).

Paragraph (b) lists a series of additional measures that the regulation authorizes, but does not require, recipients to use. These include alternative dispute resolution, holding of payments to primes until subcontractors are paid, and other mechanisms that the recipient may devise. All these mechanisms could be made part of the recipient's DBE programs.

#### *Section 26.31 What Requirements Pertain to the DBE Directory?*

Recipients maintain directories listing certified DBEs. The issue most discussed by commenters on this section was whether the directory should include material concerning the qualifications of the firm to do various sorts of work. For example, has the firm been pre-qualified by the recipient? Can it do creditable work? What kinds of work does the firm prefer to do? Some commenters also asked that the directory should list the geographical areas in which the firm is willing to work. Other commenters opposed the idea of including this kind of information in the directory.

The Department believes that the directory and the certification process are closely intertwined. The primary purpose of the directory is to show the results of the certification process. Consequently, the directory should list all firms that the recipient has certified, along with basic identifying information for the firm. Since certification under this rule pertains to the various kinds of work a firm's disadvantaged owners can control, it is important to list those kinds of work in the directory. For example, if a firm seeks to work in fields A, B, and C, but the recipient has determined that its disadvantaged owners can control its operations only with respect to A and B, then the directory would recite that the firm is certified to perform work as a DBE in fields A and B.

The focus of the directory is intended to be eligibility. A directory is a list of firms that have been certified as eligible DBEs, with sufficient identifying information to permit interested firms to contact the DBEs. We do not intend to turn a recipient's directory into a comprehensive business resource manual. For example, information about firms' qualifications, geographical preferences for work, performance track record, capitalization, etc. are not required to be part of the directory. Some commenters favored including one or more of these elements, but we are concerned that other business information—however useful in its own right—could clutter up the directory and dilute its focus on certification.

#### *Section 26.33 What Steps Must a Recipient Take to Address Overconcentration of DBEs in Certain Types of Work?*

For some time, the Department has heard allegations that DBEs are overconcentrated in certain fields of highway construction work (e.g., guardrail, fencing, landscaping, traffic

control, striping). The concern expressed is that there are so many DBEs in these areas that non-DBEs are frozen out of the opportunity to work. In an attempt to respond to these concerns, the SNPRM asked for comment on a series of options for "diversification" mechanisms, various incentives and disincentives designed to shift DBE participation to other types of work.

The Department received a great deal of comment on these proposals, almost all of it negative. There were few comments suggesting that overconcentration was a serious problem, and many comments said that the alleged problem was not real. Some FTA and FAA recipients said that if there was a problem with overconcentration, it was limited to the highway construction program. As a general matter, recipients said that the proposed mechanisms were costly, cumbersome, and too prescriptive.

Prime contractors opposed the provisions because they would make it more difficult for them to find DBEs with which to meet their goals, while DBEs opposed them because they felt the provisions would penalize success and force them out of areas of business in which they were experienced. Many commenters suggested using outreach or business development plans as ways of assisting DBEs to move into additional areas of work.

The Department does not have data from commenters or other sources to support a finding that "overconcentration" is a serious, nationwide problem. However, as part of the narrow tailoring of the DBE program, we believe it would be useful to give recipients the authority to address overconcentration problems where they may occur. In keeping with the increased flexibility that this rule provides recipients, we give recipients discretion to identify situations where overconcentration is unduly burdening non-DBE firms. If a recipient finds an area of overconcentration, it would have to devise means of addressing the problem that work in their local situations. Possible means of dealing with the problem could include assisting prime contractors to find DBEs in non-traditional fields or varying the use of contract goals to lessen any burden on particular types of non-DBE specialty contractors. While recipients would have to obtain DOT approval of determinations of overconcentration and measures for dealing with them, the Department is not prescribing any specific mechanisms for doing so.

*Section 26.35 What Role do Business Development and Mentor-Protégé Programs Have in the DBE Program?*

In the SNPRM, both mentor-protégé programs and business development programs (BDPs) were cast as tools to use for diversification. They still may be used for that purpose, as noted in § 26.33. However, the Department believes that they may have a broader application, and their use in the final rule is not limited to diversification purposes. BDPs, in particular, are good examples of race-neutral methods recipients can use to promote the participation of DBEs and other small businesses in their contracting programs.

There were few comments on these provisions. Recipients wanted flexibility, and suggested that these kinds of programs should be optional. Their comments said that such programs were resource-intensive, and that Federal financial assistance for them would be welcome. One contractor's organization offered its own mentor-protégé plan as a model. A few comments voiced suspicion of mentor-protégé plans, on the basis that they allowed fronts and frauds into the program.

The final rule makes the use of BDPs and mentor-protégé programs optional for recipients. An operating administration can direct a particular recipient to institute a BDP, but BDPs are not mandatory across the board. The operating administration would negotiate with the recipient before mandating a BDP.

One feature added to this provision allows recipients to establish a kind of mini-graduation requirement for firms that voluntarily participate in BDPs. One of the purposes of a BDP is to equip DBE firms to compete in the market outside the DBE program. Therefore, a recipient could ask BDP participants to agree—as a condition of receiving BDP assistance—to agree to leave the DBE program after a certain number of years, or after certain business development objectives had been achieved.

Standing alone, mentor-protégé programs are not an adequate substitute for the DBE program. While they can be an important tool to help selected firms, they cannot be counted on to level the playing field for DBEs in general. An effective mentor-protégé program requires close monitoring to guard against abuse, which further limits the number of DBEs they can assist. Even with these limits, a mentor-protégé program that has safeguards to prevent large non-DBE firms from circumventing the DBE program can be a useful

component of a recipient's overall strategy to ensure equal opportunities for DBEs.

The final rule includes safeguards intended to prevent the misuse of mentor-protégé programs. Only firms that a recipient has already certified as DBEs (necessarily including a determination that they are independent firms) can participate as protégés. This is intended to preclude non-DBE firms from creating captive DBE firms to serve as protégés. A non-DBE mentor firm cannot get credit for more than half its goal on any contract by using its own protégé. Moreover, a non-DBE mentor firm cannot get DBE credit for using its own protégé on more than every other contract performed by the protégé. That is, if Mentor Firm X uses Protégé Firm Y to perform a subcontract, X cannot get DBE credit for using Y on another subcontract until Y had first worked on an intervening prime contract or subcontract with a different prime contractor.

To make mentor-protégé relationships feasible, the rule provides that mentors and protégés are not treated as affiliates of one another for size determination purposes. Mentor-protégé programs and BDPs must be approved by the concerned operating administration before they take effect. Recipients who already have such programs in place would make them part of their revised DBE programs sent to the concerned OA within 180 days of the effective date of part 26.

*Section 26.37 What Are a Recipient's Responsibilities for Monitoring the Performance of Other Program Participants?*

The few comments on this section asked for more detail and clarification. In the interest of flexibility, the Department is reluctant to be prescriptive in the matter of monitoring and enforcement mechanisms. What we are looking for is a strong and effective set of monitoring and compliance provisions in each recipient's DBE program. These mechanisms could be most anything available to the recipient under Federal, state, or local law (e.g., liquidated damages provisions, responsibility determinations, suspension and debarment rules, etc.)

One of the main purposes of these provisions is to make sure that DBEs actually perform work committed to them at contract award. The results that recipients must measure consist of payments actually made to DBEs, not just promises at the award stage. Credit toward goals can be awarded only when payments (including, for example, the return of retainage payments) are

actually made to DBEs. Under the final rule, recipients would keep a running tally of the extent to which, on each contract, performance had matched promises. Prime contractors whose performance fell short of original commitments would be subject to the compliance mechanisms the recipient had made applicable.

*Section 26.41 What Is the Role of the Statutory 10 Percent Goal in This Program?*

This is a new section, intended to explain what role the 10 percent statutory goal plays in the DBE program. Under former part 23, the 10 percent figure derived from the statute had a role in the setting of overall goals by recipients. For example, if recipients had a goal of less than 10 percent, the rule required them to make a special justification.

This section makes clear that the 10 percent goal is an aspirational goal that applies to the Department of Transportation on a national level, not to individual recipients. It is a goal that the Department can use to evaluate its overall national success in achieving the objectives that Congress has established for this program. However, the national 10 percent goal is not tied to recipients' goal-setting decisions. Recipients set goals based on what will achieve a level playing field for DBEs in their own programs, without regard to the national goal. Recipients are not required to set their overall or contract goals at 10 percent or any other particular level. Recipients are no longer required to make a special justification if their overall goals are less than 10 percent.

As discussed in connection with the Congressional debate on the TEA-21 DBE provision, Congress viewed flexibility concerning the statutory 10 percent goal as an important feature of narrow tailoring and made clear that it was setting a national goal, not a goal for any individual recipient. The Department wants to ensure that state and local programs have sufficient flexibility to implement their programs in a narrowly tailored way. This section is part of the Department's effort toward that end.

*Section 26.43 Can Recipients Use Quotas or Set-Asides as Part of This Program?*

The DBE program has often been labeled as a "quota" or "set-aside" program, especially, though not exclusively, by its opponents. This label is, and always has been, incorrect. Fifteen years ago, in the preamble to the Department's first rule implementing a DBE statute, the Department carefully

specified that neither quotas nor set-asides were required (see 48 FR 33437-38; July 21, 1983). This remains true today. However, in light of *Adarand* and this year's Congressional debates on the DBE statutes, we believe this point deserves additional emphasis. This regulation prohibits quotas under any circumstances and makes clear that set-asides can only be used as a means of last resort for redressing egregious discrimination.

A number of non-DBE contractors and their organizations continued to assert, in comments on the SNPRM, that the DBE program operates as a quota program. This section makes clear that recipients cannot use quotas on DOT-assisted contracts under any circumstances. A quota is a simple numerical requirement that a recipient or contractor must meet, without consideration of other factors. For example, if a recipient sets a 12 percent goal on a particular contract and refuses to award the contract to any bidder who does not have 12 percent DBE participation, either refusing to look at showings of good faith efforts or arbitrarily disregarding them, then the recipient has used a quota. The Department's regulations have never endorsed this practice. The issue of good faith efforts is discussed further below in connection with § 26.51.

A set-aside is a very specific tool. A contracting agency sets a contract aside for DBEs if it permits no one but DBEs to compete for the contract. Firms other than DBEs are not eligible to bid. The Department's DBE program has never required the use of set-asides and has allowed recipients to use set-asides only under very limited circumstances.

Under the SNPRM, a recipient could use a set-aside on a DOT-assisted contract only if other methods of meeting overall goals were demonstrated to be unavailing and the recipient had legal authority independent of part 26. Comments were divided concerning the use of set-asides. A number of non-DBE contractors opposed the use of set-asides, some of them saying that set-asides might be something they could live with if their use were balanced by the elimination of DBE contract goals on other contracts in the same field. Some recipients and DBEs said, however, that set-asides were a useful tool to achieve goals, particularly for start-up contractors or small contracts.

The Department has carefully reviewed these comments and continues to believe that set-asides should not be used in the DBE program unless they are absolutely necessary to address a specific problem when no other means

would suffice. If a recipient has been unable to remedy the effects of egregious discrimination through other means, it may, as a last resort, make limited use of set-asides to the extent necessary to resolve the problem.

#### *Section 26.45 How Do Recipients Set Overall Goals?*

Since its inception, the recipient's overall goal has been the heart of the DBE program. Responding to *Adarand*, DOT clarified the theory and purpose of the overall goal in the SNPRM. In the proposed rule, the Department made clear that the purpose of the overall goal—and, in fact, the DBE program as a whole—is to achieve a "level playing field" for DBEs seeking to participate in federal-aid transportation contracting. To reach a level playing field, recipients need to examine their programs and their markets and determine the amount of participation they would expect DBEs to achieve in the absence of discrimination and the effects of past discrimination. The focus of the goal section of the SNPRM was to propose ways to measure what a level playing field would look like and to seek input on the availability of data to make such a measurement.

#### *The Proposed Rule and Comments*

The Department proposed several options that recipients might use for setting overall goals, including three alternative formulas for measuring the availability of ready, willing and able DBEs in local markets. The specific formulas will be discussed below, but generally, they each called for setting a goal that reflected the percentage of locally available firms that were DBEs (i.e. dividing the number of DBEs by the number of all businesses). On all of the alternatives, the SNPRM sought comments on both the feasibility and practical value of the options, as well as the prospects for combining any of the approaches and the question of whether to mandate a single approach or allow each recipient to choose amongst the options. We invited commenters to propose changes to any of the details of the options or to devise entirely new ones. Finally, we asked commenters for their input on the availability of reliable data for use with each of the options.

Hundreds of commenters of all types—including DBEs and non-DBEs, prime and subcontractors, state and local recipients, industry and interest groups and private individuals—responded with a wealth of feedback, opinions and data. It is an understatement to say that there was no consensus among commenters as to the best way to set overall goals. Support for

the proposed options was almost evenly spread over the choices presented, with many commenters firmly against all of the options. Still more suggested that the current, non-formulaic method was the best way to ensure the flexibility to respond to local market conditions. Similarly, among those who expressed an opinion, commenters were split between the propriety of choosing a single "best" method and imposing it on all recipients and allowing recipients to choose amongst all the options. One of the few universal themes in the goal-setting comments was the problem of the availability of reliable data on the number of DBE and non-DBE contractors.

There were a few common threads that different groups of commenters tended to apply to all of the formulas. Among recipients, many comments focused on the lack of data about non-DBE contractors, especially subcontractors. Recipients often noted that they would not have the information needed for the denominator of any of the formulas (i.e. the total number of available businesses). Non-DBE contractors—and industry groups representing them—generally believed that there should be a capacity measure built into any goal setting mechanism. Finally, DBEs—and their industry associations—were concerned that all of the formulas would create goals based only on the current number of DBEs, locking in the effects of past discrimination by ignoring the fact that the lack of opportunities in the past has suppressed the number of DBE firms available today.

Under the proposed rule's Alternative 1, recipients would calculate the percentage of DBE firms in their directories among all firms available to work on their DOT-assisted contracts. Under Alternative 2, recipients would calculate the percentage of all minority- and women-owned firms in certain SIC codes in their areas among all firms in these SIC codes in the same areas. Under Alternative 3, recipients would calculate a percentage based on the average number of DBE firms that had worked on their DOT-assisted contracts in recent years divided by the average number of all firms that had worked on their DOT-assisted contracts in the same period. The SNPRM also proposed that recipients could use other means, such as disparity studies or goals developed by other recipients serving the same area, as a basis for their goals.

Each of the three proposed alternatives received some support, though this was often the rather tepid endorsement of commenters who felt that one or another alternative was the

best of a bad lot. Non-DBE contractors often claimed that the alternatives would unfairly increase goals, while DBE contractors often claimed that the same proposals would unfairly decrease goals.

Commenters said that data for determining the denominators of the equations in Alternatives 1 and 2, as well as the numerator in Alternative 2, did not exist and that it would be a major, time-consuming job to begin to obtain the data. Adaptation of existing information from other sources (e.g., Census data) was said to have significant statistical difficulties. The difficulty of getting data on out-of-state firms was emphasized in some comments.

Commenters looked on the alternatives as cumbersome, creating unreasonable administrative burdens, and as producing statistical results that were skewed in various ways. The use of DBE directories as the source of the numerator in Alternative 1 was criticized on the basis that directories may contain firms that never actually participate in DOT-assisted contracts. It was suggested that the number of firms bidding rather than the number of firms certified would be a more reliable guide, but it was also pointed out that, because subcontractors seldom formally bid for work, this data would be hard to obtain. Some commenters proposed adding overall population statistics to the mix.

A significant number of commenters—primarily non-DBE contractors, but including some recipients and other commenters as well—emphasized the need to take “capacity” into account. Most popular among these comments was using a capacity version of Alternative 3. These comments did not propose a method of determining the capacity of the firms contracting with the recipient.

#### *The Final Rule*

In view of the complexity and importance of the goal setting process and the many issues raised by commenters, the Department has decided to adopt a two step process for goal setting. The process is intended to provide the maximum flexibility for recipients while ensuring that goals are based on the availability of ready, willing and able DBEs in each recipient's relevant market. The Department believes that this approach is critical to meeting our constitutional obligation to ensure that the program is narrowly tailored to remedy the effects of discrimination. The first step of the process will be to create a baseline figure for the relative availability of ready, willing and able DBEs in each

recipient's market. The second step will be to make adjustments from the base figure, relying on an examination of additional evidence, past experience, local expertise and anticipated changes in DOT-assisted contracting over the coming year.

#### **Step 1: Determining a Base Figure for the Overall Goal**

The base figure is intended to be a measurement of the current percentage of ready, willing and able businesses that are DBEs. Ensuring that this figure is based on demonstrable evidence of each recipient's relevant market conditions will help to ensure that the program remains narrowly tailored. To be explicit, recipients cannot simply use the 10 percent national goal, their goal from the previous year, or their DBE participation level from the previous year as their base figure. Instead, all recipients must take an actual measurement of their marketplace, using the best evidence they have available, and derive a base figure that is as fair and accurate a representation as possible of the percentage of available businesses that are DBEs.

There are many different ways to measure the contracting market and assess the relative availability of DBEs. As discussed above, the SNPRM proposed three alternate formulas to measure relative availability, none of which were particularly popular with commenters. In this final rule, the Department is placing primary emphasis on the principles underlying the measurement, mandating only that a measurement of the relative availability of DBEs be made on the basis of demonstrable evidence of relevant market conditions, rather than requiring that any particular procedure or formula be used. The final rule contains a number of examples of how to create a base figure which recipients are free to adopt in their entirety or to use as guidelines for how to devise their own measurement.

There are several reasons we have taken this approach. First, the Department is aware of the differences in available data in various markets across the nation. The flexibility inherent in this approach will ensure that all recipients can use the procedure to set a reasonable goal and allow each recipient to use the best data available to it. As discussed in another section, this rule will also provide for the development of more standard data for future goal setting. Second, for many recipients, setting goals in this way will be a new exercise. By fixing only the basic principle, but allowing the methodology to change, recipients will

have the opportunity to fine tune the process each year as their experience grows and the data available to them improve. Finally, the rule makes sure that every recipient will have at least one reasonable and practical goal setting method available to them.

The first example for setting a base figure relies on data sources that are immediately available to all recipients: their DBE directories, and a Census Bureau database that DOT and the Census Bureau will make available to all recipients that wish to use it. This example has its roots in the first two goal setting formulas proposed in the SNPRM. Recipients would first assess the number of ready, willing and able DBEs based on their own directories. For some recipients this will be as simple as counting the number of firms in their directory. For others, particularly those using directories maintained by other agencies, the directories will have to be “filtered” for firms involved in transportation contracting. The resulting number of DBEs would become the numerator. The denominator would then be derived from the Census Bureau's County Business Pattern (CBP) database. We will provide user-friendly electronic access to the database via the internet to allow recipients to input the geographic area and SIC codes in which they contract and receive a number for the availability of all businesses.

There are several issues that must be addressed when comparing numbers derived from two different data sources, some of which were raised in the comments on the SNPRM. Recipients will need to ensure that the scope of businesses included in the numerator is as close as possible to the scope included in the denominator. Using as close as possible to the same SIC codes and geographic base is very important. A recipient using its own DBE directory, particularly one that contains only firms in the fields in which it contracts, will still need to determine what fields it will use for the denominator when sorting through the CBP database. The best way to do this would be to examine their contracting program and determine the SIC codes in which they let the substantial majority of their contracts and subcontracts. The geographic area used for both the numerator and the denominator should cover the area from which the recipient draws the substantial majority of its contractors. While it may be sufficient for some state recipients to use their state borders as their contracting area, local transit and airport recipients will rarely have such an obvious choice. Those recipients will need to more carefully examine the

geographic area from which they draw contractors and base their calculation of both the numerator and denominator of the equation on the same area.

The Department and the Census Bureau will make the CBP data available in a format that gives recipients as much flexibility as possible to tailor the data to their contracting programs. Recipients will be able to extract the data in one block for all of the SIC codes they expect to contract in, or by individual SIC codes, allowing them to

weight the relative availability of DBEs in various fields, giving more weight to the fields in which they spend more money. For example, let us assume a recipient estimates that it will expend 10% of its federal aid funds within SIC code 15, 40% in SIC code 16, 25% in SIC code 17, and the remaining 25% on contracting spread over SIC codes 07, 42 and 87. The recipient could separately determine the relative availability of DBEs for each of the three major construction SIC codes (i.e., 15, 16 and

17) and the relative availability of DBEs in the other three SIC codes grouped together and weight each according to the amount of money to be spent in each area. In this example, the recipient could calculate its weighted base figure by first determining the number of DBEs in its directory for each of the groups, then extracting the availability of CBP businesses for the same groups. It would then perform the following calculation to arrive at a base figure for step one of the goal setting process:

$$\text{Base Figure} = \left[ .10 \frac{(\text{DBEs in SIC 15})}{\text{CBPs in SIC 15}} + .40 \frac{(\text{DBEs in 16})}{\text{CBPs in 16}} + .25 \frac{(\text{DBEs in 17})}{\text{CBPs in 17}} + .25 \frac{(\text{DBEs in 07,42,87})}{\text{CBPs in 07,42,87}} \right] \times 100$$

As has been stated generally, this formula is offered only as an example of a way that a recipient could choose to use the CBP database. Recipients using the CBP data should choose whether to weight their calculation, and whether to do so by individual SIC codes or by groups of SIC codes, based on their own assessment of what method will best fit their spending pattern.<sup>1</sup>

Finally, there is still the question of the propriety of comparing data from two sources as different as DBE directories and the CBP. As mentioned above, some commenters asserted that the directories may contain firms that do not normally perform DOT-assisted contracts. This problem is greatest, of course, for directories maintained by other agencies for purposes beyond DOT-assisted contracting. We believe that the recipient's knowledge of its contracting needs and the contents of its DBE directory will allow it to solve this problem by sorting the directories by SIC code to extract only the firms likely to be interested in DOT-assisted contracting. Any remaining effect from DBEs that are certified in the relevant SIC codes but still do not intend to compete for DOT-assisted contracts will be more than offset by the hurdles involved in actually becoming a DBE. It is important to note here that the certification process itself, with its paperwork, review and on-site inspection, create a filter on the number of existing firms that will be counted in the numerator without there being any equivalent filter culling firms out of the denominator. Ultimately, the Department chose these two data sources for the example because, while they may not be perfect, they represent

the best universally available current data on both the presence of DBEs and the presence of all businesses in local markets. Any recipient that believes it has available to it better sources of local data from which to make a similar calculation for its base figure is encouraged to use them.

The second example for calculating a base figure is using a bidders list to determine the relative availability of DBEs. The concept is similar to the one described above. The recipient would divide the number of available ready, willing and able DBEs by the number for all firms. The difference is that instead of measuring availability by DBE certifications and Census data, the recipient would measure availability by the number of firms that have directly participated in, or attempted to participate in, DOT-assisted contracting in the recent past. This approach has its roots in Alternative 3 from the SNPRM. Of fundamental importance to this approach is that the recipient would need to include all firms that have sought DOT-assisted contracts, regardless of whether they did so by bidding on a prime contract or quoting a job as a subcontractor. Because most DOT recipients derive the substantial majority of their DBE participation through subcontracting, it is absolutely essential that all DBE and non-DBE firms that quote subcontracts be included in the bidders list.<sup>2</sup> Bidders lists are a very focussed measure of ready, willing and able firms because they filter the pool of available firms by requiring a demonstration of their ability to participate in the process through tracking and identifying

contracting opportunities, understanding the requirements of a particular job and assembling a bid for it. Another attractive feature of the bidding "filter" is that it applies equally to both DBEs and non-DBEs.

The third example included in the final rule for setting a base figure is using data derived from a disparity study. As was discussed in the SNPRM, the Department is not requiring recipients to do a disparity study, but is only making clear that use of disparity study data by recipients that have them or choose to conduct them is a valid means of setting a goal. Disparity studies generally contain a wide array of statistical data, as well as anecdotal data and analysis that can be particularly useful in the goal setting process. We list disparity studies here, not because they are needed to justify operating the DBE program—Congress has already established the compelling need for the DBE program—but because the data a good disparity study provides can be an excellent guide for a recipient to use to set a narrowly tailored goal.

The Department will not set out specific requirements for what data or analysis is required before a disparity study can be used for setting a goal, because we believe that the design and conduct of the study is best left to the local officials and the professional organizations with which they contract to conduct the studies. Instead, we again offer simple general principles that should apply to all studies used for goal setting. Any study data relied on in the goal setting process should be as recent as possible and be focussed on the transportation contracting industry. When setting the goal, first use the study's statistical evidence to set a base figure for the relative availability of DBEs. Other study information, whether it is anecdotal data, analysis or statistical information about related

<sup>1</sup> While it is not statistically necessary to account for 100% of program dollars when performing this type of weighting, the greater the percentage accounted for, the more accurate the resulting calculation will be.

<sup>2</sup> To prevent any confusion, it is important to note that the DBE program does not use the so-called "benchmarking" system employed in direct Federal procurement. The benchmarking system relies on a unique database created specifically for use in the federal procurement program.

fields, should be included when making adjustments to the base figure (discussed in more detail below), but not included in the base figure for the relative availability of DBEs.

The last specific example included in the rule is using the goal of another recipient as the base figure for goal setting. This option was also included in the SNPRM. It is intended to avoid duplicative work and to lighten the burden the goal setting process might put on smaller recipients. It is important to note that a recipient could only use another recipient's goal if it was set in accordance with this rule and the other recipient performed similar contracting in a similar market area. Using another recipient's approved goal would only satisfy the first step of the goal setting process. It would serve as the base figure, and could not be used to skip over step two of the process. The recipient would need to examine the same additional evidence it would otherwise use to determine whether to adjust its goal from the base figure, as well as being required to make adjustments to account for differences in its local market or contracting program.

The final rule also maintains the option of devising an alternative method of calculating a base figure for the goal setting process. Explicitly listing this option serves to emphasize the point that the options in the rule are examples meant as guidelines intended to ensure maximum flexibility for recipients. Recipients can use this option to take advantage of their unique expertise or any unique source of data that they have that may not be available to other recipients. The concerned operating administration will review and approve the proposals of recipients that believe they can calculate a base figure that will better reflect their relevant market than any of the examples provided in this rule. Approval will be contingent on the proposals following the same principles that apply to any recipient: the methodology must be based on demonstrable data of relevant market conditions and be designed to reach a goal that the recipient would expect DBEs to achieve in the absence of discrimination.

#### Step 2: Adjusting the Base Figure

As alluded to above, measuring the relative availability of DBEs to derive a base figure is only the first step of the goal setting process. To ensure that they arrive at goals that truly and accurately reflect the participation they would expect absent the effects of discrimination, recipients must go beyond the formulaic measurement of

current availability to account for other evidence of conditions affecting DBEs. To accomplish this second step, recipients must first survey their jurisdiction to determine what types of relevant evidence is available to them. Then, relying on their own knowledge of their contracting markets they must review the evidence to determine whether either an up or down adjustment from the base figure is needed.

One universally available form of evidence that all recipients should consider is the proven capacity of DBEs to perform work on DOT-assisted contracts. All recipients have been tracking and reporting the dollar volume of work that is contracted and subcontracted to DBEs each year. Viewed in isolation, the past achievements of DBEs do not reflect the availability of DBEs relative to all available businesses, but it is an important and current measure of the ability of DBEs to perform on DOT-assisted contracts.

Though not universally available, there are hundreds of existing disparity studies that contain a wealth of statistical and anecdotal evidence on the utilization of disadvantaged businesses. In addition to being a possible source of data for Step 1 of the goal setting process, disparity studies should be considered during Step 2 of the process. The base figure from Step 1 is intended to determine the relative availability of DBEs. The data and analysis in a disparity study can help a recipient determine whether those existing businesses are under- or over-utilized. If a recipient has a study with disparity ratios showing that existing DBEs are receiving significantly less work than expected, an upward adjustment from the base figure is called for. Similarly, if the disparity ratio shows overutilization, a downward adjustment to the base figure would be warranted. The anecdotal evidence and analysis of contracting requirements and conditions that may have a discriminatory impact on DBEs are also important sources that should be examined when determining what adjustment to make to the base figure.<sup>3</sup> Finally, disparity studies that are conducted within a recipient's jurisdiction should be examined even if they were not done specifically for the recipient. For example, a state highway agency may find useful data and

analysis in either a statewide disparity study covering other agencies or in a disparity study examining contracting in a county or city within the state.

If a recipient uses another recipient's goal as its base figure under Step 1 of the goal setting process, it will have to make additional adjustments to ensure that its final goal is narrowly tailored to its market and contracting program. For example, if a local transit or airport authority adopts a statewide goal as its base figure, it must determine the extent that local relative availability of DBEs differs from the relative availability of DBEs in the contracting area relied on by the state. The local recipient would also need to examine the differences in the type of contracting work in its program and determine whether there are significant differences in the relative availability of DBEs in any fields that are unique to its program—or unique to the program of the other recipient. Similarly, if one local recipient used the goal of another local recipient in the same market as its base figure, it would also need to adjust for differences in the contracting fields used by the two programs.

Finally, the rule contains a brief list of other types of data a recipient could consider when adjusting its base figure to arrive at an overall goal. The list is by no means intended to be exhaustive. Instead, it is meant as a guide to the types of information a recipient should look for in Step 2 of the goal setting process. There is a wide array of relevant local, regional and national information about the utilization of disadvantaged businesses. Recipients are encouraged to cast as wide a net as they can to carefully examine their contracting programs and the public and private markets in which they operate.

#### *Additional Goal Setting Issues*

The Department proposed, in both the 1992 NPRM and the 1997 SNPRM, that overall goals be calculated as a percentage of DOT funds a recipient expects to expend in DOT-assisted contracts. This is different from the existing part 23 rule, which asked recipients to set overall goals on the basis of all funds, including state and local funds, to be expended in DOT-assisted contracts. This change is for accounting and administrative convenience and is not intended to have a substantive effect on the program. While not the subject of many comments, those who did comment on the proposal favored the change. The final rule adopts this approach.

A few recipients commented that public participation concerning goal setting was bothersome. Nevertheless,

<sup>3</sup> It is important to note that adjusting the goal is only part of the response a recipient should make to evidence of discriminatory barriers for DBEs. All recipients have a primary responsibility to ensure non-discrimination in their programs and should act aggressively to remove any discriminatory barriers in their programs.

we view it as an essential part of the goal setting process. There are many stakeholders involved in setting goals, and it is reasonable that they should be involved in the process and have an opportunity for comment. The part 23 provision requiring getting a state governor's approval of a goal of less than 10 percent has been eliminated, both because overall goals are no longer tied to the national 10 percent goal and to reduce administrative burdens.

The goal setting provision of the final rule continues to direct recipients to set one annual overall goal for DBEs, rather than group-specific goals separating minority and women-owned businesses.

#### *Section 26.47 Can Recipients Be Penalized for Failing To Meet Overall Goals?*

This is a new section of the regulation, the purpose of which is to clarify the Department's views on the situations in which it is appropriate to impose sanctions on recipients with respect to goals. The provision states explicitly what has long been the Department's policy: no recipient is sanctioned, or found in noncompliance, simply because it fails to meet its overall goal. In fact, through the history of the DBE program, the Department never has sanctioned a recipient for failing to obtain a particular amount of DBE participation.

On the other hand, if a recipient fails to set an overall goal which the concerned operating administration approves, or fails to operate its program in good faith toward the objective of meeting the goal, it is subject to a finding of noncompliance and possible sanctions. For example, if a recipient refuses to establish a goal or, having established one, does little or nothing to work toward attaining it, it would be reasonable for the Department to find the recipient in noncompliance. Like all compliance provisions of the rule, this provision is subject to the "court order" exception recently created by statute (see § 26.101(b)).

#### *Section 26.49 How Are Overall Goals Established for Transit Vehicle Manufacturers?*

This provision basically continues in effect the existing transit vehicle manufacturer (TVM) provisions of the rule. The SNPRM proposed to change the existing rule in two respects. FHWA or FAA recipients could avail themselves of similar provisions, if they chose. The final rule retains this flexibility. Also, it was proposed that FTA, rather than manufacturers, would set TVM goals. The few comments we received on this section objected to the

latter change. Consequently, we will not adopt the proposed change and will continue to require the TVMs themselves to set their own goals based on the principles outlined in § 26.45 of this rule.

#### *Section 26.51 What Means Do Recipients Use To Meet Overall Goals?*

One of the key points of both the SNPRM and this final rule is that, in meeting overall goals, recipients have to give priority to race-neutral means. By race-neutral means (a term which, for purposes of this rule, includes gender neutrality), we mean outreach, technical assistance, procurement process modification, etc.—measures which can be used to increase opportunities for all small businesses, not just DBEs, and do not involve setting specific goals for the use of DBEs on individual contracts. Contract goals, on the other hand, are race-conscious measures.

In the context of these definitions, it is important to note that awards of contracts to DBEs are not necessarily race-conscious actions. Whenever a DBE receives a prime contract because it is the lowest responsible bidder, the resulting DBE participation was achieved through race-neutral means. Similarly, when a DBE receives a subcontract on a project that does not have a contract goal, its participation was also achieved through race-neutral means. Finally, even on projects that do carry contract goals, when a prime awards a particular subcontract to a DBE because it has proven in the past that it does the best or quickest work, or because it submitted the lowest quote, the resulting DBE participation has, in fact, been achieved through race-neutral means. We also note that the use of race-neutral measures (e.g., outreach, technical assistance) specifically to increase the participation of DBEs does not convert these measures into race-conscious measures.

A number of non-DBE contractors commented that race-neutral measures should not only be given priority, but must be tried and fail before any use of contract goals can occur. This, they asserted, is essential for a program to be narrowly tailored. The law on this point is fairly clear, and does not support the commenters' contention. The extent to which race-neutral alternatives were considered and deemed inadequate to remedy the problem is the relevant narrow tailoring question. Both in past legislation and when considering TEA-21, Congress did consider race-neutral alternatives. In fact, as described above, throughout the debate, Member after Member gave examples of how state and local race-neutral programs without

goals fail to overcome the discriminatory barriers that face DBEs. Congress' careful consideration and conclusion that race-neutral means are insufficient, buttressed by this rule's emphasis on achieving as much of the goal as possible through race-neutral means, satisfies this part of the narrow tailoring requirement.

No one opposed the use of race-neutral means, though a number of DBEs and recipients stressed that these means, standing alone, were insufficient to address discrimination and its effects. Most recipients and non-DBE contractors supported the use of race-neutral measures, though some recipients said that increased use of these measures would require additional resources.

The relationship between race-conscious and race-neutral measures in the final rule is very important. The recipient establishes an overall goal. The recipient estimates, in advance, what part of that goal it can meet through the use of race-neutral means. This projection, and the basis for it, would be provided to the concerned operating administration at the same time as the overall goal, and is subject to OA approval.

The requirement of the rule is that the recipient get the maximum feasible DBE participation through race-neutral means. The recipient uses race-conscious measures (e.g., sets contract goals) to get the remainder of the DBE participation it needs to meet the overall goal. If the recipient expects to be able to meet its entire overall goal through race-neutral means, it could, with OA approval, implement its program without any use of contract goals.

For example, suppose Recipient X establishes an 11 percent overall goal for Fiscal Year 2000. This is the amount of DBE participation that X has determined it would have if the playing field were level. Recipient X projects that, using a combination of race-neutral means, it can achieve 5 percent DBE participation. Recipient X then sets contract goals on some of its contracts throughout the year to bring in an additional 6 percent DBE participation. Recipients would keep data separately on the DBE participation obtained through those contracts that either did or did not involve the use of contract goals. Recipients would use this and other data to adjust their use of race-neutral means and contract goals during the remainder of the year and in future years. For example, if Recipient X projected being able to attain 5 percent DBE participation through race-neutral measures, but was only able to obtain 1 percent from the race-neutral measures

it used, Recipient X would increase its future use of contract goals. On the other hand, if Recipient X exceeded its prediction that it would get 5 percent DBE participation from race-neutral measures and actually obtained 10 percent DBE participation from the contracts on which there were no contract goals, it would reduce its future use of contract goals. A recipient that was consistently able to meet its overall goal using only race-neutral measures would never need to use contract goals.

Most recipients and non-DBE contractors agreed with the SNPRM's proposal that (contrary to the part 23 provision on this subject) contract goals not be required on all contracts. This provision is retained in the final rule. We believe that this provision provides recipients the ability to achieve the objective of a narrowly tailored program. The rule also reiterates that the contract goal need not be set at the same level as the overall goal. To express this more clearly, let us return to the above example of Recipient X. Just because Recipient X has an overall goal of 11 percent, it does not have to set a contract goal on each contract. Nor does it have to establish an 11 percent goal on each contract on which it does set a contract goal. Indeed, since X has projected that it can achieve almost half of its overall goal through race-neutral means, it would most likely set contract goals on some contracts but not on others. On contracts with a contract goal, the goal might be 4 percent one time, 18 percent another time, 9 percent another time, depending on the actual work involved in each contract, the location of the work and the subcontracting opportunities available. The idea is for X to set contract goals that, cumulatively over the year, bring in 6 percent DBE participation, which, added to the 5 percent participation X projects achieving from race-neutral measures, ends up meeting the 11 percent overall goal.

The SNPRM asked for comment on evaluation credits as an additional race-conscious measure that recipients could use to meet overall goals. The vast majority of the many comments on this subject opposed the use of evaluation credits, on both legal (e.g., as contrary to narrow tailoring) and policy (e.g., as confusing and subjective) grounds. A smaller number of commenters favored at least giving recipients discretion to use this tool. While the Department does not agree with the contention that evaluation credits are legally suspect, we do agree with much of the sentiment against using them in the DBE program, particularly the practical difficulties they might involve when applied to

subcontracting (which constitutes the main source of DBE participation in the program). As a result, the final rule does not contain an evaluation credits provision.

The SNPRM proposed certain mechanisms for determining when it was appropriate to ratchet back the use of contract goals. Most commenters said they found these particular mechanisms complicated and confusing. The Department believes that, as a matter of narrow tailoring, it is important to have concrete mechanisms in place to ensure that race-conscious measures like contract goals are used only to the extent necessary to ensure a level playing field. The final rule contains examples of four such mechanisms.

The first mechanism applies to a situation in which a recipient estimates that it can meet its overall goal exclusively through the use of race-neutral goals. In this case, the recipient simply does not set contract goals during the year. The second mechanism takes this approach one step further. If the recipient meets its overall goal two years in a row using *only* race-neutral measures, the recipient continues to use only race-neutral measures in future years, without having to project each year how much of its overall goal it anticipates meeting through race-neutral and race-conscious means, respectively. However, if in any year the recipient does not meet its overall goal, the recipient must make the projection for the following year, using race-conscious means as needed to meet the goal.

The third mechanism applies to recipients who exceed their overall goals for two years in a row while using contract goals. In the third year, when setting their overall goal and making their projection of the amount of DBE participation they will achieve through race-neutral means, they would determine the average percentage by which they exceeded their overall goals in the two previous years. They would then use that percentage to reduce their reliance on contract goals in the coming year, as noted in the regulatory text example. The rationale for this reduction is that the recipient's overall goal represents its best estimation of the participation level expected for DBEs in the absence of discrimination. By exceeding that goal consistently, the recipient may be relying too heavily on race-conscious measures. Scaling back the use of contract goals—while keeping careful track of DBE participation rates on projects without contract goals—will ensure that the recipient's DBE program remains narrowly tailored to overcoming the continuing effects of discrimination.

The fourth mechanism operates within a given year. If a recipient determines part way through the year that it will exceed (or fall short of) its overall goal, and it is using contract goals during that year, it would scale back its use of contract goals (or increase its use of race-neutral means and/or contract goals) during the remainder of the year to ensure that it is using an appropriate balance of means to meet its "level playing field" objectives.

There were also a number of comments on how contract goals should be expressed. Most favored continuing the existing practice of adding together the Federal and local shares of a contract and expressing the contract goal as a percentage of the sum because it works well and avoids confusion. A few comments favored expressing contract goals as a percentage of only the Federal share of a contract. Ultimately, we believe that it is not necessary for the Department to dictate which method to use. Recipients may continue to use whichever method they feel works best and allows them to accurately track the participation of DBEs in their program. Recipients need only ensure that they are consistent and clearly express the method they are using, and report to the Department the total federal aid dollars spent and the federal aid dollars spent with DBEs.

As a last note on this topic, FAA recipients are reminded that funds derived from passenger facility charges (PFCs) are not covered by this part and should not be counted as part of the Federal share in any goal calculation. If a recipient chooses to express its contract goals as a percentage of the combined Federal and local share, it may include the PFC funds as part of the local share.

#### *Section 26.53 What Are the Good Faith Efforts Procedures Recipients Follow in Situations Where There Are Contract Goals?*

There was little disagreement about the main point of this section. When a recipient sets a contract goal, the basic obligation of bidders is to make good faith efforts (GFE) to meet it. They can demonstrate these efforts in either of two ways, which are equally valid. First, they can meet the goal, by documenting that they have obtained commitments for enough DBE participation to meet the goal. Second, even though they have not met the goal, they can document that they have made good faith efforts to do so. The Department emphasizes strongly that this requirement is an important and serious one. A refusal by a recipient to accept valid showings of

good faith is not acceptable under this rule.

Appendix A discusses in greater detail the kinds of good faith efforts bidders are expected to make. There was a good deal of comment concerning its contents. Non-minority contractors recited that good faith efforts standards should be "objective, measurable, realistically achievable, and standardized." Not one of these comments provided any examples or suggestions of what "objective, measurable, realistically achievable, and standardized" standards would look like, however. Certainly a one-size-fits-all checklist is neither desirable nor possible. What constitutes a showing of adequate good faith efforts in a particular procurement is an intrinsically fact-specific judgment that recipients must make. Circumstances of procurements vary widely, and GFE determinations must fit each individual situation as closely as possible.

The proposed good faith efforts appendix suggested that one of the factors recipients could take into account is the behavior of bidders other than the apparent successful bidder. For example, if the latter failed to meet the contract goal, but other bidders did, that could suggest that the apparent successful bidder had not exerted sufficient efforts to get DBE participation. Recipients who commented on this issue favored the concept; non-DBE contractors opposed it. The final rule's Appendix A makes clear that recipients are not to use a "conclusive presumption" approach, in which the apparent successful bidder is summarily found to have failed to make good faith efforts simply because another bidder was able to meet the goal. However, the track record of other bidders can be a relevant factor in a GFE determination, in more than one way. If other bidders have met the goal, and the apparent successful bidder has not, this at least raises the question of whether the apparent successful bidder's efforts were adequate. It does not, by itself, prove that the apparent successful bidder did not make a good faith effort to get DBE participation, however. On the other hand, if the apparent successful bidder—even if it failed to meet the goal—got as much or more DBE participation than other bidders, then this fact would support the apparent successful bidder's showing of GFE. The revised Appendix makes these points.

The proposed good faith efforts appendix also expanded on language in part 23 concerning price-based decisions by prime contractors. The existing language provides that a

recipient can use, as evidence of a bidder's failure to make good faith efforts, the recipient's rejection of a DBE subcontractor's "reasonable price" offer. The SNPRM added that a recipient could set a price differential from 1–10 percent to evaluate bidders' efforts. If a bidder did not meet the goal and rejected a DBE offer within the range, the recipient could view the bidder as not making good faith efforts. This was an attempt to provide additional, quantified, guidance to recipients on this issue.

Comment was mixed on this issue. Non-DBE prime contractors generally opposed the price differential idea, saying that it encouraged deviations from the traditional low bid system. It should be noted, however, that subcontracts are typically awarded outside any formal low bid system. Some recipients thought that it was a bad idea to designate a range, because it would limit their discretion, while others liked the additional definiteness of the range. Most recipients supported the "reasonable price" concept in general, even if they had their doubts about the value of a range. Some DBE organizations favored the range approach.

Taking all the comments into consideration, the Department has decided to retain language similar to that of part 23, without reference to any specific range. Appendix A now provides that the fact that some additional costs may be involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet a DBE contract goal, as long as such costs are reasonable. Along with this emphasis on the reasonableness of the cost necessarily comes the fact that prime contractors are not expected to bear unreasonable costs. The availability of a good faith efforts waiver of the contract goal helps to ensure that a prime contractor will not be in a position where it has to accept an excessive or unreasonable bid from a DBE subcontractor. At the same time, any burden that a non-DBE subcontractor might face is also limited by the reasonableness of competing bids. This approach retains flexibility for recipients while avoiding the concerns commenters expressed about a particular range.

The SNPRM proposed that recipients would have to provide for an administrative review of decisions that a bidder's GFE showing was inadequate. The purpose of the provision was to ensure that recipients did not arbitrarily dismiss bidders' attempts to show that they made good faith efforts. The provision was meant to emphasize the

seriousness with which the Department takes the GFE requirement and to help respond to allegations that some recipients administered the program in a quota-like fashion. The SNPRM also asked whether such a mechanism should be operated entirely by the recipient or whether a committee including representatives of DBE and non-DBE contractors should be involved.

A number of recipients, and a few contractors, opposed the idea on the basis of concern about administrative burdens on recipients and potential delays in the procurement process. A greater number of commenters, largely non-DBE contractors but also including recipients and DBEs, supported the proposal as ensuring greater fairness in the process. A significant majority of all commenters said that the recipient should operate the system on its own, because a committee would make the process more cumbersome and raise conflict of interest issues.

The Department will adopt this proposal, which should add to the fairness of the system and make allegations of *de facto* quota operations less likely. The Department intends that reconsideration be administered by recipients. The regulation does not call for a committee involving non-recipient personnel. The Department intends that the process be informal and timely. The recipient could ensure that the process be completed within a brief period (e.g., 5–10 days) to minimize any potential delay in procurements. The bidder would have an opportunity to meet with the reconsideration official, but a formal hearing is not required. To ensure fairness, the reconsideration official must be someone who did not participate in the original decision to reject the bidder's showing. The recipient would have to provide a written decision on reconsideration, but there would be no provision for administrative appeals to DOT.

A point raised by several non-DBE commenters was that DBEs should have to make good faith efforts (even when they were not acting as prime contractors). The commenters suggested things like providing capacity statements and documenting that they have bid on contracts. This point is unrelated to the subject of this section, which has to do with what efforts bidders for prime contracts have to make to show that they have made to obtain DBE subcontractors. It is difficult to see what purpose the additional paperwork burdens these commenters' requests would serve.

One of the most hotly debated issues among commenters was whether DBE

firms bidding on prime contracts should have to meet goals and make good faith efforts to employ DBE subcontractors. Under part 23, DBE prime contractors did not have to meet goals or make good faith efforts. The rationale for this position was that, as DBEs, 100 percent of the work of these contractors counted toward recipients' contract goals, which the firms automatically met.

A significant majority of commenters on this issue—particularly non-DBE contractors but also including some recipients and a few DBEs—argued that DBE primes should meet goals and make GFE the same as other contractors. Failing to do so, they said, went beyond providing a level playing field to the point of providing an unfair advantage for DBE bidders for prime contracts. This change would also increase opportunities for DBE subcontractors, they said. One comment suggested requiring DBE prime contractors to meet goals or make GFE, but stressed that work they performed with their own forces as well as work awarded to DBE subcontractors should count toward goals.

Supporters of the current system said that many prime contracts performed by DBEs are too small to permit subcontracting (of course, goals need be set only on contracts with subcontracting possibilities). Moreover, these commenters—mostly DBEs and recipients—said that there was already inequity as between DBEs and non-DBEs, and requiring DBEs to meet the same requirements simply maintained the inequity. There was also some support for a third option the Department included in the SNPRM, in which DBEs would have to meet goals and make GFE to the extent that work they proposed to perform with their own forces was insufficient to meet goals.

The Department believes that, in a rule aimed at providing a level playing field for DBEs, it is appropriate to impose the same requirements on all bidders for prime contracts. Consequently, part 26 will depart from the part 23 approach and require DBE prime contractors to meet goals and make good faith efforts on the same basis as other prime contractors. However, in recognition of the DBE bidders' status as DBEs, we will permit them to count toward goals the work that they commit to performing with their own forces, as well as the work that they commit to be performed by DBE subcontractors. DBE bidders on prime contracts will be expected to make the same outreach efforts as other bidders and to document good faith

efforts in situations where they do not fully meet contract goals.

Under part 23 and the SNPRM, recipients have a choice between handling bidder compliance with contract goals and good faith efforts requirements as a matter of responsiveness or responsibility. Some recipients and other contractors recounted successful experience with one approach or the other, and suggested reasons why everyone should follow each approach (e.g., responsiveness as a deterrent to bid-shopping; responsibility as a more flexible and cost-effective approach). Both approaches have their merits, and the Department believes the best course is to maintain the existing recipient discretion on this issue.

Some recipients use so-called "design-build" or "turnkey" contracts, in which the design and construction of an entire project is contracted out to a master contractor. The master contractor then lets subcontracts, which are often equivalent to the prime contracts that the recipient would let if it were designing and building the project directly. In a sense, the master contractor stands in the shoes of the recipient.

On design-build contracts, the normal process for setting contract goals does not fit the contract award process well. At the time of the award of the master contract, neither the recipient nor the master contractor knows in detail what the project will look like or exactly what contracting opportunities there will be, let alone the identity of DBEs who may subsequently be involved. In these situations, the recipient may alter the normal process, setting a project goal to which the master contractor commits. Later, when the master contractor is letting subcontracts, it will set contract goals as appropriate, standing in the shoes of the recipient. The recipient will exercise oversight of this process.

The final issue in this section has to do with replacement of DBEs that drop out of a contract. What actions, if any, should a prime contractor have to take when a DBE is unable to complete a subcontract, for whatever reason? Should it matter whether or not the DBE's participation is needed to achieve the prime contractor's goal?

Comment on this issue came mostly from recipients, with some non-DBE contractors and a few DBEs providing their views. A majority of the commenters believed that replacement of a fallen-away DBE with another DBE (or making a good faith effort toward that end) should be required only when needed to ensure that the prime contractor continued to meet its contract

goal. Others said that, since using DBEs to which the prime had committed at the time of award was a contractual requirement, replacement or good faith efforts should be required regardless of the prime's ability to meet the goal without the lost DBE's participation.

The Department believes that, in a narrowly tailored rule, it is not appropriate to require DBE participation at a level exceeding that needed to ensure a level playing field. Consequently, we will require a prime contractor to replace a fallen-away DBE (or to demonstrate that it has made good faith efforts toward that end) only to the extent needed to ensure that the prime contractor is able to achieve the contract goal established by the recipient for the procurement. The Department will also retain the SNPRM provision—supported by most commenters who mentioned it—that a prime contractor may not terminate a DBE firm for convenience and then perform the work with its own forces without the recipient's written consent. This provision is intended to prevent abuse of the program by a prime contractor who would commit to using a DBE and then bump the DBE off the project in favor of doing the work itself.

#### *Section 26.55 How Is DBE Participation Counted Toward Goals?*

In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE. This represents a change from the existing rule and the SNPRM, which said that all the work of a DBE's contract (implicitly including work subcontracted to non-DBEs) counts toward goals. A few comments urged such a change. The new language is also consistent with the way that the final rule treats goals for DBE prime contractors.

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE subcontractor buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should

count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit.

One of the most difficult issues in this section concerns how to count DBE credit for the services of DBE trucking firms. The SNPRM proposed that, to be performing a CUF, a DBE trucking firm had to own 50 percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. In response to these comments, the Department revisited this issue and reviewed the trucking CUF policies of a number of states. The resulting provision requires DBEs to have overall control of trucking operations and own at least one truck, but permits leasing from a variety of sources under controlled conditions, with varying consequences for DBE credit awarded.

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators. For work done with its own trucks and drivers, and for work with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, since the services themselves are being performed by non-DBEs.

When we say that a DBE firm must own at least one of the trucks it uses on a contract, we intend for recipients to have a certain amount of discretion for handling unexpected circumstances, beyond the control of the firm. For example, suppose firm X starts the contract with one truck it owns. The truck is disabled by an accident or mechanical problem part way through the contract. Recipients need not conclude that the firm has ceased to perform a commercially useful function.

Most commenters who addressed the issue agreed with the SNPRM proposal that a DBE does not perform a CUF unless it performs at least 30 percent of the work of a contract with its own forces (a few commenters suggested 50 percent). This provision has been retained. A commenter suggested that the use of two-party checks by a DBE and another firm should not

automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly-recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse.

One commenter noted an apparent inconsistency between counting 100 percent of the value of materials and supplies used by a DBE construction contractor (e.g., in the context of a furnish and install contract) and counting only 60 percent of the value of goods obtained by a non-DBE contractor from a DBE regular dealer. The two situations are treated differently, but there is a policy reason for the difference. There is a continuing concern in the program that, if non-DBEs are able to meet DBE goals readily by doing nothing more than obtaining supplies made by non-DBE manufacturers through DBE regular dealers, the non-DBEs will be less likely to hire DBE subcontractors for other purposes. As a policy matter, the Department does not want to reduce incentives to use DBE subcontractors, so we have not permitted 100 percent credit for supplies in this situation. Giving 100 percent credit for materials and supplies when a DBE contractor performs a furnish and install contract does not create the same type of disincentive, so the policy concern does not apply. In our experience, the 60 percent credit has been an effective incentive for the use of DBE regular dealers, so those firms are not unduly burdened.

#### *Section 26.61 How Are Burdens of Proof Allocated in the Certification Process?*

This section, which states a "preponderance of evidence" standard for applicants' demonstration to recipients concerning group membership, ownership, control, and business size, received favorable comment from all commenters who addressed it. We are retaining it with only one change, a reference to the fact that, in the final rule, recipients will collect information concerning the economic status of prospective DBE owners.

#### *Section 26.63 What Rules Govern Group Membership Determinations?*

There were several comments on details of this provision. One commenter suggested that tribal

registration be used as an identifier for Native Americans. The suggestion is consistent with long-standing DOT guidance; however this section of the regulation is meant to set out general rules applicable to all determinations of group membership, not to enumerate means of making the determination for specific groups. The same commenter suggested that if someone knowingly misrepresents himself as a group member, he should not be given further consideration for eligibility. Misrepresentation of any kind on an application is a serious matter. Indeed, misrepresentation of material facts in an application can be grounds for debarment or even criminal prosecution. While it would certainly be appropriate for recipients to take action against someone who so misrepresented himself, the regulatory text on group membership is not the place to make a general point about the consequences of misrepresentation.

Some commenters wanted further definition of what "a long period of time" means. We believe it would be counterproductive to designate a number of years that would apply in all cases, since circumstances are likely to differ. The point is to avoid "certification conversions" in which an individual suddenly discovers, not long before the application process, ancestry or culture with which he previously has had little involvement.

We are adopting the SNPRM provision without substantive change.

#### *Section 26.65 What Rules Govern Business Size Determinations?*

By statute, the Department is mandated to apply SBA small business size standards to determining whether a firm is a small business. The Department is also mandated to apply the statutory size cap (\$16.6 million in the current legislation, which the Department adjusts for inflation from time to time). Consequently, the Department cannot adopt the variety of comments we received to adjust size standards or the gross receipts cap to take differences among industries or regions into account. We are adopting the proposed language, using the new statutory gross receipts cap. As under part 23, a firm must fit under both the relevant SBA size standard and the generally applicable DOT statutory cap to be eligible for certification.

A few commenters asked for additional guidance for situations in which a firm is working in more than one SIC code, and the SBA size standards for the different SIC codes are different. First, size determinations are made for the firm as a whole, not for one

division or another. Second, suppose the size of Firm X (e.g., determined through looking at the firm's gross receipts) is \$5 million, and X is seeking certification as a DBE in SIC code yyyy and zzzz, whose SBA small business size standards are \$3.5 and \$7 million, respectively. Firm X would be a small business that could be certified as a DBE, and that could receive DBE credit toward goals, in SIC code zzzz but not in SIC code yyyy. This approach to the issue of differing standards being involved with the same firm fits in well with the general requirement of part 26 that certification be for work in particular SIC codes.

#### *Section 26.67 What Rules Determine Social and Economic Disadvantage?*

The statutes governing the DBE program continue to state that members of certain designated groups are presumed to be both socially and economically disadvantaged. Therefore, the Department is not adopting comments suggesting that one or both of the presumptions be eliminated from the DBE rule. While the rule does specify that applicants who are members of the designated groups do have to submit a signed certification that they are, in fact, socially and economically disadvantaged, this requirement should not be read as making simple "self-certification" sufficient to establish disadvantage. As has been the case since the beginning of the DBE program, the presumptions of social and economic disadvantage are rebuttable.

The Department is making an important change in this provision in response to comments about how to rebut the presumption of economic disadvantage. Recipient comments unanimously said that recipients should collect financial information, such as statements of personal net worth (PNW) and income tax returns, in order to determine whether the presumption of economic disadvantage really applies to individual applicants. Particularly in the context of a narrowly tailored program, in which it is important to ensure that the benefits are focussed on genuinely disadvantaged people (not just anyone who is a member of a designated group), we believe that these comments have merit. While charges by opponents of the program that fabulously wealthy persons could readily participate under part 23 have been exceedingly hyperbolic and inaccurate (e.g., references to the Sultan of Brunei as a potential DBE), it is appropriate to give recipients this tool to make sure that non-disadvantaged persons do not participate.

For this reason, part 26 requires recipients to obtain a signed and notarized statement of personal net worth from all persons who claim to own and control a firm applying for DBE certification *and* whose ownership and control are relied upon for DBE certification. These statements must be accompanied by appropriate supporting documentation (e.g., tax returns, where relevant). The rule does not prescribe the exact supporting documentation that should be provided, and recipients should strive for a good balance between the need for thorough examination of applicants' PNW and the need to limit paperwork burdens on applicants. For reasons of avoiding a retroactive paperwork burden on firms that are now certified, the rule does not require recipients to obtain this information from currently certified firms. These firms would submit the information the next time they apply for renewal or recertification. The final rule's provisions on calculating personal net worth are derived directly from SBA regulations on this subject (see 13 CFR § 124.104(c)(2), as amended on June 30, 1998).

One of the primary concerns of DBE firms commenting about submitting personal financial information is ensuring that the information remains confidential. In response to this concern, the rule explicitly requires that this material be kept confidential. It may be provided to a third party only with the written consent of the individual to whom the information pertains. This provision is specifically intended to preempt any contrary application of state or local law (e.g., a state freedom of information act that might be interpreted to require a state transportation agency to provide to a requesting party the personal income tax return of a DBE applicant who had provided the return as supporting documentation for his PNW statement). There is one exception to this confidentiality requirement. If there is a certification appeal in which the economic disadvantage of an individual is at issue (e.g., the recipient has determined that he or she is not economically disadvantaged and the individual seeks DOT review of the decision), the personal financial information would have to be provided to DOT as part of the administrative record. The Department would treat the information as confidential.

Creating a clear and definitive standard for determining when an individual has overcome the economic disadvantage that the DBE program is meant to remedy has long been a contentious issue. In 1992, the

Department proposed to use a personal net worth standard of \$750,000 to rebut the presumption of disadvantage for members of the designated groups. In 1997, the Department proposed a similar idea, though rather than use the \$750,000 figure, the SNPRM asked the public for input on what the specific amount should be. Finally, as discussed in detail above, the issue of ensuring that wealthy individuals do not participate in the DBE program was a central part of the 1998 Congressional debate.

Public comment on both proposals was sharply divided. Roughly equal numbers of commenters thought \$750,000 was too high as thought it was too low. Commenters proposed figures ranging from \$250,000 to \$2 million. Others supported the \$750,000 level, which is based on the SBA's threshold for participation in the SDB program (it is also the retention level for the 8(a) program). One theme running through a number of comments was that recipients should have discretion to vary the threshold depending on such factors as the local economy or the type of firms involved. Some comments opposed the idea of a PNW threshold altogether or suggested an alternative approach (e.g., based on Census data about the distribution of wealth).

Others commented that rebutting the presumption did not go far enough, pointing out that the only way to ensure that wealthy people did not participate in the program was for the threshold to act as a complete bar on the eligibility of an individual to participate in the program. Congress appears to share this concern. While they differed on the effectiveness of past DOT efforts, both proponents and opponents of the program agreed that preventing the participation of wealthy individuals was central to ensuring the constitutionality of the DBE program.

The Department agrees and, in light of the comments and the intervening TEA-21 debate, is adopting the clearest and most effective standard available: when an individual's personal net worth exceeds the \$750,000 threshold, the presumption of economic disadvantage is conclusively rebutted and the individual is no longer eligible to participate in the DBE program. The Department is using the \$750,000 figure because it is a well established and effective part of the SBA programs and is a reasonable middle ground in view of the wide range of comments calling for higher or lower thresholds. Using a figure any lower, as some commenters noted, could penalize success and make growth for DBEs difficult (since, for example, banks and insurers frequently

look to the personal assets of small business owners in making lending and bonding decisions). Operating the threshold as a cap on eligibility for all applicants also serves to treat men and women, minorities and non-minorities equally.

When a recipient determines, from the PNW statement and supporting information, that an individual's personal net worth exceeds \$750,000, the recipient must deem the individual's presumption of economic disadvantage to have been conclusively rebutted. No hearing or other proceeding is called for in this case. When this happens in the course of an application for DBE eligibility, the certification process for the applicant firm stops, unless other socially and economically disadvantaged owners can account for the required 51 percent ownership and control. A recipient cannot count the participation of the owner whose presumption of economic disadvantage has been conclusively rebutted toward the ownership and control requirements for DBE eligibility.

There may be other situations in which a recipient has a reasonable basis (e.g., from information in its own files, as the result of a complaint from a third party) for believing that an individual who benefits from the statutory presumptions is not really socially and/or economically disadvantaged. In these cases, the recipient may begin a proceeding to rebut the presumptions. For example, if a recipient had reason to believe that the owner of a currently-certified firm had accumulated personal assets well in excess of \$750,000, it might begin such a proceeding. The recipient has the burden of proving, by a preponderance of evidence, that the individual is not disadvantaged. However, the recipient may require the individual to produce relevant information.

It is possible that, at some time in the future, SBA may consider changing the \$750,000 cap amount. The Department anticipates working closely with SBA on any such matter and seeking comment on any potential changes to this rule that would be coordinated with changes SBA proposes for Federal procurement programs in this area.

Under part 23, recipients had to accept 8(a)-certified firms (except for those who exceeded the statutory gross receipts cap). The SNPRM proposed some modifications of this requirement. Recipients were concerned that in some situations information used for 8(a) certification could be inaccurate or out of date. They noted differences between 8(a) and DBE certification standards and procedures. They asked for the ability to

look behind 8(a) certifications and make their own certification decisions.

In response to these comments, the Department is providing greater discretion to recipients. Under part 26, recipients can treat 8(a) certifications as they do certifications made by other DOT recipients. A recipient can accept such a certification in lieu of conducting its own certification process or it can require the firm to go through part or all of its own application process. Because SBA is beginning a certification process for firms participating in the small and disadvantaged business (SDB) program, we will treat certified SDB firms in the same way. If an SDB firm is certified by SBA or an organization recognized by SBA as a certifying authority, a recipient may accept this certification instead of doing its own certification. (This does not apply to firms whose participation in the SDB program is based on a self-certification.) We note that this way of handling SBA program certifications is in the context of the development by DOT recipients of uniform certification programs. If a unified certification program (UCP) accepts a firm's 8(a) or 8(d) certification, then the firm will be certified for all DOT recipients in the state.

People who are not presumed socially and economically disadvantaged can still apply for DBE certification. To do so, they must demonstrate to the recipient that they are disadvantaged as individuals. Using the guidance provided in Appendix E, recipients must make case-by-case decisions concerning such applications. It should be emphasized that the DBE program is a disadvantage-based program, not one limited to members of certain designated groups. For this reason, recipients must take these applications seriously and consider them fairly. The applicant has the burden of proof concerning disadvantage, however.

#### *Section 26.69 What Rules Govern Determinations of Ownership?*

Commenters on the ownership provisions of the SNPRM addressed a variety of points. Most commenters agreed that the general burden of proof on applicants should be the preponderance of the evidence. A few commenters thought that this burden should also apply in situations where a firm was formerly owned by a non-disadvantaged individual. For some of these situations, the SNPRM proposed the higher "clear and convincing evidence" standard, because of the heightened opportunities for abuse involved. The Department believes this safeguard is necessary, and we will

retain the higher standard in these situations.

Commenters asked for more guidance in evaluating claims that a contribution of expertise from disadvantaged owners should count toward the required 51 percent ownership. They cited the potential for abuse. The Department believes that there may be circumstances in which expertise can be legitimately counted toward the ownership requirement. For example, suppose someone with a great deal of expertise in a computer-related field, without whom the success of his or her high-tech start-up business would not be feasible, receives substantial capital from a non-disadvantaged source.

We have modified the final rule provision to reflect a number of considerations. Situations in which expertise must be recognized for this purpose are limited. The expertise must be outstanding and in a specialized field: everyday experience in administration, construction, or a professional field is unlikely to meet this test. (This is not a "sweat equity" provision.) We believe that it is fair that the critical expertise of this individual be recognized in terms of the ownership determination. At the same time, the individual must have a significant financial stake in the company. This program focuses on entrepreneurial activity, not simply expertise. While we will not designate a specific percentage of ownership that such an individual must have, entrepreneurship without a reasonable degree of financial risk is inconceivable.

The SNPRM's proposals on how to treat assets obtained through inheritance, divorce, and gifts were somewhat controversial. Most comments agreed with the proposal that assets acquired through death or divorce be counted. One commenter objected to the provision that such assets always be counted, saying that the owner should have to make an additional demonstration that it truly owned the assets before the recipient counted them. We do not see the point of such an additional showing. If a white male business owner dies, and his widow inherits the business, the assets are clearly hers, and the deceased husband will play no further role in operating the firm. Likewise, assets a woman obtains through a divorce settlement are unquestionably hers. Absent a term of a divorce settlement or decree that limits the customary incidents of ownership of the assets or business (a contingency for which the proposed provision provided), there is no problem for which an additional showing of some

sort by the owner would be a useful remedy.

A majority of comments on the issue of gifts opposed the SNPRM proposal, saying that gifts should not be counted toward ownership at all. The main reason was that allowing gifts would make it easier for fronts to infiltrate the program. Some comments also had a flavor of opposition to counting what commenters saw as unearned assets. The Department understands these concerns. If a non-disadvantaged individual who provides a gift is no longer connected with the business, or a disadvantaged individual makes the gift, the issue of the firm being a potential front is much reduced. Where a non-disadvantaged individual makes a gift and remains involved with the business, the concern about potential fronts is greater.

For this reason, the SNPRM erected a presumption that assets acquired by gift in this situation would not count. The applicant could overcome this presumption only by showing, through clear and convincing evidence—a high standard of proof—that the transfer was not for the purpose of gaining DBE certification and that the disadvantaged owner really controls the company. This provides effective safeguards against fraud, without going to the unfair extreme of creating a conclusive presumption that all gifts are illegitimate. Also, for purposes of ownership, all assets are created equal. If the money that one invests in a company is really one's own, it does not matter whether it comes from the sweat of one's brow, a bank loan, a gift or inheritance, or hitting the lottery. As long as there are sufficient safeguards in place to protect against fronts—and we believe the rule provides them—the origin of the assets is unimportant. We are adopting the proposed provisions without change.

Commenters were divided about how to handle marital property, especially in community property states. Some commenters believed that such assets should not be counted at all. This was based, in part, on the concern that allowing such assets to be counted could make it difficult to screen out interspousal gifts designed to set up fronts, even if irrevocable transfers of assets were made. Other commenters said they thought the proposal was appropriate, and some of these thought the requirement for irrevocable transfers was unfair.

The Department is adopting the proposed language. In a community property state, or elsewhere where property is jointly held between spouses, the wife has a legal interest in

a portion of the property. It is really hers. It would be inappropriate to treat this genuine property interest as if it did not exist for purposes of DBE ownership.

To ensure the integrity of the program, it is necessary to put safeguards in place. The regulation does so. First, recipients would not count more assets toward DBE ownership than state law treats as belonging to the wife (the final rule provision adds language to this effect). Second, the irrevocable transfer requirement prevents the husband from being in a position to continue to claim any ownership rights in the assets. If an irrevocable transfer of assets constitutes a gift from a non-disadvantaged spouse who remains involved in the business, then the presumption/clear and convincing evidence mechanism discussed above for gifts would apply to the transaction. If recipients in community property states wanted to establish a mechanism for allocating assets between spouses that was consistent with state law, but did not require court involvement or other more formal procedures, they could propose doing so as part of their DBE programs, subject to operating administration approval.

Most commenters supported the SNPRM's proposal concerning trusts, particularly the distinction drawn between revocable living and irrevocable trusts. One commenter favored counting revocable living trusts when the same disadvantaged individual is both the grantor and beneficiary. The Department believes there is merit in making this exception. If the same disadvantaged individual is grantor, beneficiary, and trustee (i.e., an individual puts his own money in a revocable living trust for tax planning or other legitimate purposes and he alone plays the roles of grantor, beneficiary, and trustee), the situation seems indistinguishable for DBE program purposes from the situation of the same individual controlling his assets without the trust. In all other situations, revocable living trusts would not count.

Some comments asked for clarification of the 51 percent ownership requirement, a subject on which the Department has received a number of questions over the years. The Department has clarified this requirement, with respect to corporations, by stating that socially and economically disadvantaged individuals must own 51 percent of each class of voting stock of a corporation, as well as 51 percent of the aggregate stock. A similar point applies to partnerships and limited liability companies. This latter type of company was not

mentioned in the SNPRM, but a commenter specifically requested clarification concerning it. (We have also noted, in § 26.83, that limited liability companies must report changes in management responsibility to recipients. This is intended to include situations where management responsibility is rotated among members.) These clarifications are consistent with SBA regulations.

There are some ownership issues (e.g., concerning stock options and distribution of dividends) that SBA addresses in some detail in its regulations (see 13 CFR § 124.105 (c), (e), (f)) that were not the subject of comments to the DOT SNPRM. These issues have not been prominent in DOT certification practice, to the best of our knowledge, so we are not adding them to the rule. However, we would use the SBA provisions as guidance in the event such issues arise.

#### *Section 26.71 What Rules Govern Determinations Concerning Control?*

Commenters generally agreed with the proposed provisions concerning expertise and delegation of responsibilities, 51 percent control of voting stock, and differences in remuneration. A few commenters expressed concern about having to make judgments concerning expertise. However, this expertise standard, as a matter of interpretation, has been part of the DBE program since the mid-1980s. We do not believe that articulating it in the regulatory text should cause problems, and we believe it is a very reasonable and understandable approach to expertise issues. The provision concerning 51 percent ownership of voting stock, as discussed above, has been relocated in the ownership section of the rule. The Department has added three useful clarifications of the general requirement that disadvantaged owners must control the firm (e.g., by serving as president or CEO, controlling a corporate board). These clarifications are based on SBA's regulations (see 13 CFR § 124.106(a)(2), (b), (d)(1)). The Department intends to use other material in 13 CFR § 124.106 as guidance on control matters, when applicable. Otherwise, the Department is adopting these provisions as proposed.

There was some concern about the proposal concerning licensing. Some recipients thought that it would be better to require a license as proof of control in the case of all licensed occupations. We do not think it is justifiable for the DBE program to require more than state law does. If state law allows someone to run a certain

type of business (e.g., electrical contractors, engineers) without personally having a license in that occupation, then we do not think it is appropriate for the recipient to refuse to consider that someone without a license may be able to control the business. The rule is very explicit in saying that the recipient can consider the presence or absence of a license in determining whether someone really has sufficient ability to control a firm.

Family-owned firms have long been a concern in the program. The SNPRM provided explicitly that if the threads of control in a family-run business cannot be disentangled, such that the recipient can specifically find that a woman or other disadvantaged individual independently controls the business, the recipient may not certify the firm. A business that is controlled by the family as a group, as distinct from controlled individually by disadvantaged individuals, is not eligible.

Notwithstanding this provision, a few recipients commented that certifying any businesses in which non-disadvantaged family members participate would open the program to fronts. We do not agree. Non-disadvantaged individuals can participate in any DBE firm, as long as disadvantaged individuals control the firm. It is not fair and does not achieve any reasonable program objective to say that an unrelated white male may perform functions in a DBE while the owner's brother may never do so.

Commenters generally supported the provision calling for recipients to certify firms only for types of work in which disadvantaged owners had the ability to control the firm's operations. One commenter suggested that recipients, while not requiring recertification of firms seeking to perform additional types of work as DBEs (e.g., work in other than their primary industrial classification), should have to approve a written request from firms in this position. We do believe it is necessary for recipients to verify that disadvantaged owners can control work in an additional area, and we have added language to this effect. Recipients will have discretion about how to administer this verification process.

Commenters asked for additional clarification about the eligibility of people who work only part-time in a firm. We have done so by adding examples of situations that do not lead to eligibility (part-time involvement in a full-time firm and absentee ownership) and a situation that may, depending on circumstances, be compatible with eligibility (running a part-time firm all the time it is operating). It should be

noted that this provision does not preclude someone running a full-time firm from having outside employment. Outside employment is incompatible with eligibility only when it interferes with the individual's ability to control the DBE firm on a full-time basis.

One commenter brought to the Department's attention the situation of DBEs who use "employee leasing companies." According to the commenter, employee leasing companies fill a number of administrative functions for employers, such as payroll, personnel, forwarding of taxes to governmental entities, and drug testing. Typically, the employees of the underlying firm are transferred to the payroll of the employee leasing firm, which in turn leases them back to the underlying employer. The underlying employer continues to hire, fire, train, assign, direct, control etc. the employees with respect to their on-the-job duties. While the employee leasing firm sends payments to the IRS, Social Security, and state tax authorities on behalf of the underlying employer, it is the latter who is remains responsible for paying the taxes.

For practical and legal purposes, the underlying employer retains an employer-employee relationship with the leased employees. The employee leasing company does not get involved in the operations of the underlying employer. In this situation, the use of an employee leasing company by a DBE does not preclude the DBE from meeting the control requirements of this rule. Nor does the employee leasing company become an affiliate of the DBE for business size purposes. Case-by-case judgement, of course, remains necessary. Should an employee leasing company in fact exercise control over the on-the-job activities of employees of the DBE, then the ability of the DBE to meet control requirements would be compromised.

One commenter said, as a general matter, that independence and control should be considered separately. We view independence as an aspect of control: If a firm is not independent of some other business, then the other firm, not the disadvantaged owners, exercise control. While independence is an aspect of control that recipients must review, we do not see any benefit in separating consideration of the two concepts.

A recent court decision (*Jack Wood Construction Co., Inc. v. U.S. Department of Transportation*, 12 F. Supp. 2d 25 (D.D.C., 1998)) overturned a DOT Office of Civil Rights certification appeal decision that upheld a denial of certification based on lack of control.

The court, reading existing part 23 closely, said that a non-disadvantaged individual who was an employee, but not an owner, of a firm could disproportionately control the affairs of a firm without making it ineligible. The court also said that the existing rule language did not make it necessary for a disadvantaged owner to have both technical and managerial competence to control a firm. Part 26 solves both problems that the court found to exist in part 23's control provisions (see § 26.71(e)-(g)).

#### *Section 26.73 What Are Other Rules Affecting Certification?*

There were relatively few comments on this section. One commenter disagreed with the proposal to continue the provision that a firm owned by a DBE firm, rather than by socially and economically disadvantaged individuals, was not eligible. The argument against this provision, as we understand it, is that precluding a DBE firm from being owned by, for example, a holding company that is in turn owned by disadvantaged individuals would deny those individuals a financing and tax planning tool available to other businesses.

This argument has merit in some circumstances. The purpose of the DBE program is to help create a level playing field for DBEs. It would be inconsistent with the program's intent to deny DBEs a financial tool that is generally available to other businesses. The Department will allow this exception. Recipients must be careful, however, to ensure that certifying a firm under this exception does not have the effect of allowing the firm, or its parent company, to evade any of the requirements or restrictions of the certification process. The arrangement must be consistent with local business practices and must not have the effect of diluting actual ownership by disadvantaged individuals below the 51 percent requirement. All other certification requirements, including control by disadvantaged individuals and size limits, would continue to apply.

Another commenter suggested a firm should not be certified as a DBE if its owners have interests in non-DBE businesses. We believe that a *per se* rule to this effect would be too draconian. If owners of a DBE—whether disadvantaged individuals or not—also have interests in other businesses, the recipient can look at the relationships among the businesses to determine if the DBE is really independent.

One commenter opposed basing certification on the present status of

firms, seeking discretion to deny certification based on the history of the firm. We believe there is no rational or legal basis for denying certification to a firm on the basis of what it was in the past. Is it a small business presently owned and controlled by socially and economically disadvantaged individuals? If so, it would be contrary to the statute, and to the intent of the program, to deny certification because at some time—perhaps years—in the past, it was not owned and controlled by such individuals. The rule specifies that recipients may consider whether a firm has engaged in a pattern of conduct evincing an intent to evade or subvert the program.

The final provision of this section concerns firms owned by Alaska Native Corporations (ANCs), Indian tribes, and Native Hawaiian Organizations. Like the NPRM, it provides that firms owned by these entities can be eligible DBEs, even though their ownership does not reside, as such, in disadvantaged *individuals*. These firms must meet the size standards applicable to other firms, including affiliation (lest large combinations of tribal or ANC-owned corporations put other DBEs at a strong competitive disadvantage). Also, they must be controlled by socially and economically disadvantaged individuals. For example, if a tribe or ANC owns a company, but its daily business operations are controlled by a non-disadvantaged white male, the firm would not be eligible.

Commenters pointed us to the following provision of the Alaska Native Claims Settlement Act (ANCSA):

(e) Minority and economically disadvantaged status—

(1) For all purposes of Federal law, a Native Corporation shall be considered to be a corporation owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the Settlement Common Stock of the corporation and other stock of the corporation held by holders of Settlement Common Stock and by Natives and descendants of Natives, represents a majority of both the total equity of the corporation and the total voting power of the corporation for the purposes of electing directors.

(2) For all purposes of Federal law, direct and indirect subsidiary corporations, joint ventures, and partnerships of a Native Corporation qualifying pursuant to paragraph (1) shall be considered to be entities owned and controlled by Natives and a minority and economically disadvantaged business enterprise if the shares of stock or other units of ownership interest in any such entity held by such Native Corporation and by the holders of its Settlement Common Stock represent a majority of both—

(A) The total equity of the subsidiary corporation, joint venture, or partnership; and

(B) The total voting power of the subsidiary corporation, joint venture, or partnership for the purpose of electing directors, the general partner, or principal officers. (43 U.S.C. 1626(e)).

The question for the Department is whether, reading this language together with the language of the Department's DBE statutes, DOT must alter these provisions.

The DOT DBE statute (TEA-21 version) provides as follows:

(b) Disadvantaged Business Enterprises.—

(1) General rule.—Except to the extent that the Secretary determines otherwise, not less than 10 percent of the amounts made available for any program under titles I, III, and V of this Act shall be expended with small business concerns owned and controlled by socially and economically disadvantaged individuals.

(2) Definitions.—In this subsection, the following definitions apply:

(A) Small business concern.—The term "small business concern" has the meaning such term has under section 3 of the Small Business Act (15 U.S.C. 632); except that such term shall not include any concern or group of concerns controlled by the same socially and economically disadvantaged individual or individuals which has average annual gross receipts over the preceding 3 fiscal years in excess of \$16,600,000, as adjusted by the Secretary for inflation.

(B) Socially and economically disadvantaged individuals.—The term "socially and economically disadvantaged individuals" has the meaning such term has under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) and relevant subcontracting regulations promulgated pursuant thereto; except that women shall be presumed to be socially and economically disadvantaged individuals for purposes of this subsection.

\* \* \* \* \*

(4) Uniform certification.—The Secretary shall establish minimum uniform criteria for State governments to use in certifying whether a concern qualifies for purposes of this subsection. Such minimum uniform criteria shall include but not be limited to on-site visits, personal interviews, licenses, analysis of stock ownership, listing of equipment, analysis of bonding capacity, listing of work completed, resume of principal owners, financial capacity, and type of work preferred.

While the language § 1626(e) is broad, the terms used in the two statutes are not identical. Section 1626(e) refers to "minority and economically disadvantaged business enterprise[s]", while the Department's statutes refer to "small business concerns owned and controlled by socially and economically disadvantaged individuals." Requirements applicable to the former need not necessarily apply to the latter.

The legislative history of § 1626(e) lends support to distinguishing the two statutes. The following excerpt from House Report 102-673 suggests that the intent of Congress in enacting this provision was to focus on direct Federal procurement programs:

[The statute] amends section [1626(e)] of ANCSA to clarify that Alaska Native Corporations are minority and economically disadvantaged business enterprises for the purposes of implementing the SBA programs \* \* \* This section would further clarify that Alaska Native Corporations and their subsidiary companies are minority and economically disadvantaged business enterprises for purposes of qualifying for participation in federal contracting and subcontracting programs, the largest of which include the SBA 8(a) program and the Department of Defense Small and Disadvantaged Business Program. These programs were established to increase the participation of certain segments of the population that have historically been denied access to Federal procurement activities. While this section eliminates the need for Alaska Native Corporations or their subsidiaries to prove their "economic" disadvantage the corporations would still be required to meet size requirements as small businesses. This will continue to be determined on a case-by-case basis. (Id. at 19.)

This statute, in other words, was meant to apply to direct Federal procurement programs like the 8(a) program or the DOD SBD program, rather than a program involving state and local procurements reimbursed by DOT financial assistance.

The TEA-21 program is a more recent, more specific statute governing DOT recipients' programs. In contrast, the older, more general section 1626(e) evinces no specific intent to govern the DOT DBE program. There is no evidence that Congress, in enacting section 1626(e), had any awareness of or intent to alter the DOT DBE program.

A number of provisions of the TEA-21 statute suggest that Congress intended to impose specific requirements for the DOT program, without regard to other more general statutory references. For example, the \$16.6 million size cap and the uniform certification requirements suggest that Congress wanted the eligibility for the DOT program to be determined in very specific ways, giving no hint that they intended these specific requirements to be overridden in the case of ANCs.

The Department concludes that section 1626(e) is distinguishable from the DOT DBE statutes, and that the latter govern the implementation of the DBE program. The Department is not compelled to alter its approach to certification in the case of ANCs.

*Section 26.81 What Are the Requirements for Unified Certification Programs?*

As was the case following the 1992 NPRM, a significant majority of the large number of commenters addressing the issue favored implementing the proposed UCP requirement, which the final rule retains largely as proposed. A few commenters suggested that airports be included in UCPs for concession purposes as well as for FAA-assisted contracting, because there are not any significant differences between the certification standards for concessionaires and contractors (the only exception is size standards, which are easy to apply). We agree, and the final rule does not make an exception for concessions (regardless of the CFR part in which the concessions provisions appear). Some commenters wanted either a longer or shorter implementation period than the SNPRM proposed, but we believe the proposal is a good middle ground between the goal of establishing UCPs as soon as possible and the time recipients will need to resolve organizational, operational, and funding issues.

There were a number of comments and questions about details of the UCP provision. One recipient wondered whether a UCP may or must be separate from a recipient and what the legal liability implications of various arrangements might be. As far as the rule is concerned, a UCP can either be situated within a recipient's organization or elsewhere. Recipients can take state law concerning liability into account in determining how best to structure a UCP in their state. Another recipient asked if existing UCPs could be exempted from submitting plans for approval. Rather than being exempted, we believe that it would be appropriate for such UCPs to submit their existing plans. They would have to change them only to the extent needed to conform to the requirements of the rule.

Some commenters asked about the relationship of UCPs to recipients. For example, should a recipient be able to certify a firm that the UCP had not certified (or whose application the UCP had not yet acted on) or refuse to recognize the UCP certification of a firm the recipient did not think should be eligible? In both cases, the answer is no. Allowing this kind of discretion would fatally undermine the "one-stop shopping" rationale of UCPs. However, a recipient could, like any other party, initiate a third-party challenge to a UCP certification action, the result of which could be appealed to DOT.

We would emphasize that the form of the UCP is a matter for negotiation among DOT recipients in a state, and this regulation does not prescribe its organization. A number of models are available, including single state agencies, consortia of recipients that hire a contractor or share the workload among themselves, mandatory reciprocity among recipients, etc. It might be conceivable for a UCP to be a "virtual entity" that is not resident in any particular location. What matters is that the UCP meet the functional requirements of this rule and actually provide one-stop shopping service to applicants. The final rule adds a provision to clarify that UCPs—even when not part of a recipient's own organization—must comply with all provisions of this rule concerning certification and nondiscrimination. Recipients cannot use a UCP that does not do so. For example, if a UCP fails to comply with part 26 certification standards and procedures, or discriminates against certain applicants, the Secretary reserves the right to direct recipients not to use the UCP, effectively "decertifying" the UCP for purposes of DOT-assisted programs. In this case, which we hope will never happen, the Department would work with recipients in the state on interim measures and replacement of the erring UCP.

The SNPRM proposed "pre-certification." That is, the UCP would have to certify a firm before the firm became eligible to participate as a DBE in a contract. The application could not be submitted as a last-minute request in connection with a procurement action, which could lead to hasty and inaccurate certification decisions. Commenters were divided on this issue, with most expressing doubts about the concept. The Department believes that avoiding last-minute (and especially post-bid opening) applications is important to an orderly and accurate certification process, so we are retaining this requirement. However, we are modifying the timing of the requirement, by requiring that certification take place before the bid/offer due date, rather than before the issuance of the solicitation. The certification action must be *completed* by this date in order for the firm's proposed work on the particular contract to be credited toward DBE goals. It is not enough for the application to have been submitted by the deadline.

The SNPRM proposed that, once UCPs were up and running, a UCP in State A would not have to process an application from a firm whose principal

place of business was in State B unless State B had first certified the firm. Most commenters supported this proposal, one noting that it would help eliminate problems of having to make costly out-of-state site visits. It would also potentially reduce confusion caused by multiple, and potentially conflicting, outcomes in certification decisions. One commenter was concerned that this provision would lead to "free-rider" problems among recipients. The Department will be alert to this possibility, but we do not see it as precluding going forward with this provision. We have added a provision making explicit that when State B has certified a firm, it would have an obligation to send copies of the information and documents it had on the firm to State A when the firm applied there.

All save one of the comments on mandatory reciprocity opposed the concept. That is, commenters favored UCPs being able to choose whether or not to accept certification decisions made by other UCPs. The Department urges UCPs to band together in multi-state or regional alliances, but we believe that it is best to leave reciprocity discretionary. Mandatory reciprocity, even among UCPs, could lead to forum shopping problems.

UCPs will have a common directory, which will have to be maintained in electronic form (i.e., on the internet). One commenter suggested that this electronic directory be updated daily. We think this comment has merit, and the final rule will require recipients to keep a running update of the electronic directory, making changes as they occur.

*Section 26.83 What Procedures Do Recipients Follow in Making Certification Decisions?*

Commenters generally supported this certification process section, and we are adopting it with only minor changes. Commenters suggested that provision for electronic filing of applications be discretionary rather than mandatory. We agree, and the final rule does not mandate development of electronic filing systems. Some commenters remained concerned about site visits and asked for more guidance on the subject. We intend to provide future guidance on this subject.

Most commenters who addressed the subject favored the development of a mandatory, nationwide, standard DOT application form for DBE eligibility. A number of commenters supplied the forms they use as examples. We believe that this is a good idea, which will help avoid confusion among applicants in a nationwide program. However, we have

not yet developed a form for this purpose. The final rule reserves a requirement for recipients to use a uniform form. We intend to work on developing such a form during the next year, in consultation with recipients and applicants. Meanwhile, recipients can continue to use existing forms, modified as necessary to conform to the requirements of this part.

The SNPRM said recipients could charge a reasonable fee to applicants. A majority of commenters, both recipients and DBEs, opposed the idea of a fee or said it should be capped at a low figure. Fees are not mandatory, and they would be limited, under the final rule, to modest application fees (not intended to recover the cost of the certification process). However, if a recipient wants to charge a modest application fee, we do not see that it is inconsistent with the nature of the program to allow it to do so. Fee waivers would be required if necessary (i.e., a firm who showed they could not afford it). All fees would have to be approved by the concerned OA as part of the DBE program approval process, which would preclude excessive fees.

Given that reciprocity is discretionary among recipients, we thought it would be useful to spell out the options a recipient has when presented by an applicant with the information that another recipient has certified the firm. The recipient may accept the other recipient's certification without any additional procedures. The recipient can make an independent decision based, in whole or in part, on the information developed by the first recipient (e.g., application forms, supporting documents, reports of site visits). The recipient may make the applicant start an entire new application process. The choice among these options is up to the recipient. (As noted above, UCPs will have these same options.)

Most commenters on the subject supported the three-year term for certifications. Some wanted a shorter or longer period. We believe the three-year term is appropriate, particularly given the safeguards of annual and update affidavits that the rule provides. In response to a few comments that recipients should have longer than the proposed 21 days after a change in circumstances to submit an update affidavit, we have extended the period to 30 days. If recipients want to have a longer term in their DBE programs than the three years provided in the rule, they can do so, with the Department's approval, as part of their DBE programs.

A few recipients said that the 90-day period for making decisions on

applications (with the possibility of a 60-day extension) was too short. Particularly since this clock does not begin ticking until a *complete* application, including necessary supporting documentation, is received from the applicant, we do not think this time frame is unreasonable. We would urge recipients and applicants to work together to resolve minor errors or data gaps during the assembly of the package, before this time period begins to run.

#### *Section 26.85 What Rules Govern Recipients' Denials of Initial Requests for Certification?*

A modest number of commenters addressed this section, most of whom supported it as proposed. One commenter noted that it was appropriate to permit minor errors to be corrected in an application without invoking the 12-month reapplication waiting period. We agree, and we urge recipients to follow such a policy. Most commenters thought 12 months was a good length for a reapplication period. A few opposed the idea of a waiting period or thought a shorter period was appropriate. The rule keeps 12 months, but permits recipients to seek DOT approval, through the DBE program review process, for shorter periods.

#### *Section 26.87 What Procedures Does a Recipient Use To Remove a DBE's Eligibility?*

As long ago as 1983, the Department (in the preamble to the first DBE rule) strongly urged recipients to use appropriate due process procedures for decertification actions. Recipient procedures are still inconsistent and, in some cases, inadequate, in this respect. Quite recently, for example, litigation forced one recipient to rescind a decertification of an apparently ineligible firm because it had failed to provide administrative due process. We believe that proper due process procedures are crucial to maintaining the integrity of this program. The majority of commenters agreed, though a number of commenters had concerns about particular provisions of the SNPRM proposal.

Some recipients, for example, thought separation of functions was an unnecessary requirement, or too burdensome, particularly for small recipients. We believe separation of functions is essential: there cannot be a fair proceeding if the same party acts as prosecutor and judge. We believe that the burdens are modest, particularly in the context of state DOTs and statewide UCPs. We acknowledge that for small recipients, like small airports and transit

authorities, small staffs may create problems in establishing separation of functions (e.g., if there is only one person in the organization who is knowledgeable about the DBE program). For this reason, the rule will permit small recipients to comply with this requirement to the extent feasible until UCPs are in operation (at which time the UCPs would have to ensure separation of functions in all such cases). The organizational scheme for providing separation of functions will be part of each recipient's DBE program. In the case of a small recipient, if the DBE program showed that other alternatives (e.g., the airport using the transit authority's DBE officer as the decisionmaker in decertification actions, and vice-versa) were unavailable, the Department could approve something less than ideal separation of functions for the short term before the UCP becomes operational. In reviewing certification appeals from such recipients, the Department would take into account the absence of separation of functions.

It is very important that the decisionmaker be someone who is familiar with the DBE certification requirements of this part. The decisionmaker need not be an administrative law judge or some similar official; a knowledgeable program official is preferable to an ALJ who lacks familiarity with the program.

Another aspect of the due process requirements that commenters addressed was the requirement for a record of the hearing, which some commenters found to be burdensome. We want to emphasize that, while recipients have to keep a hearing record (including a verbatim record of the hearing), they do not need to produce a transcript unless there is an appeal. A hearing record is essential, because DOT appellate review is a review of the administrative record.

Some commenters suggested deleting two provisions. One of these allowed recipients to impose a sort of administrative temporary restraining order on firms pending a final decertification decision. The other allowed the effect of a decertification decision to be retroactive to the date of the complaint. The Department agrees that these two provisions could lead to unfairness, and so we have deleted them.

#### *Section 26.89 What Is the Process for Certification Appeals to the Department of Transportation?*

Several commenters addressed this section, supporting it with a few requests for modification. Some

commenters wanted a time limit for DOT consideration of appeals. We have added a provision saying that if DOT takes longer than 180 days from the time we receive a complete package, we will write everyone concerned with an explanation of the delay and a new target date for completion. Some commenters thought a different time limit for appeals to the Department (e.g., 180 days) would be beneficial. We believe that 90 days is enough time for someone to decide whether a decision of a recipient or UCP should be appealed and write a letter to DOT. This time period starts to run from the date of the final recipient decision on the matter. DOT can accept late-filed appeals on the basis of a showing of good cause (e.g., factors beyond the control of the appellant). Some recipients thought that more time might be necessary to compile an administrative record, so we have permitted DOT to grant extensions for good cause. Generally, however, the Department will adhere to the 90-day time period in order to prevent delays in the appeals process. As a clarification, we have added a provision that all recipients involved must provide administrative record material to DOT when there is an appeal. For example, State A has relied on the information gathered by State B to certify Firm X. A competitor files an ineligibility complaint with State A, which decertifies the firm. Firm X appeals to the Department. Both State A and State B must provide their administrative record materials to DOT for purposes of the appeal. (The material would be provided to the Departmental Office of Civil Rights.)

#### *Section 26.91 What Actions Do Recipients Take Following DOT Certification Appeal Decisions?*

There were few comments concerning this section. Some comments suggested DOT appeal decisions should have mandatory nationwide effect. That is if DOT upheld the decertification action of Recipient A, Recipients B, C, D, E, etc. should automatically decertify the firm. This approach is inconsistent with the administrative review of the record approach this rule takes for appeals to DOT.

A DOT decision that A's decertification was supported by substantial evidence is not a DOT decision that the firm is ineligible. It is only a finding that A had enough evidence to decertify the firm. Other results might also be supported by substantial evidence. Nevertheless, when the Department takes action on an appeal, other recipients would be well

advised to review their own decisions to see if any new proceedings are appropriate. One comment suggested the Department should explain a refusal to accept a complaint. This is already the Department's practice.

The SNPRM included a proposal to permit direct third-party complaints to the Department. There were few comments on this proposal, which would have continued an existing DOT practice. Some of these comments suggested dropping this provision, saying it made more sense to have all certification matters handled at the recipient level in the first instance. Others raised procedural issues (e.g., the possibility of the Department holding *de novo* hearings). The Department has reconsidered this proposal, and we have decided to delete it. We believe it will avoid administrative confusion and simplify procedures for everyone if all certification actions begin at the recipient level, with DOT appellate review on the administrative record.

#### **Subpart F—Compliance and Enforcement**

There were very few comments concerning this subpart, which we are adopting as proposed. One section has been added to reflect language in TEA-21 that prohibits sanctions against recipients for noncompliance in situations where compliance is precluded by a final Federal court order finding the program unconstitutional.

#### **DBE Participation in Airport Concessions**

The Department proposed a number of changes to its airport concessions DBE program rule in the 1997 SNPRM. We received a substantial number of comments on these proposals. The Department is continuing to work on its responses to these comments, as well as on refinements of the rule to ensure that it is narrowly tailored. This work is not complete. Rather than postpone issuance of the rest of the rule pending completion of this work, we are not issuing final concessions provisions at this time. The existing concessions provisions of 49 CFR part 23 will remain in place pending completion of the revised rule.

#### **Regulatory Analyses and Notices**

##### *Executive Order 12866*

This rule is a significant rule under Executive Order 12866, because of the substantial public interest concerning and policy importance of programs to ensure nondiscrimination in Federally-assisted contracting. It also affects a wide variety of parties, including

recipients in three important DOT financial assistance programs and the DBE and non-DBE contractors that work for them. It has been reviewed by the Office of Management and Budget. It is also a significant rule for purposes of the Department's Regulatory Policies and Procedures.

We do not believe that the rule will have significant economic impacts, however. In evaluating the potential economic impact of this rule, we begin by noting that it does not create a new program. It simply revises the rule governing an existing program. The economic impacts of the DBE program are created by the existing regulation and the statutes that mandate it, not by these revisions. The changes that we propose in this program are likely to have some positive economic impacts. For example, "one-stop shopping" and clearer standards in certification are likely to reduce costs for small businesses applying for DBE certification, as well as reducing administrative burdens on recipients.

The rule's "narrow tailoring" changes are likely to be neutral in terms of their overall economic impact. These could have some distributive impacts (e.g., if the proposed goal-setting mechanism results in changes in DBE goals, a different mix of firms may work on recipients' contracts), but there would probably not be net gains or losses to the economy. There could be some short-term costs to recipients owing to changes in program administration resulting from "narrow tailoring," however.

In any event, the economic impacts are quite speculative and appear nearly impossible to quantify. Comments did not provide, and the Department does not have, any significant information that would allow the Department to estimate any such impacts.

##### *Regulatory Flexibility Act Analysis*

The DBE program is aimed at improving contracting opportunities for small businesses owned and controlled by socially and economically disadvantaged individuals. Virtually all the businesses it affects are small entities. There is no doubt that a DBE rule always affects a substantial number of small entities.

This rule, while improving program administration and facilitating DBE participation (e.g., by making the certification process clearer) and responding to legal developments, appears essentially cost-neutral with respect to small entities in general (as noted above, the one-stop shopping feature is intended to benefit small entities seeking to participate). It does

not impose new burdens or costs on small entities, compared to the existing rule. It does not affect the total funds or business opportunities available to small businesses that seek to work in DOT financial assistance programs. To the extent that the proposals in this rule (e.g., with respect to changes in the methods used to set overall goals) lead to different goals than the existing rule, some small firms may gain, and others lose, business.

There is no data of which the Department is aware that would permit us, at this time, to measure the distributive effects of the revisions on various types of small entities. It is likely that any attempt to gauge these effects would be highly speculative. For this reason, we are not able to make a quantitative, or even a precise qualitative, estimate of these effects.

#### *Paperwork Reduction Act*

A number of provisions of this rule involve information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA). One of these provisions, concerning a report of DBE achievements that recipients make to the Department, is the subject of an existing OMB approval under the PRA.

With one exception, the other information collection requirements of the rule continue existing part 23 requirements, major elements of the DBE program that recipients and contractors have been implementing since 1980 or 1983. While the final rule modifies these requirements in some ways, the Department believes the overall burden of these requirements will remain the same or shrink. These requirements are the following:

- Firms applying for DBE certification must provide information to recipients to allow them to make eligibility decisions. Currently certified firms must provide information to recipients to allow them to review the firms' continuing eligibility. (After the UCP requirements of the rule are implemented, the burdens of the certification provisions should be substantially reduced.)

- When contractors bid on prime contracts that have contract goals, they must document their DBE participation and/or the good faith efforts they have made to meet the contract goals. (Given the final rule's emphasis on race-neutral measures, it is likely the burden in this area will be reduced.)

- Recipients must maintain a directory of certified DBE firms. (Once UCPs are implemented, there will be 52 consolidated directories rather than the hundreds now required, reducing burdens substantially.)

- Recipients must calculate overall goals and transmit them to the Department for approval. (The process of setting overall goals is more flexible, but may also be more complex, than under part 23. As they make their transition to the final rule's goal-setting process during the first years of implementation, recipients may temporarily expend more hours than in the past on information-related tasks.)

- Recipients must have a DBE program approved by the Department. (The final rule includes a one-time requirement to submit a revised program document making changes to conform to the new regulation.)

The Department estimates that these program elements will result in a total of approximately 1.58 million burden hours to recipients and contractors combined during the first year of implementation and approximately 1.47 million annual burden hours thereafter.

The final rule also includes one new information collection element. It calls for recipients to collect and maintain data concerning both DBE and non-DBE bidders on DOT-assisted contracts. This information is intended to assist recipients in making more precise determinations of the availability of DBEs and the shape of the "level playing field" the maintenance of which is a major objective of the rule. The Department estimates that this requirement will add 254,595 burden hours in the first year of implementation. This figure is projected to decline to 193,261 hours in the second year and to 161,218 hours in the third and subsequent years.

Both as the result of comments and what the Department learns as it implements the DBE program under part 26, it is possible for the Department's information needs and the way we meet them to change. Sometimes the way we collect information can be changed informally (e.g., by guidance telling recipients they need not repeat information that does not change significantly from year to year). In other circumstances, a technical amendment to the regulation may be needed. In any case, the Department will remain sensitive to situations in which modifying information collection requirements becomes appropriate.

As required by the PRA, the Department has submitted an information collection approval request to OMB. Organizations and individuals desiring to submit comments on information collection requirements should direct them to the Department's docket for this rulemaking. You may also submit copies of your comments to

the Office of Information and Regulatory Affairs (OIRA), OMB, Room 10235, New Executive Office Building, Washington, DC, 20503; Attention: Desk Officer for U.S. Department of Transportation.

The Department considers comments by the public on information collections for several purposes:

- Evaluating the necessity of information collections for the proper performance of the Department's functions, including whether the information has practical utility.

- Evaluating the accuracy of the Department's estimate of the burden of the information collections, including the validity of the methods and assumptions used.

- Enhancing the quality, usefulness, and clarity of the information to be collected.

- Minimizing the burden of the collection of information on respondents, including through the use of electronic and other methods.

The Department points out that, with the exception of the bid data collection, all the information collection elements discussed in this section of the preamble have not only been part of the Department's DBE program for many years, but have also been the subject of extensive public comment following the 1992 NPRM and 1997 SNPRM. Among the over 900 comments received in response to these notices were a number addressing administrative burden issues surrounding these program elements. In this final rule, the Department has responded to these comments.

OMB is required to make a decision concerning information collections within 30-60 days of the publication of this notice. Therefore, for best effect, comments should be received by DOT/OMB within 30 days of publication. Following receipt of OMB approval, the Department will publish a **Federal Register** notice containing the applicable OMB approval numbers.

#### *Federalism*

The rule does not have sufficient Federalism impacts to warrant the preparation of a Federalism assessment. While the rule concerns the activities of state and local governments in DOT financial assistance programs, the rule does not significantly alter the role of state and local governments vis-a-vis DOT from the present part 23. The availability of program waivers could allow greater flexibility for state and local participants, however.

#### **List of Subjects**

##### *49 CFR Part 23*

Administrative practice and procedure, Airports, Civil rights,

Concessions, Government contracts, Grant programs—transportation, Minority businesses, Reporting and recordkeeping requirements.

#### 49 CFR Part 26

Administrative practice and procedure, Airports, Civil rights, Government contracts, Grant programs—transportation, Highways and roads, Mass transportation, Minority businesses, Reporting and recordkeeping requirements.

Issued this 8th day of January, 1999, at Washington, DC.

**Rodney E. Slater,**

*Secretary of Transportation.*

For the reasons set forth in the preamble, the Department amends 49 CFR subtitle A as follows:

### **PART 23—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISE IN AIRPORT CONCESSIONS**

1. Revise the heading of 49 CFR part 23 as set forth above.

2. Revise the authority citation for 49 CFR part 23 to read as follows:

**Authority:** 42 U.S.C. 200d *et seq.*; 49 U.S.C. 47107 and 47123; Executive Order 12138, 3 CFR, 1979 Comp., p. 393.

#### **Subparts A, C, D, and E—[Removed and Reserved]**

3. Remove and reserve subparts A, C, D, and E of part 23.

#### **§ 23.89 [Amended]**

4. Amend § 23.89 as follows:

a. In the definition of “disadvantaged business,” remove the words “§ 23.61 of subpart D of this part” and add the words “49 CFR part 26”; and remove the words “§ 23.61” in the last line of the definition and add the words “49 CFR part 26”.

b. In the definition of “small business concern,” paragraph (b), remove the words “§ 23.43(d)” and add the words “§ 23.43(d) in effect prior to March 4, 1999 (See 49 CFR Parts 1 to 99 revised as of October 1, 1998.)”.

c. In the definition of “socially and economically disadvantaged individuals,” remove the words “§ 23.61 of subpart D of this part” and add “49 CFR part 26”.

#### **§ 23.93 [Amended]**

5. Amend § 23.93(a) introductory text by removing the words “§ 23.7” and adding the words “§ 26.7”.

#### **§ 23.95 [Amended]**

6. Amend § 23.95(a)(1) by removing the words “based on the factors listed in § 23.45(g)(5)” and adding the words

“consistent with the process for setting overall goals set forth in 49 CFR 26.45”.

7. In addition, amend § 23.95 as follows:

a. In paragraph (f)(1), remove the words “§ 23.51” and add the words “49 CFR part 26, subpart E”;

b. In paragraph (f)(2), remove the words “Except as provided in § 23.51(c), each” and add “Each”;

c. Remove paragraph (f)(5);

d. In paragraph (g)(1), remove the words “§ 23.53” and add the words “49 CFR part 26, subpart D”.

#### **§ 23.97 [Amended]**

8. Amend § 23.97 by removing the words “§ 23.55” and adding the words “49 CFR 26.89”.

#### **§ 23.11 [Removed]**

9. Remove § 23.111.

10. Add a new 49 CFR part 26, to read as follows:

### **PART 26—PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS**

#### **Subpart A—General**

Sec.

26.1 What are the objectives of this part?

26.3 To whom does this part apply?

26.5 What do the terms used in this part mean?

26.7 What discriminatory actions are forbidden?

26.9 How does the Department issue guidance and interpretations under this part?

26.11 What records do recipients keep and report?

26.13 What assurances must recipients and contractors make?

26.15 How can recipients apply for exemptions or waivers?

#### **Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting**

26.21 Who must have a DBE program?

26.23 What is the requirement for a policy statement?

26.25 What is the requirement for a liaison officer?

26.27 What efforts must recipients make concerning DBE financial institutions?

26.29 What prompt payment mechanisms may recipients have?

26.31 What requirements pertain to the DBE directory?

26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?

26.35 What role do business development and mentor-protégé programs have in the DBE program?

26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?

#### **Subpart C—Goals, Good Faith Efforts, and Counting**

26.41 What is the role of the statutory 10 percent goal in this program?

26.43 Can recipients use set-asides or quotas as part of this program?

26.45 How do recipients set overall goals?

26.47 Can recipients be penalized for failing to meet overall goals?

26.49 How are overall goals established for transit vehicle manufacturers?

26.51 What means do recipients use to meet overall goals?

26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?

26.55 How is DBE participation counted toward goals?

#### **Subpart D—Certification Standards**

26.61 How are burdens of proof allocated in the certification process?

26.63 What rules govern group membership determinations?

26.65 What rules govern business size determinations?

26.67 What rules govern determinations of social and economic disadvantage?

26.69 What rules govern determinations of ownership?

26.71 What rules govern determinations concerning control?

26.73 What are other rules affecting certification?

#### **Subpart E—Certification Procedures**

26.81 What are the requirements for Unified Certification Programs?

26.83 What procedures do recipients follow in making certification decisions?

26.85 What rules govern recipients' denials of initial requests for certification?

26.87 What procedures does a recipient use to remove a DBE's eligibility?

26.89 What is the process for certification appeals to the Department of Transportation?

26.91 What actions do recipients take following DOT certification appeal decisions?

#### **Subpart F—Compliance and Enforcement**

26.101 What compliance procedures apply to recipients?

26.103 What enforcement actions apply in FHWA and FTA programs?

26.105 What enforcement actions apply in FAA Programs?

26.107 What enforcement actions apply to firms participating in the DBE program?

26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?

Appendix A to part 26—Guidance Concerning Good Faith Efforts

Appendix B to part 26—Forms [Reserved]

Appendix C to part 26—DBE Business Development Program Guidelines

Appendix D to part 26—Mentor-Protégé Program Guidelines

Appendix E to part 26—Individual Determinations of Social and Economic Disadvantage

**Authority:** 23 U.S.C. 324; 42 U.S.C. 2000d *et seq.*; 49 U.S.C 1615, 47107, 47113, 47123;

Sec. 1101(b), Pub. L. 105-178, 112 Stat. 107, 113.

## Subpart A—General

### § 26.1 What are the objectives of this part?

This part seeks to achieve several objectives:

- (a) To ensure nondiscrimination in the award and administration of DOT-assisted contracts in the Department's highway, transit, and airport financial assistance programs;
- (b) To create a level playing field on which DBEs can compete fairly for DOT-assisted contracts;
- (c) To ensure that the Department's DBE program is narrowly tailored in accordance with applicable law;
- (d) To ensure that only firms that fully meet this part's eligibility standards are permitted to participate as DBEs;
- (e) To help remove barriers to the participation of DBEs in DOT-assisted contracts;
- (f) To assist the development of firms that can compete successfully in the marketplace outside the DBE program; and
- (g) To provide appropriate flexibility to recipients of Federal financial assistance in establishing and providing opportunities for DBEs.

### § 26.3 To whom does this part apply?

(a) If you are a recipient of any of the following types of funds, this part applies to you:

- (1) Federal-aid highway funds authorized under Titles I (other than Part B) and V of the Intermodal Surface Transportation Efficiency Act of 1991 (ISTEA), Pub. L. 102-240, 105 Stat. 1914, or Titles I, III, and V of the Transportation Equity Act for the 21st Century (TEA-21), Pub. L. 105-178, 112 Stat. 107.
- (2) Federal transit funds authorized by Titles I, III, V and VI of ISTEA, Pub. L. 102-240 or by Federal transit laws in Title 49, U.S. Code, or Titles I, III, and V of the TEA-21, Pub. L. 105-178.
- (3) Airport funds authorized by 49 U.S.C. 47101, *et seq.*

(b) [Reserved]

(c) If you are letting a contract, and that contract is to be performed entirely outside the United States, its territories and possessions, Puerto Rico, Guam, or the Northern Marianas Islands, this part does not apply to the contract.

(d) If you are letting a contract in which DOT financial assistance does not participate, this part does not apply to the contract.

### 26.5 What do the terms used in this part mean?

*Affiliation* has the same meaning the term has in the Small Business

Administration (SBA) regulations, 13 CFR part 121.

(1) Except as otherwise provided in 13 CFR part 121, concerns are affiliates of each other when, either directly or indirectly:

- (i) One concern controls or has the power to control the other; or
- (ii) A third party or parties controls or has the power to control both; or
- (iii) An identity of interest between or among parties exists such that affiliation may be found.

(2) In determining whether affiliation exists, it is necessary to consider all appropriate factors, including common ownership, common management, and contractual relationships. Affiliates must be considered together in determining whether a concern meets small business size criteria and the statutory cap on the participation of firms in the DBE program.

*Alaska Native* means a citizen of the United States who is a person of one-fourth degree or more Alaskan Indian (including Tsimshian Indians not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or a combination of those bloodlines. The term includes, in the absence of proof of a minimum blood quantum, any citizen whom a Native village or Native group regards as an Alaska Native if their father or mother is regarded as an Alaska Native.

*Alaska Native Corporation* (ANC) means any Regional Corporation, Village Corporation, Urban Corporation, or Group Corporation organized under the laws of the State of Alaska in accordance with the Alaska Native Claims Settlement Act, as amended (43 U.S.C. 1601, *et seq.*).

*Compliance* means that a recipient has correctly implemented the requirements of this part.

*Contract* means a legally binding relationship obligating a seller to furnish supplies or services (including, but not limited to, construction and professional services) and the buyer to pay for them.

*Contractor* means one who participates, through a contract or subcontract (at any tier), in a DOT-assisted highway, transit, or airport program.

*Department or DOT* means the U.S. Department of Transportation, including the Office of the Secretary, the Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), and the Federal Aviation Administration (FAA).

*Disadvantaged business enterprise or DBE* means a for-profit small business concern—

(1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and

(2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

*DOT-assisted contract* means any contract between a recipient and a contractor (at any tier) funded in whole or in part with DOT financial assistance, including letters of credit or loan guarantees, except a contract solely for the purchase of land.

*Good faith efforts* means efforts to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, can reasonably be expected to fulfill the program requirement.

*Immediate family member* means father, mother, husband, wife, son, daughter, brother, sister, grandmother, grandfather, grandson, granddaughter, mother-in-law, or father-in-law.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community of Indians, including any ANC, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians, or is recognized as such by the State in which the tribe, band, nation, group, or community resides. See definition of "tribally-owned concern" in this section.

*Joint venture* means an association of a DBE firm and one or more other firms to carry out a single, for-profit business enterprise, for which the parties combine their property, capital, efforts, skills and knowledge, and in which the DBE is responsible for a distinct, clearly defined portion of the work of the contract and whose share in the capital contribution, control, management, risks, and profits of the joint venture are commensurate with its ownership interest.

*Native Hawaiian* means any individual whose ancestors were natives, prior to 1778, of the area which now comprises the State of Hawaii.

*Native Hawaiian Organization* means any community service organization serving Native Hawaiians in the State of Hawaii which is a not-for-profit organization chartered by the State of Hawaii, is controlled by Native Hawaiians, and whose business activities will principally benefit such Native Hawaiians.

*Noncompliance* means that a recipient has not correctly implemented the requirements of this part.

*Operating Administration or OA* means any of the following parts of DOT: the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), and Federal Transit Administration (FTA). The "Administrator" of an operating administration includes his or her designees.

*Personal net worth* means the net value of the assets of an individual remaining after total liabilities are deducted. An individual's personal net worth does not include: The individual's ownership interest in an applicant or participating DBE firm; or the individual's equity in his or her primary place of residence. An individual's personal net worth includes only his or her own share of assets held jointly or as community property with the individual's spouse.

*Primary industry classification* means the four digit Standard Industrial Classification (SIC) code designation which best describes the primary business of a firm. The SIC code designations are described in the Standard Industry Classification Manual. As the North American Industrial Classification System (NAICS) replaces the SIC system, references to SIC codes and the SIC Manual are deemed to refer to the NAICS manual and applicable codes. The SIC Manual and the NAICS Manual are available through the National Technical Information Service (NTIS) of the U.S. Department of Commerce (Springfield, VA, 22261). NTIS also makes materials available through its web site ([www.ntis.gov/naics](http://www.ntis.gov/naics)).

*Primary recipient* means a recipient which receives DOT financial assistance and passes some or all of it on to another recipient.

*Principal place of business* means the business location where the individuals who manage the firm's day-to-day operations spend most working hours and where top management's business records are kept. If the offices from which management is directed and where business records are kept are in different locations, the recipient will determine the principal place of business for DBE program purposes.

*Program* means any undertaking on a recipient's part to use DOT financial assistance, authorized by the laws to which this part applies.

*Race-conscious* measure or program is one that is focused specifically on assisting only DBEs, including women-owned DBEs.

*Race-neutral* measure or program is one that is, or can be, used to assist all small businesses. For the purposes of this part, *race-neutral* includes gender-neutrality.

*Recipient* is any entity, public or private, to which DOT financial assistance is extended, whether directly or through another recipient, through the programs of the FAA, FHWA, or FTA, or who has applied for such assistance.

*Secretary* means the Secretary of Transportation or his/her designee.

*Set-aside* means a contracting practice restricting eligibility for the competitive award of a contract solely to DBE firms.

*Small Business Administration or SBA* means the United States Small Business Administration.

*Small business concern* means, with respect to firms seeking to participate as DBEs in DOT-assisted contracts, a small business concern as defined pursuant to section 3 of the Small Business Act and Small Business Administration regulations implementing it (13 CFR part 121) that also does not exceed the cap on average annual gross receipts specified in § 26.65(b).

*Socially and economically disadvantaged individual* means any individual who is a citizen (or lawfully admitted permanent resident) of the United States and who is—

(1) Any individual who a recipient finds to be a socially and economically disadvantaged individual on a case-by-case basis.

(2) Any individual in the following groups, members of which are rebuttably presumed to be socially and economically disadvantaged:

(i) "Black Americans," which includes persons having origins in any of the Black racial groups of Africa;

(ii) "Hispanic Americans," which includes persons of Mexican, Puerto Rican, Cuban, Dominican, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race;

(iii) "Native Americans," which includes persons who are American Indians, Eskimos, Aleuts, or Native Hawaiians;

(iv) "Asian-Pacific Americans," which includes persons whose origins are from Japan, China, Taiwan, Korea, Burma (Myanmar), Vietnam, Laos, Cambodia (Kampuchea), Thailand, Malaysia, Indonesia, the Philippines, Brunei, Samoa, Guam, the U.S. Trust Territories of the Pacific Islands (Republic of Palau), the Commonwealth of the Northern Marianas Islands, Macao, Fiji, Tonga, Kiribati, Juvalu, Nauru, Federated States of Micronesia, or Hong Kong;

(v) "Subcontinent Asian Americans," which includes persons whose origins are from India, Pakistan, Bangladesh, Bhutan, the Maldives Islands, Nepal or Sri Lanka;

(vi) Women;

(vii) Any additional groups whose members are designated as socially and economically disadvantaged by the SBA, at such time as the SBA designation becomes effective.

*Tribally-owned concern* means any concern at least 51 percent owned by an Indian tribe as defined in this section.

*You* refers to a recipient, unless a statement in the text of this part or the context requires otherwise (i.e., 'You must do XYZ' means that recipients must do XYZ).

#### § 26.7 What discriminatory actions are forbidden?

(a) You must never exclude any person from participation in, deny any person the benefits of, or otherwise discriminate against anyone in connection with the award and performance of any contract covered by this part on the basis of race, color, sex, or national origin.

(b) In administering your DBE program, you must not, directly or through contractual or other arrangements, use criteria or methods of administration that have the effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, sex, or national origin.

#### § 26.9 How does the Department issue guidance and interpretations under this part?

(a) This part applies instead of subparts A and C through E of 49 CFR part 23 in effect prior to March 4, 1999. (See 49 CFR Parts 1 to 99, revised as of October 1, 1998.) Only guidance and interpretations (including interpretations set forth in certification appeal decisions) consistent with this part 26 and issued after March 4, 1999 have definitive, binding effect in implementing the provisions of this part and constitute the official position of the Department of Transportation.

(b) The Secretary of Transportation, Office of the Secretary of Transportation, FHWA, FTA, and FAA may issue written interpretations of or written guidance concerning this part. Written interpretations and guidance are valid and binding, and constitute the official position of the Department of Transportation, only if they are issued over the signature of the Secretary of Transportation or if they contain the following statement:

The General Counsel of the Department of Transportation has reviewed this document and approved it as consistent with the language and intent of 49 CFR part 26.

**§ 26.11 What records do recipients keep and report?**

(a) [Reserved]

(b) You must continue to provide data about your DBE program to the Department as directed by DOT operating administrations.

(c) You must create and maintain a bidders list, consisting of all firms bidding on prime contracts and bidding or quoting subcontracts on DOT-assisted projects. For every firm, the following information must be included:

- (1) Firm name;
- (2) Firm address;
- (3) Firm's status as a DBE or non-DBE;
- (4) The age of the firm; and
- (5) The annual gross receipts of the firm.

**§ Section 26.13 What assurances must recipients and contractors make?**

(a) Each financial assistance agreement you sign with a DOT operating administration (or a primary recipient) must include the following assurance:

The recipient shall not discriminate on the basis of race, color, national origin, or sex in the award and performance of any DOT-assisted contract or in the administration of its DBE program or the requirements of 49 CFR part 26. The recipient shall take all necessary and reasonable steps under 49 CFR part 26 to ensure nondiscrimination in the award and administration of DOT-assisted contracts. The recipient's DBE program, as required by 49 CFR part 26 and as approved by DOT, is incorporated by reference in this agreement. Implementation of this program is a legal obligation and failure to carry out its terms shall be treated as a violation of this agreement. Upon notification to the recipient of its failure to carry out its approved program, the Department may impose sanctions as provided for under part 26 and may, in appropriate cases, refer the matter for enforcement under 18 U.S.C. 1001 and/or the Program Fraud Civil Remedies Act of 1986 (31 U.S.C. 3801 *et seq.*).

(b) Each contract you sign with a contractor (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The contractor, sub recipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR part 26 in the award and administration of DOT-assisted contracts. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate.

**§ 26.15 How can recipients apply for exemptions or waivers?**

(a) You can apply for an exemption from any provision of this part. To apply, you must request the exemption in writing from the Office of the Secretary of Transportation, FHWA, FTA, or FAA. The Secretary will grant the request only if it documents special or exceptional circumstances, not likely to be generally applicable, and not contemplated in connection with the rulemaking that established this part, that make your compliance with a specific provision of this part impractical. You must agree to take any steps that the Department specifies to comply with the intent of the provision from which an exemption is granted. The Secretary will issue a written response to all exemption requests.

(b) You can apply for a waiver of any provision of Subpart B or C of this part including, but not limited to, any provisions regarding administrative requirements, overall goals, contract goals or good faith efforts. Program waivers are for the purpose of authorizing you to operate a DBE program that achieves the objectives of this part by means that may differ from one or more of the requirements of Subpart B or C of this part. To receive a program waiver, you must follow these procedures:

(1) You must apply through the concerned operating administration. The application must include a specific program proposal and address how you will meet the criteria of paragraph (b)(2) of this section. Before submitting your application, you must have had public participation in developing your proposal, including consultation with the DBE community and at least one public hearing. Your application must include a summary of the public participation process and the information gathered through it.

(2) Your application must show that—

- (i) There is a reasonable basis to conclude that you could achieve a level of DBE participation consistent with the objectives of this part using different or innovative means other than those that are provided in subpart B or C of this part;

- (ii) Conditions in your jurisdiction are appropriate for implementing the proposal;

- (iii) Your proposal would prevent discrimination against any individual or group in access to contracting opportunities or other benefits of the program; and

- (iv) Your proposal is consistent with applicable law and program requirements of the concerned operating

administration's financial assistance program.

(3) The Secretary has the authority to approve your application. If the Secretary grants your application, you may administer your DBE program as provided in your proposal, subject to the following conditions:

- (i) DBE eligibility is determined as provided in subparts D and E of this part, and DBE participation is counted as provided in § 26.49;

- (ii) Your level of DBE participation continues to be consistent with the objectives of this part;

- (iii) There is a reasonable limitation on the duration of your modified program; and

- (iv) Any other conditions the Secretary makes on the grant of the waiver.

(4) The Secretary may end a program waiver at any time and require you to comply with this part's provisions. The Secretary may also extend the waiver, if he or she determines that all requirements of paragraphs (b)(2) and (3) of this section continue to be met. Any such extension shall be for no longer than period originally set for the duration of the program.

**Subpart B—Administrative Requirements for DBE Programs for Federally-Assisted Contracting**

**§ 26.21 Who must have a DBE program?**

(a) If you are in one of these categories and let DOT-assisted contracts, you must have a DBE program meeting the requirements of this part:

- (1) All FHWA recipients receiving funds authorized by a statute to which this part applies;

- (2) FTA recipients that receive \$250,000 or more in FTA planning, capital, and/or operating assistance in a Federal fiscal year;

- (3) FAA recipients that receive a grant of \$250,000 or more for airport planning or development.

(b)(1) You must submit a DBE program conforming to this part by August 31, 1999 to the concerned operating administration (OA). Once the OA has approved your program, the approval counts for all of your DOT-assisted programs (except that goals are reviewed and approved by the particular operating administration that provides funding for your DOT-assisted contracts).

(2) You do not have to submit regular updates of your DBE programs, as long as you remain in compliance. However, you must submit significant changes in the program for approval.

(c) You are not eligible to receive DOT financial assistance unless DOT has

approved your DBE program and you are in compliance with it and this part. You must continue to carry out your program until all funds from DOT financial assistance have been expended.

**§ 26.23 What is the requirement for a policy statement?**

You must issue a signed and dated policy statement that expresses your commitment to your DBE program, states its objectives, and outlines responsibilities for its implementation. You must circulate the statement throughout your organization and to the DBE and non-DBE business communities that perform work on your DOT-assisted contracts.

**§ 26.25 What is the requirement for a liaison officer?**

You must have a DBE liaison officer, who shall have direct, independent access to your Chief Executive Officer concerning DBE program matters. The liaison officer shall be responsible for implementing all aspects of your DBE program. You must also have adequate staff to administer the program in compliance with this part.

**26.27 What efforts must recipients make concerning DBE financial institutions?**

You must thoroughly investigate the full extent of services offered by financial institutions owned and controlled by socially and economically disadvantaged individuals in your community and make reasonable efforts to use these institutions. You must also encourage prime contractors to use such institutions.

**§ 26.29 What prompt payment mechanisms must recipients have?**

(a) You must establish, as part of your DBE program, a contract clause to require prime contractors to pay subcontractors for satisfactory performance of their contracts no later than a specific number of days from receipt of each payment you make to the prime contractor. This clause must also require the prompt return of retainage payments from the prime contractor to the subcontractor within a specific number of days after the subcontractor's work is satisfactorily completed.

(1) This clause may provide for appropriate penalties for failure to comply, the terms and conditions of which you set.

(2) This clause may also provide that any delay or postponement of payment among the parties may take place only for good cause, with your prior written approval.

(b) You may also establish, as part of your DBE program, any of the following

additional mechanisms to ensure prompt payment:

(1) A contract clause that requires prime contractors to include in their subcontracts language providing that prime contractors and subcontractors will use appropriate alternative dispute resolution mechanisms to resolve payment disputes. You may specify the nature of such mechanisms.

(2) A contract clause providing that the prime contractor will not be reimbursed for work performed by subcontractors unless and until the prime contractor ensures that the subcontractors are promptly paid for the work they have performed.

(3) Other mechanisms, consistent with this part and applicable state and local law, to ensure that DBEs and other contractors are fully and promptly paid.

**§ 26.31 What requirements pertain to the DBE directory?**

You must maintain and make available to interested persons a directory identifying all firms eligible to participate as DBEs in your program. In the listing for each firm, you must include its address, phone number, and the types of work the firm has been certified to perform as a DBE. You must revise your directory at least annually and make updated information available to contractors and the public on request.

**§ 26.33 What steps must a recipient take to address overconcentration of DBEs in certain types of work?**

(a) If you determine that DBE firms are so overconcentrated in a certain type of work as to unduly burden the opportunity of non-DBE firms to participate in this type of work, you must devise appropriate measures to address this overconcentration.

(b) These measures may include the use of incentives, technical assistance, business development programs, mentor-protégé programs, and other appropriate measures designed to assist DBEs in performing work outside of the specific field in which you have determined that non-DBEs are unduly burdened. You may also consider varying your use of contract goals, to the extent consistent with § 26.51, to ensure that non-DBEs are not unfairly prevented from competing for subcontracts.

(c) You must obtain the approval of the concerned DOT operating administration for your determination of overconcentration and the measures you devise to address it. Once approved, the measures become part of your DBE program.

**§ 26.35 What role do business development and mentor-protégé programs have in the DBE program?**

(a) You may or, if an operating administration directs you to, you must establish a DBE business development program (BDP) to assist firms in gaining the ability to compete successfully in the marketplace outside the DBE program. You may require a DBE firm, as a condition of receiving assistance through the BDP, to agree to terminate its participation in the DBE program after a certain time has passed or certain objectives have been reached. See Appendix C of this part for guidance on administering BDP programs.

(b) As part of a BDP or separately, you may establish a "mentor-protégé" program, in which another DBE or non-DBE firm is the principal source of business development assistance to a DBE firm.

(1) Only firms you have certified as DBEs before they are proposed for participation in a mentor-protégé program are eligible to participate in the mentor-protégé program.

(2) During the course of the mentor-protégé relationship, you must:

(i) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than one half of its goal on any contract let by the recipient; and

(ii) Not award DBE credit to a non-DBE mentor firm for using its own protégé firm for more than every other contract performed by the protégé firm.

(3) For purposes of making determinations of business size under this part, you must not treat protégé firms as affiliates of mentor firms, when both firms are participating under an approved mentor-protégé program. See Appendix D of this part for guidance concerning the operation of mentor-protégé programs.

(c) Your BDPs and mentor-protégé programs must be approved by the concerned operating administration before you implement them. Once approved, they become part of your DBE program.

**§ 26.37 What are a recipient's responsibilities for monitoring the performance of other program participants?**

(a) You must implement appropriate mechanisms to ensure compliance with the part's requirements by all program participants (e.g., applying legal and contract remedies available under Federal, state and local law). You must set forth these mechanisms in your DBE program.

(b) Your DBE program must also include a monitoring and enforcement mechanism to verify that the work committed to DBEs at contract award is

actually performed by the DBEs. This mechanism must provide for a running tally of actual DBE attainments (e.g., payments actually made to DBE firms) and include a provision ensuring that DBE participation is credited toward overall or contract goals only when payments are actually made to DBE firms.

### Subpart C—Goals, Good Faith Efforts, and Counting

#### § 26.41 What is the role of the statutory 10 percent goal in this program?

(a) The statutes authorizing this program provide that, except to the extent the Secretary determines otherwise, not less than 10 percent of the authorized funds are to be expended with DBEs.

(b) This 10 percent goal is an aspirational goal at the national level, which the Department uses as a tool in evaluating and monitoring DBEs' opportunities to participate in DOT-assisted contracts.

(c) The national 10 percent goal does not authorize or require recipients to set overall or contract goals at the 10 percent level, or any other particular level, or to take any special administrative steps if their goals are above or below 10 percent.

#### § 26.43 Can recipients use set-asides or quotas as part of this program?

(a) You are not permitted to use quotas for DBEs on DOT-assisted contracts subject to this part.

(b) You may not set-aside contracts for DBEs on DOT-assisted contracts subject to this part, except that, in limited and extreme circumstances, you may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination.

#### § 26.45 How do recipients set overall goals?

(a) You must set an overall goal for DBE participation in your DOT-assisted contracts.

(b) Your overall goal must be based on demonstrable evidence of the availability of ready, willing and able DBEs relative to all businesses ready, willing and able to participate on your DOT-assisted contracts (hereafter, the "relative availability of DBEs"). The goal must reflect your determination of the level of DBE participation you would expect absent the effects of discrimination. You cannot simply rely on either the 10 percent national goal, your previous overall goal or past DBE participation rates in your program without reference to the relative availability of DBEs in your market.

(c) *Step 1.* You must begin your goal setting process by determining a base figure for the relative availability of DBEs. The following are examples of approaches that you may take toward determining a base figure. These examples are provided as a starting point for your goal setting process. Any percentage figure derived from one of these examples should be considered a basis from which you begin when examining all evidence available in your jurisdiction. These examples are not intended as an exhaustive list. Other methods or combinations of methods to determine a base figure may be used, subject to approval by the concerned operating administration.

(1) *Use DBE Directories and Census Bureau Data.* Determine the number of ready, willing and able DBEs in your market from your DBE directory. Using the Census Bureau's County Business Pattern (CBP) data base, determine the number of all ready, willing and able businesses available in your market that perform work in the same SIC codes. (Information about the CBP data base may be obtained from the Census Bureau at their web site, [www.census.gov/epcd/cbp/view/cbpview.html](http://www.census.gov/epcd/cbp/view/cbpview.html).) Divide the number of DBEs by the number of all businesses to derive a base figure for the relative availability of DBEs in your market.

(2) *Use a bidders list.* Determine the number of DBEs that have bid or quoted on your DOT-assisted prime contracts or subcontracts in the previous year. Determine the number of all businesses that have bid or quoted on prime or subcontracts in the same time period. Divide the number of DBE bidders and quoters by the number for all businesses to derive a base figure for the relative availability of DBEs in your market.

(3) *Use data from a disparity study.* Use a percentage figure derived from data in a valid, applicable disparity study.

(4) *Use the goal of another DOT recipient.* If another DOT recipient in the same, or substantially similar, market has set an overall goal in compliance with this rule, you may use that goal as a base figure for your goal.

(5) *Alternative methods.* Subject to the approval of the DOT operating administration, you may use other methods to determine a base figure for your overall goal. Any methodology you choose must be based on demonstrable evidence of local market conditions and be designed to ultimately attain a goal that is rationally related to the relative availability of DBEs in your market.

(d) *Step 2.* Once you have calculated a base figure, you must examine all of the evidence available in your

jurisdiction to determine what adjustment, if any, is needed to the base figure in order to arrive at your overall goal.

(1) There are many types of evidence that must be considered when adjusting the base figure. These include:

(i) The current capacity of DBEs to perform work in your DOT-assisted contracting program, as measured by the volume of work DBEs have performed in recent years;

(ii) Evidence from disparity studies conducted anywhere within your jurisdiction, to the extent it is not already accounted for in your base figure; and

(iii) If your base figure is the goal of another recipient, you must adjust it for differences in your local market and your contracting program.

(2) You may also consider available evidence from related fields that affect the opportunities for DBEs to form, grow and compete. These include, but are not limited to:

(i) Statistical disparities in the ability of DBEs to get the financing, bonding and insurance required to participate in your program;

(ii) Data on employment, self-employment, education, training and union apprenticeship programs, to the extent you can relate it to the opportunities for DBEs to perform in your program.

(3) If you attempt to make an adjustment to your base figure to account for the continuing effects of past discrimination (often called the "but for" factor) or the effects of an ongoing DBE program, the adjustment must be based on demonstrable evidence that is logically and directly related to the effect for which the adjustment is sought.

(e) Once you have determined a percentage figure in accordance with paragraphs (c) and (d) of this section, you should express your overall goal as follows:

(1) If you are an FHWA recipient, as a percentage of all Federal-aid highway funds you will expend in FHWA-assisted contracts in the forthcoming fiscal year;

(2) If you are an FTA or FAA recipient, as a percentage of all FTA or FAA funds (exclusive of FTA funds to be used for the purchase of transit vehicles) that you will expend in FTA or FAA-assisted contracts in the forthcoming fiscal year. In appropriate cases, the FTA or FAA Administrator may permit you to express your overall goal as a percentage of funds for a particular grant or project or group of grants and/or projects.

(f)(1) If you set overall goals on a fiscal year basis, you must submit them to the applicable DOT operating administration for review on August 1 of each year, unless the Administrator of the concerned operating administration establishes a different submission date.

(2) If you are an FTA or FAA recipient and set your overall goal on a project or grant basis, you must submit the goal for review at a time determined by the FTA or FAA Administrator.

(3) You must include with your overall goal submission a description of the methodology you used to establish the goal, including your base figure and the evidence with which it was calculated, and the adjustments you made to the base figure and the evidence relied on for the adjustments. You should also include a summary listing of the relevant available evidence in your jurisdiction and, where applicable, an explanation of why you did not use that evidence to adjust your base figure. You must also include your projection of the portions of the overall goal you expect to meet through race-neutral and race-conscious measures, respectively (see § 26.51(c)).

(4) You are not required to obtain prior operating administration concurrence with the your overall goal. However, if the operating administration's review suggests that your overall goal has not been correctly calculated, or that your method for calculating goals is inadequate, the operating administration may, after consulting with you, adjust your overall goal or require that you do so. The adjusted overall goal is binding on you.

(5) If you need additional time to collect data or take other steps to develop an approach to setting overall goals, you may request the approval of the concerned operating administration for an interim goal and/or goal-setting mechanism. Such a mechanism must:

(i) Reflect the relative availability of DBEs in your local market to the maximum extent feasible given the data available to you; and

(ii) Avoid imposing undue burdens on non-DBEs.

(g) In establishing an overall goal, you must provide for public participation. This public participation must include:

(1) Consultation with minority, women's and general contractor groups, community organizations, and other officials or organizations which could be expected to have information concerning the availability of disadvantaged and non-disadvantaged businesses, the effects of discrimination on opportunities for DBEs, and your efforts to establish a level playing field for the participation of DBEs.

(2) A published notice announcing your proposed overall goal, informing the public that the proposed goal and its rationale are available for inspection during normal business hours at your principal office for 30 days following the date of the notice, and informing the public that you and the Department will accept comments on the goals for 45 days from the date of the notice. The notice must include addresses to which comments may be sent, and you must publish it in general circulation media and available minority-focused media and trade association publications.

(h) Your overall goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

#### **§ 26.47 Can recipients be penalized for failing to meet overall goals?**

(a) You cannot be penalized, or treated by the Department as being in noncompliance with this rule, because your DBE participation falls short of your overall goal, unless you have failed to administer your program in good faith.

(b) If you do not have an approved DBE program or overall goal, or if you fail to implement your program in good faith, you are in noncompliance with this part.

#### **§ 26.49 How are overall goals established for transit vehicle manufacturers?**

(a) If you are an FTA recipient, you must require in your DBE program that each transit vehicle manufacturer, as a condition of being authorized to bid or propose on FTA-assisted transit vehicle procurements, certify that it has complied with the requirements of this section. You do not include FTA assistance used in transit vehicle procurements in the base amount from which your overall goal is calculated.

(b) If you are a transit vehicle manufacturer, you must establish and submit for FTA's approval an annual overall percentage goal. In setting your overall goal, you should be guided, to the extent applicable, by the principles underlying § 26.45. The base from which you calculate this goal is the amount of FTA financial assistance included in transit vehicle contracts you will perform during the fiscal year in question. You must exclude from this base funds attributable to work performed outside the United States and its territories, possessions, and commonwealths. The requirements and procedures of this part with respect to submission and approval of overall goals apply to you as they do to recipients.

(c) As a transit vehicle manufacturer, you may make the certification required by this section if you have submitted the goal this section requires and FTA has approved it or not disapproved it.

(d) As a recipient, you may, with FTA approval, establish project-specific goals for DBE participation in the procurement of transit vehicles in lieu of complying through the procedures of this section.

(e) If you are an FHWA or FAA recipient, you may, with FHWA or FAA approval, use the procedures of this section with respect to procurements of vehicles or specialized equipment. If you choose to do so, then the manufacturers of this equipment must meet the same requirements (including goal approval by FHWA or FAA) as transit vehicle manufacturers must meet in FTA-assisted procurements.

#### **§ 26.51 What means do recipients use to meet overall goals?**

(a) You must meet the maximum feasible portion of your overall goal by using race-neutral means of facilitating DBE participation. Race-neutral DBE participation includes any time a DBE wins a prime contract through customary competitive procurement procedures, is awarded a subcontract on a prime contract that does not carry a DBE goal, or even if there is a DBE goal, wins a subcontract from a prime contractor that did not consider its DBE status in making the award (e.g., a prime contractor that uses a strict low bid system to award subcontracts).

(b) Race-neutral means include, but are not limited to, the following:

(1) Arranging solicitations, times for the presentation of bids, quantities, specifications, and delivery schedules in ways that facilitate DBE, and other small businesses, participation (e.g., unbundling large contracts to make them more accessible to small businesses, requiring or encouraging prime contractors to subcontract portions of work that they might otherwise perform with their own forces);

(2) Providing assistance in overcoming limitations such as inability to obtain bonding or financing (e.g., by such means as simplifying the bonding process, reducing bonding requirements, eliminating the impact of surety costs from bids, and providing services to help DBEs, and other small businesses, obtain bonding and financing);

(3) Providing technical assistance and other services;

(4) Carrying out information and communications programs on contracting procedures and specific

contract opportunities (e.g., ensuring the inclusion of DBEs, and other small businesses, on recipient mailing lists for bidders; ensuring the dissemination to bidders on prime contracts of lists of potential subcontractors; provision of information in languages other than English, where appropriate);

(5) Implementing a supportive services program to develop and improve immediate and long-term business management, record keeping, and financial and accounting capability for DBEs and other small businesses;

(6) Providing services to help DBEs, and other small businesses, improve long-term development, increase opportunities to participate in a variety of kinds of work, handle increasingly significant projects, and achieve eventual self-sufficiency;

(7) Establishing a program to assist new, start-up firms, particularly in fields in which DBE participation has historically been low;

(8) Ensuring distribution of your DBE directory, through print and electronic means, to the widest feasible universe of potential prime contractors; and

(9) Assisting DBEs, and other small businesses, to develop their capability to utilize emerging technology and conduct business through electronic media.

(c) Each time you submit your overall goal for review by the concerned operating administration, you must also submit your projection of the portion of the goal that you expect to meet through race-neutral means and your basis for that projection. This projection is subject to approval by the concerned operating administration, in conjunction with its review of your overall goal.

(d) You must establish contract goals to meet any portion of your overall goal you do not project being able to meet using race-neutral means.

(e) The following provisions apply to the use of contract goals:

(1) You may use contract goals only on those DOT-assisted contracts that have subcontracting possibilities.

(2) You are not required to set a contract goal on every DOT-assisted contract. You are not required to set each contract goal at the same percentage level as the overall goal. The goal for a specific contract may be higher or lower than that percentage level of the overall goal, depending on such factors as the type of work involved, the location of the work, and the availability of DBEs for the work of the particular contract. However, over the period covered by your overall goal, you must set contract goals so that they will cumulatively result in meeting any portion of your overall goal you do not

project being able to meet through the use of race-neutral means.

(3) Operating administration approval of each contract goal is not necessarily required. However, operating administrations may review and approve or disapprove any contract goal you establish.

(4) Your contract goals must provide for participation by all certified DBEs and must not be subdivided into group-specific goals.

(f) To ensure that your DBE program continues to be narrowly tailored to overcome the effects of discrimination, you must adjust your use of contract goals as follows:

(1) If your approved projection under paragraph (c) of this section estimates that you can meet your entire overall goal for a given year through race-neutral means, you must implement your program without setting contract goals during that year.

*Example to Paragraph (f)(1):* Your overall goal for Year I is 12 percent. You estimate that you can obtain 12 percent or more DBE participation through the use of race-neutral measures, without any use of contract goals. In this case, you do not set any contract goals for the contracts that will be performed in Year I.

(2) If, during the course of any year in which you are using contract goals, you determine that you will exceed your overall goal, you must reduce or eliminate the use of contract goals to the extent necessary to ensure that the use of contract goals does not result in exceeding the overall goal. If you determine that you will fall short of your overall goal, then you must make appropriate modifications in your use of race-neutral and/or race-conscious measures to allow you to meet the overall goal.

*Example to Paragraph (f)(2):* In Year II, your overall goal is 12 percent. You have estimated that you can obtain 5 percent DBE participation through use of race-neutral measures. You therefore plan to obtain the remaining 7 percent participation through use of DBE goals. By September, you have already obtained 11 percent DBE participation for the year. For contracts let during the remainder of the year, you use contract goals only to the extent necessary to obtain an additional one percent DBE participation. However, if you determine in September that your participation for the year is likely to be only 8 percent total, then you would increase your use of race-neutral and/or race-conscious means during the remainder of the year in order to achieve your overall goal.

(3) If the DBE participation you have obtained by race-neutral means alone meets or exceeds your overall goals for two consecutive years, you are not required to make a projection of the

amount of your goal you can meet using such means in the next year. You do not set contract goals on any contracts in the next year. You continue using only race-neutral means to meet your overall goals unless and until you do not meet your overall goal for a year.

*Example to Paragraph (f)(3):* Your overall goal for Years I and Year II is 10 percent. The DBE participation you obtain through race-neutral measures alone is 10 percent or more in each year. (For this purpose, it does not matter whether you obtained additional DBE participation through using contract goals in these years.) In Year III and following years, you do not need to make a projection under paragraph (c) of this section of the portion of your overall goal you expect to meet using race-neutral means. You simply use race-neutral means to achieve your overall goals. However, if in Year VI your DBE participation falls short of your overall goal, then you must make a paragraph (c) projection for Year VII and, if necessary, resume use of contract goals in that year.

(4) If you obtain DBE participation that exceeds your overall goal in two consecutive years through the use of contract goals (i.e., not through the use of race-neutral means alone), you must reduce your use of contract goals proportionately in the following year.

*Example to Paragraph (f)(4):* In Years I and II, your overall goal is 12 percent, and you obtain 14 and 16 percent DBE participation, respectively. You have exceeded your goals over the two-year period by an average of 25 percent. In Year III, your overall goal is again 12 percent, and your paragraph (c) projection estimates that you will obtain 4 percent DBE participation through race-neutral means and 8 percent through contract goals. You then reduce the contract goal projection by 25 percent (i.e., from 8 to 6 percent) and set contract goals accordingly during the year. If in Year III you obtain 11 percent participation, you do not use this contract goal adjustment mechanism for Year IV, because there have not been two consecutive years of exceeding overall goals.

(g) In any year in which you project meeting part of your goal through race-neutral means and the remainder through contract goals, you must maintain data separately on DBE achievements in those contracts with and without contract goals, respectively. You must report this data to the concerned operating administration as provided in § 26.11.

**§ 26.53 What are the good faith efforts procedures recipients follow in situations where there are contract goals?**

(a) When you have established a DBE contract goal, you must award the contract only to a bidder/offeror who makes good faith efforts to meet it. You must determine that a bidder/offeror has made good faith efforts if the bidder/

offeror does either of the following things:

(1) Documents that it has obtained enough DBE participation to meet the goal; or

(2) Documents that it made adequate good faith efforts to meet the goal, even though it did not succeed in obtaining enough DBE participation to do so. If the bidder/offeror does document adequate good faith efforts, you must not deny award of the contract on the basis that the bidder/offeror failed to meet the goal. See Appendix A of this part for guidance in determining the adequacy of a bidder/offeror's good faith efforts.

(b) In your solicitations for DOT-assisted contracts for which a contract goal has been established, you must require the following:

(1) Award of the contract will be conditioned on meeting the requirements of this section;

(2) All bidders/offerors will be required to submit the following information to the recipient, at the time provided in paragraph (b)(3) of this section:

(i) The names and addresses of DBE firms that will participate in the contract;

(ii) A description of the work that each DBE will perform;

(iii) The dollar amount of the participation of each DBE firm participating;

(iv) Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet a contract goal;

(v) Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and

(vi) If the contract goal is not met, evidence of good faith efforts (see Appendix A of this part); and

(3) At your discretion, the bidder/offeror must present the information required by paragraph (b)(2) of this section—

(i) Under sealed bid procedures, as a matter of responsiveness, or with initial proposals, under contract negotiation procedures; or

(ii) At any time before you commit yourself to the performance of the contract by the bidder/offeror, as a matter of responsibility.

(c) You must make sure all information is complete and accurate and adequately documents the bidder/offeror's good faith efforts before committing yourself to the performance of the contract by the bidder/offeror.

(d) If you determine that the apparent successful bidder/offeror has failed to meet the requirements of paragraph (a)

of this section, you must, before awarding the contract, provide the bidder/offeror an opportunity for administrative reconsideration.

(1) As part of this reconsideration, the bidder/offeror must have the opportunity to provide written documentation or argument concerning the issue of whether it met the goal or made adequate good faith efforts to do so.

(2) Your decision on reconsideration must be made by an official who did not take part in the original determination that the bidder/offeror failed to meet the goal or make adequate good faith efforts to do so.

(3) The bidder/offeror must have the opportunity to meet in person with your reconsideration official to discuss the issue of whether it met the goal or made adequate good faith efforts to do so.

(4) You must send the bidder/offeror a written decision on reconsideration, explaining the basis for finding that the bidder did or did not meet the goal or make adequate good faith efforts to do so.

(5) The result of the reconsideration process is not administratively appealable to the Department of Transportation.

(e) In a "design-build" or "turnkey" contracting situation, in which the recipient lets a master contract to a contractor, who in turn lets subsequent subcontracts for the work of the project, a recipient may establish a goal for the project. The master contractor then establishes contract goals, as appropriate, for the subcontracts it lets. Recipients must maintain oversight of the master contractor's activities to ensure that they are conducted consistent with the requirements of this part.

(f)(1) You must require that a prime contractor not terminate for convenience a DBE subcontractor listed in response to paragraph (b)(2) of this section (or an approved substitute DBE firm) and then perform the work of the terminated subcontract with its own forces or those of an affiliate, without your prior written consent.

(2) When a DBE subcontractor is terminated, or fails to complete its work on the contract for any reason, you must require the prime contractor to make good faith efforts to find another DBE subcontractor to substitute for the original DBE. These good faith efforts shall be directed at finding another DBE to perform at least the same amount of work under the contract as the DBE that was terminated, to the extent needed to meet the contract goal you established for the procurement.

(3) You must include in each prime contract a provision for appropriate administrative remedies that you will invoke if the prime contractor fails to comply with the requirements of this section.

(g) You must apply the requirements of this section to DBE bidders/offerors for prime contracts. In determining whether a DBE bidder/offeror for a prime contract has met a contract goal, you count the work the DBE has committed to performing with its own forces as well as the work that it has committed to be performed by DBE subcontractors and DBE suppliers.

#### **§ 26.55 How is DBE participation counted toward goals?**

(a) When a DBE participates in a contract, you count only the value of the work actually performed by the DBE toward DBE goals.

(1) Count the entire amount of that portion of a construction contract (or other contract not covered by paragraph (a)(2) of this section) that is performed by the DBE's own forces. Include the cost of supplies and materials obtained by the DBE for the work of the contract, including supplies purchased or equipment leased by the DBE (except supplies and equipment the DBE subcontractor purchases or leases from the prime contractor or its affiliate).

(2) Count the entire amount of fees or commissions charged by a DBE firm for providing a bona fide service, such as professional, technical, consultant, or managerial services, or for providing bonds or insurance specifically required for the performance of a DOT-assisted contract, toward DBE goals, provided you determine the fee to be reasonable and not excessive as compared with fees customarily allowed for similar services.

(3) When a DBE subcontracts part of the work of its contract to another firm, the value of the subcontracted work may be counted toward DBE goals only if the DBE's subcontractor is itself a DBE. Work that a DBE subcontracts to a non-DBE firm does not count toward DBE goals.

(b) When a DBE performs as a participant in a joint venture, count a portion of the total dollar value of the contract equal to the distinct, clearly defined portion of the work of the contract that the DBE performs with its own forces toward DBE goals.

(c) Count expenditures to a DBE contractor toward DBE goals only if the DBE is performing a commercially useful function on that contract.

(1) A DBE performs a commercially useful function when it is responsible for execution of the work of the contract and is carrying out its responsibilities

by actually performing, managing, and supervising the work involved. To perform a commercially useful function, the DBE must also be responsible, with respect to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material, and installing (where applicable) and paying for the material itself. To determine whether a DBE is performing a commercially useful function, you must evaluate the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is commensurate with the work it is actually performing and the DBE credit claimed for its performance of the work, and other relevant factors.

(2) A DBE does not perform a commercially useful function if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. In determining whether a DBE is such an extra participant, you must examine similar transactions, particularly those in which DBEs do not participate.

(3) If a DBE does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved, you must presume that it is not performing a commercially useful function.

(4) When a DBE is presumed not to be performing a commercially useful function as provided in paragraph (c)(3) of this section, the DBE may present evidence to rebut this presumption. You may determine that the firm is performing a commercially useful function given the type of work involved and normal industry practices.

(5) Your decisions on commercially useful function matters are subject to review by the concerned operating administration, but are not administratively appealable to DOT.

(d) Use the following factors in determining whether a DBE trucking company is performing a commercially useful function:

(1) The DBE must be responsible for the management and supervision of the entire trucking operation for which it is responsible on a particular contract, and there cannot be a contrived arrangement for the purpose of meeting DBE goals.

(2) The DBE must itself own and operate at least one fully licensed, insured, and operational truck used on the contract.

(3) The DBE receives credit for the total value of the transportation services it provides on the contract using trucks it owns, insures, and operates using drivers it employs.

(4) The DBE may lease trucks from another DBE firm, including an owner-operator who is certified as a DBE. The DBE who leases trucks from another DBE receives credit for the total value of the transportation services the lessee DBE provides on the contract.

(5) The DBE may also lease trucks from a non-DBE firm, including an owner-operator. The DBE who leases trucks from a non-DBE is entitled to credit only for the fee or commission it receives as a result of the lease arrangement. The DBE does not receive credit for the total value of the transportation services provided by the lessee, since these services are not provided by a DBE.

(6) For purposes of this paragraph (d), a lease must indicate that the DBE has exclusive use of and control over the truck. This does not preclude the leased truck from working for others during the term of the lease with the consent of the DBE, so long as the lease gives the DBE absolute priority for use of the leased truck. Leased trucks must display the name and identification number of the DBE.

(e) Count expenditures with DBEs for materials or supplies toward DBE goals as provided in the following:

(1)(i) If the materials or supplies are obtained from a DBE manufacturer, count 100 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this paragraph (e)(1), a manufacturer is a firm that operates or maintains a factory or establishment that produces, on the premises, the materials, supplies, articles, or equipment required under the contract and of the general character described by the specifications.

(2)(i) If the materials or supplies are purchased from a DBE regular dealer, count 60 percent of the cost of the materials or supplies toward DBE goals.

(ii) For purposes of this section, a regular dealer is a firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and regularly sold or leased to the public in the usual course of business.

(A) To be a regular dealer, the firm must be an established, regular business that engages, as its principal business and under its own name, in the

purchase and sale or lease of the products in question.

(B) A person may be a regular dealer in such bulk items as petroleum products, steel, cement, gravel, stone, or asphalt without owning, operating, or maintaining a place of business as provided in this paragraph (e)(2)(ii) if the person both owns and operates distribution equipment for the products. Any supplementing of regular dealers' own distribution equipment shall be by a long-term lease agreement and not on an ad hoc or contract-by-contract basis.

(C) Packagers, brokers, manufacturers' representatives, or other persons who arrange or expedite transactions are not regular dealers within the meaning of this paragraph (e)(2).

(3) With respect to materials or supplies purchased from a DBE which is neither a manufacturer nor a regular dealer, count the entire amount of fees or commissions charged for assistance in the procurement of the materials and supplies, or fees or transportation charges for the delivery of materials or supplies required on a job site, toward DBE goals, provided you determine the fees to be reasonable and not excessive as compared with fees customarily allowed for similar services. Do not count any portion of the cost of the materials and supplies themselves toward DBE goals, however.

(f) If a firm is not currently certified as a DBE in accordance with the standards of subpart D of this part at the time of the execution of the contract, do not count the firm's participation toward any DBE goals, except as provided for in § 26.87(i).

(g) Do not count the dollar value of work performed under a contract with a firm after it has ceased to be certified toward your overall goal.

(h) Do not count the participation of a DBE subcontractor toward the prime contractor's DBE achievements or your overall goal until the amount being counted toward the goal has been paid to the DBE.

#### Subpart D—Certification Standards

##### § 26.61 How are burdens of proof allocated in the certification process?

(a) In determining whether to certify a firm as eligible to participate as a DBE, you must apply the standards of this subpart.

(b) The firm seeking certification has the burden of demonstrating to you, by a preponderance of the evidence, that it meets the requirements of this subpart concerning group membership or individual disadvantage, business size, ownership, and control.

(c) You must rebuttably presume that members of the designated groups

identified in § 26.67(a) are socially and economically disadvantaged. This means that they do not have the burden of proving to you that they are socially and economically disadvantaged. However, applicants have the obligation to provide you information concerning their economic disadvantage (see § 26.67).

(d) Individuals who are not presumed to be socially and economically disadvantaged, and individuals concerning whom the presumption of disadvantage has been rebutted, have the burden of proving to you, by a preponderance of the evidence, that they are socially and economically disadvantaged. (See Appendix E of this part.)

(e) You must make determinations concerning whether individuals and firms have met their burden of demonstrating group membership, ownership, control, and social and economic disadvantage (where disadvantage must be demonstrated on an individual basis) by considering all the facts in the record, viewed as a whole.

#### **§ 26.63 What rules govern group membership determinations?**

(a) If you have reason to question whether an individual is a member of a group that is presumed to be socially and economically disadvantaged, you must require the individual to demonstrate, by a preponderance of the evidence, that he or she is a member of the group.

(b) In making such a determination, you must consider whether the person has held himself out to be a member of the group over a long period of time prior to application for certification and whether the person is regarded as a member of the group by the relevant community. You may require the applicant to produce appropriate documentation of group membership.

(1) If you determine that an individual claiming to be a member of a group presumed to be disadvantaged is not a member of a designated disadvantaged group, the individual must demonstrate social and economic disadvantage on an individual basis.

(2) Your decisions concerning membership in a designated group are subject to the certification appeals procedure of § 26.89.

#### **§ 26.65 What rules govern business size determinations?**

(a) To be an eligible DBE, a firm (including its affiliates) must be an existing small business, as defined by Small Business Administration (SBA) standards. You must apply current SBA

business size standard(s) found in 13 CFR part 121 appropriate to the type(s) of work the firm seeks to perform in DOT-assisted contracts.

(b) Even if it meets the requirements of paragraph (a) of this section, a firm is not an eligible DBE in any Federal fiscal year if the firm (including its affiliates) has had average annual gross receipts, as defined by SBA regulations (see 13 CFR 121.402), over the firm's previous three fiscal years, in excess of \$16.6 million. The Secretary adjusts this amount for inflation from time to time.

#### **§ 26.67 What rules determine social and economic disadvantage?**

(a) *Presumption of disadvantage.* (1) You must rebuttably presume that citizens of the United States (or lawfully admitted permanent residents) who are women, Black Americans, Hispanic Americans, Native Americans, Asian-Pacific Americans, Subcontinent Asian Americans, or other minorities found to be disadvantaged by the SBA, are socially and economically disadvantaged individuals. You must require applicants to submit a signed, notarized certification that each presumptively disadvantaged owner is, in fact, socially and economically disadvantaged.

(2)(i) You must require each individual owner of a firm applying to participate as a DBE whose ownership and control are relied upon for DBE certification to submit a signed, notarized statement of personal net worth, with appropriate supporting documentation.

(ii) In determining net worth, you must exclude an individual's ownership interest in the applicant firm and the individual's equity in his or her primary residence (except any portion of such equity that is attributable to excessive withdrawals from the applicant firm). A contingent liability does not reduce an individual's net worth. The personal net worth of an individual claiming to be an Alaska Native will include assets and income from sources other than an Alaska Native Corporation and exclude any of the following which the individual receives from any Alaska Native Corporation: cash (including cash dividends on stock received from an ANC) to the extent that it does not, in the aggregate, exceed \$2,000 per individual per annum; stock (including stock issued or distributed by an ANC as a dividend or distribution on stock); a partnership interest; land or an interest in land (including land or an interest in land received from an ANC as a dividend or distribution on stock); and an interest in a settlement trust.

(b) *Rebuttal of presumption of disadvantage.* (1) If the statement of personal net worth that an individual submits under paragraph (a)(2) of this section shows that the individual's personal net worth exceeds \$750,000, the individual's presumption of economic disadvantage is rebutted. You are not required to have a proceeding under paragraph (b)(2) of this section in order to rebut the presumption of economic disadvantage in this case.

(2) If you have a reasonable basis to believe that an individual who is a member of one of the designated groups is not, in fact, socially and/or economically disadvantaged you may, at any time, start a proceeding to determine whether the presumption should be regarded as rebutted with respect to that individual. Your proceeding must follow the procedures of § 26.87.

(3) In such a proceeding, you have the burden of demonstrating, by a preponderance of the evidence, that the individual is not socially and economically disadvantaged. You may require the individual to produce information relevant to the determination of his or her disadvantage.

(4) When an individual's presumption of social and/or economic disadvantage has been rebutted, his or her ownership and control of the firm in question cannot be used for purposes of DBE eligibility under this subpart unless and until he or she makes an individual showing of social and/or economic disadvantage. If the basis for rebutting the presumption is a determination that the individual's personal net worth exceeds \$750,000, the individual is no longer eligible for participation in the program and cannot regain eligibility by making an individual showing of disadvantage.

(c) *8(a) and SDB Firms.* If a firm applying for certification has a current, valid certification from or recognized by the SBA under the 8(a) or small and disadvantaged business (SDB) program (except an SDB certification based on the firm's self-certification as an SDB), you may accept the firm's 8(a) or SDB certification in lieu of conducting your own certification proceeding, just as you may accept the certification of another DOT recipient for this purpose. You are not required to do so, however.

(d) *Individual determinations of social and economic disadvantage.* Firms owned and controlled by individuals who are not presumed to be socially and economically disadvantaged (including individuals whose presumed disadvantage has been rebutted) may apply for DBE

certification. You must make a case-by-case determination of whether each individual whose ownership and control are relied upon for DBE certification is socially and economically disadvantaged. In such a proceeding, the applicant firm has the burden of demonstrating to you, by a preponderance of the evidence, that the individuals who own and control it are socially and economically disadvantaged. An individual whose personal net worth exceeds \$750,000 shall not be deemed to be economically disadvantaged. In making these determinations, use the guidance found in Appendix E of this part. You must require that applicants provide sufficient information to permit determinations under the guidance of Appendix E of this part.

**§ 26.69 What rules govern determinations of ownership?**

(a) In determining whether the socially and economically disadvantaged participants in a firm own the firm, you must consider all the facts in the record, viewed as a whole.

(b) To be an eligible DBE, a firm must be at least 51 percent owned by socially and economically disadvantaged individuals.

(1) In the case of a corporation, such individuals must own at least 51 percent of the each class of voting stock outstanding and 51 percent of the aggregate of all stock outstanding.

(2) In the case of a partnership, 51 percent of each class of partnership interest must be owned by socially and economically disadvantaged individuals. Such ownership must be reflected in the firm's partnership agreement.

(3) In the case of a limited liability company, at least 51 percent of each class of member interest must be owned by socially and economically disadvantaged individuals.

(c) The firm's ownership by socially and economically disadvantaged individuals must be real, substantial, and continuing, going beyond pro forma ownership of the firm as reflected in ownership documents. The disadvantaged owners must enjoy the customary incidents of ownership, and share in the risks and profits commensurate with their ownership interests, as demonstrated by the substance, not merely the form, of arrangements.

(d) All securities that constitute ownership of a firm shall be held directly by disadvantaged persons. Except as provided in this paragraph (d), no securities or assets held in trust, or by any guardian for a minor, are

considered as held by disadvantaged persons in determining the ownership of a firm. However, securities or assets held in trust are regarded as held by a disadvantaged individual for purposes of determining ownership of the firm, if—

(1) The beneficial owner of securities or assets held in trust is a disadvantaged individual, and the trustee is the same or another such individual; or

(2) The beneficial owner of a trust is a disadvantaged individual who, rather than the trustee, exercises effective control over the management, policy-making, and daily operational activities of the firm. Assets held in a revocable living trust may be counted only in the situation where the same disadvantaged individual is the sole grantor, beneficiary, and trustee.

(e) The contributions of capital or expertise by the socially and economically disadvantaged owners to acquire their ownership interests must be real and substantial. Examples of insufficient contributions include a promise to contribute capital, an unsecured note payable to the firm or an owner who is not a disadvantaged individual, or mere participation in a firm's activities as an employee. Debt instruments from financial institutions or other organizations that lend funds in the normal course of their business do not render a firm ineligible, even if the debtor's ownership interest is security for the loan.

(f) The following requirements apply to situations in which expertise is relied upon as part of a disadvantaged owner's contribution to acquire ownership:

(1) The owner's expertise must be—

(i) In a specialized field;

(ii) Of outstanding quality;

(iii) In areas critical to the firm's operations;

(iv) Indispensable to the firm's potential success;

(v) Specific to the type of work the firm performs; and

(vi) Documented in the records of the firm. These records must clearly show the contribution of expertise and its value to the firm.

(2) The individual whose expertise is relied upon must have a significant financial investment in the firm.

(g) You must always deem as held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual—

(1) As the result of a final property settlement or court order in a divorce or legal separation, provided that no term or condition of the agreement or divorce

decree is inconsistent with this section; or

(2) Through inheritance, or otherwise because of the death of the former owner.

(h)(1) You must presume as not being held by a socially and economically disadvantaged individual, for purposes of determining ownership, all interests in a business or other assets obtained by the individual as the result of a gift, or transfer without adequate consideration, from any non-disadvantaged individual or non-DBE firm who is—

(i) Involved in the same firm for which the individual is seeking certification, or an affiliate of that firm;

(ii) Involved in the same or a similar line of business; or

(iii) Engaged in an ongoing business relationship with the firm, or an affiliate of the firm, for which the individual is seeking certification.

(2) To overcome this presumption and permit the interests or assets to be counted, the disadvantaged individual must demonstrate to you, by clear and convincing evidence, that—

(i) The gift or transfer to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(ii) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who provided the gift or transfer.

(i) You must apply the following rules in situations in which marital assets form a basis for ownership of a firm:

(1) When marital assets (other than the assets of the business in question), held jointly or as community property by both spouses, are used to acquire the ownership interest asserted by one spouse, you must deem the ownership interest in the firm to have been acquired by that spouse with his or her own individual resources, provided that the other spouse irrevocably renounces and transfers all rights in the ownership interest in the manner sanctioned by the laws of the state in which either spouse or the firm is domiciled. You do not count a greater portion of joint or community property assets toward ownership than state law would recognize as belonging to the socially and economically disadvantaged owner of the applicant firm.

(2) A copy of the document legally transferring and renouncing the other spouse's rights in the jointly owned or community assets used to acquire an ownership interest in the firm must be included as part of the firm's application for DBE certification.

(j) You may consider the following factors in determining the ownership of a firm. However, you must not regard a contribution of capital as failing to be real and substantial, or find a firm ineligible, solely because—

(1) A socially and economically disadvantaged individual acquired his or her ownership interest as the result of a gift, or transfer without adequate consideration, other than the types set forth in paragraph (h) of this section;

(2) There is a provision for the co-signature of a spouse who is not a socially and economically disadvantaged individual on financing agreements, contracts for the purchase or sale of real or personal property, bank signature cards, or other documents; or

(3) Ownership of the firm in question or its assets is transferred for adequate consideration from a spouse who is not a socially and economically disadvantaged individual to a spouse who is such an individual. In this case, you must give particularly close and careful scrutiny to the ownership and control of a firm to ensure that it is owned and controlled, in substance as well as in form, by a socially and economically disadvantaged individual.

**§ 26.71 What rules govern determinations concerning control?**

(a) In determining whether socially and economically disadvantaged owners control a firm, you must consider all the facts in the record, viewed as a whole.

(b) Only an independent business may be certified as a DBE. An independent business is one the viability of which does not depend on its relationship with another firm or firms.

(1) In determining whether a potential DBE is an independent business, you must scrutinize relationships with non-DBE firms, in such areas as personnel, facilities, equipment, financial and/or bonding support, and other resources.

(2) You must consider whether present or recent employer/employee relationships between the disadvantaged owner(s) of the potential DBE and non-DBE firms or persons associated with non-DBE firms compromise the independence of the potential DBE firm.

(3) You must examine the firm's relationships with prime contractors to determine whether a pattern of exclusive or primary dealings with a prime contractor compromises the independence of the potential DBE firm.

(4) In considering factors related to the independence of a potential DBE firm, you must consider the consistency of relationships between the potential

DBE and non-DBE firms with normal industry practice.

(c) A DBE firm must not be subject to any formal or informal restrictions which limit the customary discretion of the socially and economically disadvantaged owners. There can be no restrictions through corporate charter provisions, by-law provisions, contracts or any other formal or informal devices (e.g., cumulative voting rights, voting powers attached to different classes of stock, employment contracts, requirements for concurrence by non-disadvantaged partners, conditions precedent or subsequent, executory agreements, voting trusts, restrictions on or assignments of voting rights) that prevent the socially and economically disadvantaged owners, without the cooperation or vote of any non-disadvantaged individual, from making any business decision of the firm. This paragraph does not preclude a spousal co-signature on documents as provided for in § 26.69(j)(2).

(d) The socially and economically disadvantaged owners must possess the power to direct or cause the direction of the management and policies of the firm and to make day-to-day as well as long-term decisions on matters of management, policy and operations.

(1) A disadvantaged owner must hold the highest officer position in the company (e.g., chief executive officer or president).

(2) In a corporation, disadvantaged owners must control the board of directors.

(3) In a partnership, one or more disadvantaged owners must serve as general partners, with control over all partnership decisions.

(e) Individuals who are not socially and economically disadvantaged may be involved in a DBE firm as owners, managers, employees, stockholders, officers, and/or directors. Such individuals must not, however, possess or exercise the power to control the firm, or be disproportionately responsible for the operation of the firm.

(f) The socially and economically disadvantaged owners of the firm may delegate various areas of the management, policymaking, or daily operations of the firm to other participants in the firm, regardless of whether these participants are socially and economically disadvantaged individuals. Such delegations of authority must be revocable, and the socially and economically disadvantaged owners must retain the power to hire and fire any person to whom such authority is delegated. The managerial role of the socially and economically disadvantaged owners in

the firm's overall affairs must be such that the recipient can reasonably conclude that the socially and economically disadvantaged owners actually exercise control over the firm's operations, management, and policy.

(g) The socially and economically disadvantaged owners must have an overall understanding of, and managerial and technical competence and experience directly related to, the type of business in which the firm is engaged and the firm's operations. The socially and economically disadvantaged owners are not required to have experience or expertise in every critical area of the firm's operations, or to have greater experience or expertise in a given field than managers or key employees. The socially and economically disadvantaged owners must have the ability to intelligently and critically evaluate information presented by other participants in the firm's activities and to use this information to make independent decisions concerning the firm's daily operations, management, and policymaking. Generally, expertise limited to office management, administration, or bookkeeping functions unrelated to the principal business activities of the firm is insufficient to demonstrate control.

(h) If state or local law requires the persons to have a particular license or other credential in order to own and/or control a certain type of firm, then the socially and economically disadvantaged persons who own and control a potential DBE firm of that type must possess the required license or credential. If state or local law does not require such a person to have such a license or credential to own and/or control a firm, you must not deny certification solely on the ground that the person lacks the license or credential. However, you may take into account the absence of the license or credential as one factor in determining whether the socially and economically disadvantaged owners actually control the firm.

(i)(1) You may consider differences in remuneration between the socially and economically disadvantaged owners and other participants in the firm in determining whether to certify a firm as a DBE. Such consideration shall be in the context of the duties of the persons involved, normal industry practices, the firm's policy and practice concerning reinvestment of income, and any other explanations for the differences proffered by the firm. You may determine that a firm is controlled by its socially and economically disadvantaged owner although that

owner's remuneration is lower than that of some other participants in the firm.

(2) In a case where a non-disadvantaged individual formerly controlled the firm, and a socially and economically disadvantaged individual now controls it, you may consider a difference between the remuneration of the former and current controller of the firm as a factor in determining who controls the firm, particularly when the non-disadvantaged individual remains involved with the firm and continues to receive greater compensation than the disadvantaged individual.

(j) In order to be viewed as controlling a firm, a socially and economically disadvantaged owner cannot engage in outside employment or other business interests that conflict with the management of the firm or prevent the individual from devoting sufficient time and attention to the affairs of the firm to control its activities. For example, absentee ownership of a business and part-time work in a full-time firm are not viewed as constituting control. However, an individual could be viewed as controlling a part-time business that operates only on evenings and/or weekends, if the individual controls it all the time it is operating.

(k)(1) A socially and economically disadvantaged individual may control a firm even though one or more of the individual's immediate family members (who themselves are not socially and economically disadvantaged individuals) participate in the firm as a manager, employee, owner, or in another capacity. Except as otherwise provided in this paragraph, you must make a judgment about the control the socially and economically disadvantaged owner exercises vis-a-vis other persons involved in the business as you do in other situations, without regard to whether or not the other persons are immediate family members.

(2) If you cannot determine that the socially and economically disadvantaged owners—as distinct from the family as a whole—control the firm, then the socially and economically disadvantaged owners have failed to carry their burden of proof concerning control, even though they may participate significantly in the firm's activities.

(l) Where a firm was formerly owned and/or controlled by a non-disadvantaged individual (whether or not an immediate family member), ownership and/or control were transferred to a socially and economically disadvantaged individual, and the non-disadvantaged individual remains involved with the firm in any capacity, the disadvantaged individual

now owning the firm must demonstrate to you, by clear and convincing evidence, that:

(1) The transfer of ownership and/or control to the disadvantaged individual was made for reasons other than obtaining certification as a DBE; and

(2) The disadvantaged individual actually controls the management, policy, and operations of the firm, notwithstanding the continuing participation of a non-disadvantaged individual who formerly owned and/or controlled the firm.

(m) In determining whether a firm is controlled by its socially and economically disadvantaged owners, you may consider whether the firm owns equipment necessary to perform its work. However, you must not determine that a firm is not controlled by socially and economically disadvantaged individuals solely because the firm leases, rather than owns, such equipment, where leasing equipment is a normal industry practice and the lease does not involve a relationship with a prime contractor or other party that compromises the independence of the firm.

(n) You must grant certification to a firm only for specific types of work in which the socially and economically disadvantaged owners have the ability to control the firm. To become certified in an additional type of work, the firm need demonstrate to you only that its socially and economically disadvantaged owners are able to control the firm with respect to that type of work. You may not, in this situation, require that the firm be recertified or submit a new application for certification, but you must verify the disadvantaged owner's control of the firm in the additional type of work.

(o) A business operating under a franchise or license agreement may be certified if it meets the standards in this subpart and the franchiser or licensor is not affiliated with the franchisee or licensee. In determining whether affiliation exists, you should generally not consider the restraints relating to standardized quality, advertising, accounting format, and other provisions imposed on the franchisee or licensee by the franchise agreement or license, provided that the franchisee or licensee has the right to profit from its efforts and bears the risk of loss commensurate with ownership. Alternatively, even though a franchisee or licensee may not be controlled by virtue of such provisions in the franchise agreement or license, affiliation could arise through other means, such as common management or excessive restrictions on

the sale or transfer of the franchise interest or license.

(p) In order for a partnership to be controlled by socially and economically disadvantaged individuals, any non-disadvantaged partners must not have the power, without the specific written concurrence of the socially and economically disadvantaged partner(s), to contractually bind the partnership or subject the partnership to contract or tort liability.

(q) The socially and economically disadvantaged individuals controlling a firm may use an employee leasing company. The use of such a company does not preclude the socially and economically disadvantaged individuals from controlling their firm if they continue to maintain an employer-employee relationship with the leased employees. This includes being responsible for hiring, firing, training, assigning, and otherwise controlling the on-the-job activities of the employees, as well as ultimate responsibility for wage and tax obligations related to the employees.

#### **§ 26.73 What are other rules affecting certification?**

(a)(1) Consideration of whether a firm performs a commercially useful function or is a regular dealer pertains solely to counting toward DBE goals the participation of firms that have already been certified as DBEs. Except as provided in paragraph (a)(2) of this section, you must not consider commercially useful function issues in any way in making decisions about whether to certify a firm as a DBE.

(2) You may consider, in making certification decisions, whether a firm has exhibited a pattern of conduct indicating its involvement in attempts to evade or subvert the intent or requirements of the DBE program.

(b) You must evaluate the eligibility of a firm on the basis of present circumstances. You must not refuse to certify a firm based solely on historical information indicating a lack of ownership or control of the firm by socially and economically disadvantaged individuals at some time in the past, if the firm currently meets the ownership and control standards of this part. Nor must you refuse to certify a firm solely on the basis that it is a newly formed firm.

(c) DBE firms and firms seeking DBE certification shall cooperate fully with your requests (and DOT requests) for information relevant to the certification process. Failure or refusal to provide such information is a ground for a denial or removal of certification.

(d) Only firms organized for profit may be eligible DBEs. Not-for-profit organizations, even though controlled by socially and economically disadvantaged individuals, are not eligible to be certified as DBEs.

(e) An eligible DBE firm must be owned by individuals who are socially and economically disadvantaged. Except as provided in this paragraph, a firm that is not owned by such individuals, but instead is owned by another firm—even a DBE firm—cannot be an eligible DBE.

(1) If socially and economically disadvantaged individuals own and control a firm through a parent or holding company, established for tax, capitalization or other purposes consistent with industry practice, and the parent or holding company in turn owns and controls an operating subsidiary, you may certify the subsidiary if it otherwise meets all requirements of this subpart. In this situation, the individual owners and controllers of the parent or holding company are deemed to control the subsidiary through the parent or holding company.

(2) You may certify such a subsidiary only if there is cumulatively 51 percent ownership of the subsidiary by socially and economically disadvantaged individuals. The following examples illustrate how this cumulative ownership provision works:

*Example 1:* Socially and economically disadvantaged individuals own 100 percent of a holding company, which has a wholly-owned subsidiary. The subsidiary may be certified, if it meets all other requirements.

*Example 2:* Disadvantaged individuals own 100 percent of the holding company, which owns 51 percent of a subsidiary. The subsidiary may be certified, if all other requirements are met.

*Example 3:* Disadvantaged individuals own 80 percent of the holding company, which in turn owns 70 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is 56 percent (80 percent of the 70 percent). This is more than 51 percent, so you may certify the subsidiary, if all other requirements are met.

*Example 4:* Same as Example 2 or 3, but someone other than the socially and economically disadvantaged owners of the parent or holding company controls the subsidiary. Even though the subsidiary is owned by disadvantaged individuals, through the holding or parent company, you cannot certify it because it fails to meet control requirements.

*Example 5:* Disadvantaged individuals own 60 percent of the holding company, which in turn owns 51 percent of a subsidiary. In this case, the cumulative ownership of the subsidiary by disadvantaged individuals is about 31 percent. This is less than 51 percent, so you cannot certify the subsidiary.

*Example 6:* The holding company, in addition to the subsidiary seeking certification, owns several other companies. The combined gross receipts of the holding companies and its subsidiaries are greater than the size standard for the subsidiary seeking certification and/or the gross receipts cap of § 26.65(b). Under the rules concerning affiliation, the subsidiary fails to meet the size standard and cannot be certified.

(f) Recognition of a business as a separate entity for tax or corporate purposes is not necessarily sufficient to demonstrate that a firm is an independent business, owned and controlled by socially and economically disadvantaged individuals.

(g) You must not require a DBE firm to be prequalified as a condition for certification unless the recipient requires all firms that participate in its contracts and subcontracts to be prequalified.

(h) A firm that is owned by an Indian tribe, Alaska Native Corporation, or Native Hawaiian organization as an entity, rather than by Indians, Alaska Natives, or Native Hawaiians as individuals, may be eligible for certification. Such a firm must meet the size standards of § 26.65. Such a firm must be controlled by socially and economically disadvantaged individuals, as provided in § 26.71.

### Subpart E—Certification Procedures

#### § 26.81 What are the requirements for Unified Certification Programs?

(a) You and all other DOT recipients in your state must participate in a Unified Certification Program (UCP).

(1) Within three years of March 4, 1999, you and the other recipients in your state must sign an agreement establishing the UCP for that state and submit the agreement to the Secretary for approval. The Secretary may, on the basis of extenuating circumstances shown by the recipients in the state, extend this deadline for no more than one additional year.

(2) The agreement must provide for the establishment of a UCP meeting all the requirements of this section. The agreement must specify that the UCP will follow all certification procedures and standards of this part, on the same basis as recipients; that the UCP shall cooperate fully with oversight, review, and monitoring activities of DOT and its operating administrations; and that the UCP shall implement DOT directives and guidance concerning certification matters. The agreement shall also commit recipients to ensuring that the UCP has sufficient resources and expertise to carry out the requirements of this part. The agreement shall include an implementation schedule ensuring

that the UCP is fully operational no later than 18 months following the approval of the agreement by the Secretary.

(3) Subject to approval by the Secretary, the UCP in each state may take any form acceptable to the recipients in that state.

(4) The Secretary shall review the UCP and approve it, disapprove it, or remand it to the recipients in the state for revisions. A complete agreement which is not disapproved or remanded within 180 days of its receipt is deemed to be accepted.

(5) If you and the other recipients in your state fail to meet the deadlines set forth in this paragraph (a), you shall have the opportunity to make an explanation to the Secretary why a deadline could not be met and why meeting the deadline was beyond your control. If you fail to make such an explanation, or the explanation does not justify the failure to meet the deadline, the Secretary shall direct you to complete the required action by a date certain. If you and the other recipients fail to carry out this direction in a timely manner, you are collectively in noncompliance with this part.

(b) The UCP shall make all certification decisions on behalf of all DOT recipients in the state with respect to participation in the DOT DBE Program.

(1) Certification decisions by the UCP shall be binding on all DOT recipients within the state.

(2) The UCP shall provide “one-stop shopping” to applicants for certification, such that an applicant is required to apply only once for a DBE certification that will be honored by all recipients in the state.

(3) All obligations of recipients with respect to certification and nondiscrimination must be carried out by UCPs, and recipients may use only UCPs that comply with the certification and nondiscrimination requirements of this part.

(c) All certifications by UCPs shall be pre-certifications; i.e., certifications that have been made final before the due date for bids or offers on a contract on which a firm seeks to participate as a DBE.

(d) A UCP is not required to process an application for certification from a firm having its principal place of business outside the state if the firm is not certified by the UCP in the state in which it maintains its principal place of business. The “home state” UCP shall share its information and documents concerning the firm with other UCPs that are considering the firm’s application.

(e) Subject to DOT approval as provided in this section, the recipients in two or more states may form a regional UCP. UCPs may also enter into written reciprocity agreements with other UCPs. Such an agreement shall outline the specific responsibilities of each participant. A UCP may accept the certification of any other UCP or DOT recipient.

(f) Pending the establishment of UCPs meeting the requirements of this section, you may enter into agreements with other recipients, on a regional or inter-jurisdictional basis, to perform certification functions required by this part. You may also grant reciprocity to other recipient's certification decisions.

(g) Each UCP shall maintain a unified DBE directory containing, for all firms certified by the UCP (including those from other states certified under the provisions of this section), the information required by § 26.31. The UCP shall make the directory available to the public electronically, on the internet, as well as in print. The UCP shall update the electronic version of the directory by including additions, deletions, and other changes as soon as they are made.

(h) Except as otherwise specified in this section, all provisions of this subpart and subpart D of this part pertaining to recipients also apply to UCPs.

**§ 26.83 What procedures do recipients follow in making certification decisions?**

(a) You must ensure that only firms certified as eligible DBEs under this section participate as DBEs in your program.

(b) You must determine the eligibility of firms as DBEs consistent with the standards of subpart D of this part. When a UCP is formed, the UCP must meet all the requirements of subpart D of this part and this subpart that recipients are required to meet.

(c) You must take all the following steps in determining whether a DBE firm meets the standards of subpart D of this part:

(1) Perform an on-site visit to the offices of the firm. You must interview the principal officers of the firm and review their résumés and/or work histories. You must also perform an on-site visit to job sites if there are such sites on which the firm is working at the time of the eligibility investigation in your jurisdiction or local area. You may rely upon the site visit report of any other recipient with respect to a firm applying for certification;

(2) If the firm is a corporation, analyze the ownership of stock in the firm;

(3) Analyze the bonding and financial capacity of the firm;

(4) Determine the work history of the firm, including contracts it has received and work it has completed;

(5) Obtain a statement from the firm of the type of work it prefers to perform as part of the DBE program and its preferred locations for performing the work, if any;

(6) Obtain or compile a list of the equipment owned by or available to the firm and the licenses the firm and its key personnel possess to perform the work it seeks to do as part of the DBE program;

(7) Require potential DBEs to complete and submit an appropriate application form.

(i) *Uniform form.* [Reserved]

(ii) You must make sure that the applicant attests to the accuracy and truthfulness of the information on the application form. This shall be done either in the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or in the form of an unsworn declaration executed under penalty of perjury of the laws of the United States.

(iii) You must review all information on the form prior to making a decision about the eligibility of the firm.

(d) When another recipient, in connection with its consideration of the eligibility of a firm, makes a written request for certification information you have obtained about that firm (e.g., including application materials or the report of a site visit, if you have made one to the firm), you must promptly make the information available to the other recipient.

(e) When another DOT recipient has certified a firm, you have discretion to take any of the following actions:

(1) Certify the firm in reliance on the certification decision of the other recipient;

(2) Make an independent certification decision based on documentation provided by the other recipient, augmented by any additional information you require the applicant to provide; or

(3) Require the applicant to go through your application process without regard to the action of the other recipient.

(f) Subject to the approval of the concerned operating administration as part of your DBE program, you may impose a reasonable application fee for certification. Fee waivers shall be made in appropriate cases.

(g) You must safeguard from disclosure to unauthorized persons information gathered as part of the certification process that may

reasonably be regarded as proprietary or other confidential business information, consistent with applicable Federal, state, and local law.

(h) Once you have certified a DBE, it shall remain certified for a period of at least three years unless and until its certification has been removed through the procedures of § 26.87. You may not require DBEs to reapply for certification as a condition of continuing to participate in the program during this three-year period, unless the factual basis on which the certification was made changes.

(i) If you are a DBE, you must inform the recipient or UCP in writing of any change in circumstances affecting your ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material change in the information provided in your application form.

(1) Changes in management responsibility among members of a limited liability company are covered by this requirement.

(2) You must attach supporting documentation describing in detail the nature of such changes.

(3) The notice must take the form of an affidavit sworn to by the applicant before a person who is authorized by state law to administer oaths or of an unsworn declaration executed under penalty of perjury of the laws of the United States. You must provide the written notification within 30 days of the occurrence of the change. If you fail to make timely notification of such a change, you will be deemed to have failed to cooperate under § 26.109(c).

(j) If you are a DBE, you must provide to the recipient, every year on the anniversary of the date of your certification, an affidavit sworn to by the firm's owners before a person who is authorized by state law to administer oaths or an unsworn declaration executed under penalty of perjury of the laws of the United States. This affidavit must affirm that there have been no changes in the firm's circumstances affecting its ability to meet size, disadvantaged status, ownership, or control requirements of this part or any material changes in the information provided in its application form, except for changes about which you have notified the recipient under paragraph (i) of this section. The affidavit shall specifically affirm that your firm continues to meet SBA business size criteria and the overall gross receipts cap of this part, documenting this affirmation with supporting documentation of your firm's size and gross receipts. If you fail to provide this affidavit in a timely manner, you will be

deemed to have failed to cooperate under § 26.109(c).

(k) If you are a recipient, you must make decisions on applications for certification within 90 days of receiving from the applicant firm all information required under this part. You may extend this time period once, for no more than an additional 60 days, upon written notice to the firm, explaining fully and specifically the reasons for the extension. You may establish a different time frame in your DBE program, upon a showing that this time frame is not feasible, and subject to the approval of the concerned operating administration. Your failure to make a decision by the applicable deadline under this paragraph is deemed a constructive denial of the application, on the basis of which the firm may appeal to DOT under § 26.89.

**§ 26.85 What rules govern recipients' denials of initial requests for certification?**

(a) When you deny a request by a firm, which is not currently certified with you, to be certified as a DBE, you must provide the firm a written explanation of the reasons for the denial, specifically referencing the evidence in the record that supports each reason for the denial. All documents and other information on which the denial is based must be made available to the applicant, on request.

(b) When a firm is denied certification, you must establish a time period of no more than twelve months that must elapse before the firm may reapply to the recipient for certification. You may provide, in your DBE program, subject to approval by the concerned operating administration, a shorter waiting period for reapplication. The time period for reapplication begins to run on the date the explanation required by paragraph (a) of this section is received by the firm.

(c) When you make an administratively final denial of certification concerning a firm, the firm may appeal the denial to the Department under § 26.89.

**§ 26.87 What procedures does a recipient use to remove a DBE's eligibility?**

(a) *Ineligibility complaints.* (1) Any person may file with you a written complaint alleging that a currently-certified firm is ineligible and specifying the alleged reasons why the firm is ineligible. You are not required to accept a general allegation that a firm is ineligible or an anonymous complaint. The complaint may include any information or arguments supporting the complainant's assertion that the firm is ineligible and should not

continue to be certified. Confidentiality of complainants' identities must be protected as provided in § 26.109(b).

(2) You must review your records concerning the firm, any material provided by the firm and the complainant, and other available information. You may request additional information from the firm or conduct any other investigation that you deem necessary.

(3) If you determine, based on this review, that there is reasonable cause to believe that the firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. If you determine that such reasonable cause does not exist, you must notify the complainant and the firm in writing of this determination and the reasons for it. All statements of reasons for findings on the issue of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(b) *Recipient-initiated proceedings.* If, based on notification by the firm of a change in its circumstances or other information that comes to your attention, you determine that there is reasonable cause to believe that a currently certified firm is ineligible, you must provide written notice to the firm that you propose to find the firm ineligible, setting forth the reasons for the proposed determination. The statement of reasons for the finding of reasonable cause must specifically reference the evidence in the record on which each reason is based.

(c) *DOT directive to initiate proceeding.* (1) If the concerned operating administration determines that information in your certification records, or other information available to the concerned operating administration, provides reasonable cause to believe that a firm you certified does not meet the eligibility criteria of this part, the concerned operating administration may direct you to initiate a proceeding to remove the firm's certification.

(2) The concerned operating administration must provide you and the firm a notice setting forth the reasons for the directive, including any relevant documentation or other information.

(3) You must immediately commence and prosecute a proceeding to remove eligibility as provided by paragraph (b) of this section.

(d) *Hearing.* When you notify a firm that there is reasonable cause to remove its eligibility, as provided in paragraph (a), (b), or (c) of this section, you must

give the firm an opportunity for an informal hearing, at which the firm may respond to the reasons for the proposal to remove its eligibility in person and provide information and arguments concerning why it should remain certified.

(1) In such a proceeding, you bear the burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards of this part.

(2) You must maintain a complete record of the hearing, by any means acceptable under state law for the retention of a verbatim record of an administrative hearing. If there is an appeal to DOT under § 26.89, you must provide a transcript of the hearing to DOT and, on request, to the firm. You must retain the original record of the hearing. You may charge the firm only for the cost of copying the record.

(3) The firm may elect to present information and arguments in writing, without going to a hearing. In such a situation, you bear the same burden of proving, by a preponderance of the evidence, that the firm does not meet the certification standards, as you would during a hearing.

(e) *Separation of functions.* You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions.

(1) Your method of implementing this requirement must be made part of your DBE program.

(2) The decisionmaker must be an individual who is knowledgeable about the certification requirements of your DBE program and this part.

(3) Before a UCP is operational in its state, a small airport or small transit authority (i.e., an airport or transit authority serving an area with less than 250,000 population) is required to meet this requirement only to the extent feasible.

(f) *Grounds for decision.* You must not base a decision to remove eligibility on a reinterpretation or changed opinion of information available to the recipient at the time of its certification of the firm. You may base such a decision only on one or more of the following:

(1) Changes in the firm's circumstances since the certification of the firm by the recipient that render the firm unable to meet the eligibility standards of this part;

(2) Information or evidence not available to you at the time the firm was certified;

(3) Information that was concealed or misrepresented by the firm in previous certification actions by a recipient;

(4) A change in the certification standards or requirements of the Department since you certified the firm; or

(5) A documented finding that your determination to certify the firm was factually erroneous.

(g) *Notice of decision.* Following your decision, you must provide the firm written notice of the decision and the reasons for it, including specific references to the evidence in the record that supports each reason for the decision. The notice must inform the firm of the consequences of your decision and of the availability of an appeal to the Department of Transportation under § 26.89. You must send copies of the notice to the complainant in an ineligibility complaint or the concerned operating administration that had directed you to initiate the proceeding.

(h) *Status of firm during proceeding.* (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility.

(2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section.

(i) *Effects of removal of eligibility.* When you remove a firm's eligibility, you must take the following action:

(1) When a prime contractor has made a commitment to using the ineligible firm, or you have made a commitment to using a DBE prime contractor, but a subcontract or contract has not been executed before you issue the decertification notice provided for in paragraph (g) of this section, the ineligible firm does not count toward the contract goal or overall goal. You must direct the prime contractor to meet the contract goal with an eligible DBE firm or demonstrate to you that it has made a good faith effort to do so.

(2) If a prime contractor has executed a subcontract with the firm before you have notified the firm of its ineligibility, the prime contractor may continue to use the firm on the contract and may continue to receive credit toward its DBE goal for the firm's work. In this case, or in a case where you have let a prime contract to the DBE that was later ruled ineligible, the portion of the ineligible firm's performance of the contract remaining after you issued the notice of its ineligibility shall not count toward your overall goal, but may count toward the contract goal.

(3) *Exception:* If the DBE's ineligibility is caused solely by its having exceeded the size standard during the performance of the contract, you may continue to count its participation on that contract toward overall and contract goals.

(j) *Availability of appeal.* When you make an administratively final removal of a firm's eligibility under this section, the firm may appeal the removal to the Department under § 26.89.

#### **§ 26.89 What is the process for certification appeals to the Department of Transportation?**

(a)(1) If you are a firm which is denied certification or whose eligibility is removed by a recipient, you may make an administrative appeal to the Department.

(2) If you are a complainant in an ineligibility complaint to a recipient (including the concerned operating administration in the circumstances provided in § 26.87(c)), you may appeal to the Department if the recipient does not find reasonable cause to propose removing the firm's eligibility or, following a removal of eligibility proceeding, determines that the firm is eligible.

(3) Send appeals to the following address: Department of Transportation, Office of Civil Rights, 400 7th Street, SW, Room 2401, Washington, DC 20590.

(b) Pending the Department's decision in the matter, the recipient's decision remains in effect. The Department does not stay the effect of the recipient's decision while it is considering an appeal.

(c) If you want to file an appeal, you must send a letter to the Department within 90 days of the date of the recipient's final decision, including information and arguments concerning why the recipient's decision should be reversed. The Department may accept an appeal filed later than 90 days after the date of the decision if the Department determines that there was good cause for the late filing of the appeal.

(1) If you are an appellant who is a firm which has been denied certification, whose certification has been removed, whose owner is determined not to be a member of a designated disadvantaged group, or concerning whose owner the presumption of disadvantage has been rebutted, your letter must state the name and address of any other recipient which currently certifies the firm, which has rejected an application for certification from the firm or removed the firm's eligibility within one year prior to the date of the appeal, or before

which an application for certification or a removal of eligibility is pending. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(2) If you are an appellant other than one described in paragraph (c)(1) of this section, the Department will request, and the firm whose certification has been questioned shall promptly provide, the information called for in paragraph (c)(1) of this section. Failure to provide this information may be deemed a failure to cooperate under § 26.109(c).

(d) When it receives an appeal, the Department requests a copy of the recipient's complete administrative record in the matter. If you are the recipient, you must provide the administrative record, including a hearing transcript, within 20 days of the Department's request. The Department may extend this time period on the basis of a recipient's showing of good cause. To facilitate the Department's review of a recipient's decision, you must ensure that such administrative records are well organized, indexed, and paginated. Records that do not comport with these requirements are not acceptable and will be returned to you to be corrected immediately. If an appeal is brought concerning one recipient's certification decision concerning a firm, and that recipient relied on the decision and/or administrative record of another recipient, this requirement applies to both recipients involved.

(e) The Department makes its decision based solely on the entire administrative record. The Department does not make a de novo review of the matter and does not conduct a hearing. The Department may supplement the administrative record by adding relevant information made available by the DOT Office of Inspector General; Federal, state, or local law enforcement authorities; officials of a DOT operating administration or other appropriate DOT office; a recipient; or a firm or other private party.

(f) As a recipient, when you provide supplementary information to the Department, you shall also make this information available to the firm and any third-party complainant involved, consistent with Federal or applicable state laws concerning freedom of information and privacy. The Department makes available, on request by the firm and any third-party complainant involved, any supplementary information it receives from any source.

(1) The Department affirms your decision unless it determines, based on the entire administrative record, that your decision is unsupported by

substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification.

(2) If the Department determines, after reviewing the entire administrative record, that your decision was unsupported by substantial evidence or inconsistent with the substantive or procedural provisions of this part concerning certification, the Department reverses your decision and directs you to certify the firm or remove its eligibility, as appropriate. You must take the action directed by the Department's decision immediately upon receiving written notice of it.

(3) The Department is not required to reverse your decision if the Department determines that a procedural error did not result in fundamental unfairness to the appellant or substantially prejudice the opportunity of the appellant to present its case.

(4) If it appears that the record is incomplete or unclear with respect to matters likely to have a significant impact on the outcome of the case, the Department may remand the record to you with instructions seeking clarification or augmentation of the record before making a finding. The Department may also remand a case to you for further proceedings consistent with Department instructions concerning the proper application of the provisions of this part.

(5) The Department does not uphold your decision based on grounds not specified in your decision.

(6) The Department's decision is based on the status and circumstances of the firm as of the date of the decision being appealed.

(7) The Department provides written notice of its decision to you, the firm, and the complainant in an ineligibility complaint. A copy of the notice is also sent to any other recipient whose administrative record or decision has been involved in the proceeding (see paragraph (d) of this section). The notice includes the reasons for the Department's decision, including specific references to the evidence in the record that supports each reason for the decision.

(8) The Department's policy is to make its decision within 180 days of receiving the complete administrative record. If the Department does not make its decision within this period, the Department provides written notice to concerned parties, including a statement of the reason for the delay and a date by which the appeal decision will be made.

(g) All decisions under this section are administratively final, and are not subject to petitions for reconsideration.

#### **§ 26.91 What actions do recipients take following DOT certification appeal decisions?**

(a) If you are the recipient from whose action an appeal under § 26.89 is taken, the decision is binding. It is not binding on other recipients.

(b) If you are a recipient to which a DOT determination under § 26.89 is applicable, you must take the following action:

(1) If the Department determines that you erroneously certified a firm, you must remove the firm's eligibility on receipt of the determination, without further proceedings on your part. Effective on the date of your receipt of the Department's determination, the consequences of a removal of eligibility set forth in § 26.87(i) take effect.

(2) If the Department determines that you erroneously failed to find reasonable cause to remove the firm's eligibility, you must expeditiously commence a proceeding to determine whether the firm's eligibility should be removed, as provided in § 26.87.

(3) If the Department determines that you erroneously declined to certify or removed the eligibility of the firm, you must certify the firm, effective on the date of your receipt of the written notice of Department's determination.

(4) If the Department determines that you erroneously determined that the presumption of social and economic disadvantage either should or should not be deemed rebutted, you must take appropriate corrective action as determined by the Department.

(5) If the Department affirms your determination, no further action is necessary.

(c) Where DOT has upheld your denial of certification to or removal of eligibility from a firm, or directed the removal of a firm's eligibility, other recipients with whom the firm is certified may commence a proceeding to remove the firm's eligibility under § 26.87. Such recipients must not remove the firm's eligibility absent such a proceeding. Where DOT has reversed your denial of certification to or removal of eligibility from a firm, other recipients must take the DOT action into account in any certification action involving the firm. However, other recipients are not required to certify the firm based on the DOT decision.

#### **Subpart F—Compliance and Enforcement**

##### **§ 26.101 What compliance procedures apply to recipients?**

(a) If you fail to comply with any requirement of this part, you may be subject to formal enforcement action

under § 26.103 or § 26.105 or appropriate program sanctions by the concerned operating administration, such as the suspension or termination of Federal funds, or refusal to approve projects, grants or contracts until deficiencies are remedied. Program sanctions may include, in the case of the FHWA program, actions provided for under 23 CFR 1.36; in the case of the FAA program, actions consistent with 49 U.S.C. 47106(d), 47111(d), and 47122; and in the case of the FTA program, any actions permitted under 49 U.S.C. chapter 53 or applicable FTA program requirements.

(b) As provided in statute, you will not be subject to compliance actions or sanctions for failing to carry out any requirement of this part because you have been prevented from complying because a Federal court has issued a final order in which the court found that the requirement is unconstitutional.

##### **§ 26.103 What enforcement actions apply in FHWA and FTA programs?**

The provisions of this section apply to enforcement actions under FHWA and FTA programs:

(a) *Noncompliance complaints.* Any person who believes that a recipient has failed to comply with its obligations under this part may file a written complaint with the concerned operating administration's Office of Civil Rights. If you want to file a complaint, you must do so no later than 180 days after the date of the alleged violation or the date on which you learned of a continuing course of conduct in violation of this part. In response to your written request, the Office of Civil Rights may extend the time for filing in the interest of justice, specifying in writing the reason for so doing. The Office of Civil Rights may protect the confidentiality of your identity as provided in § 26.109(b). Complaints under this part are limited to allegations of violation of the provisions of this part.

(b) *Compliance reviews.* The concerned operating administration may review the recipient's compliance with this part at any time, including reviews of paperwork and on-site reviews, as appropriate. The Office of Civil Rights may direct the operating administration to initiate a compliance review based on complaints received.

(c) *Reasonable cause notice.* If it appears, from the investigation of a complaint or the results of a compliance review, that you, as a recipient, are in noncompliance with this part, the appropriate DOT office promptly sends you, return receipt requested, a written notice advising you that there is reasonable cause to find you in

noncompliance. The notice states the reasons for this finding and directs you to reply within 30 days concerning whether you wish to begin conciliation.

(d) *Conciliation.* (1) If you request conciliation, the appropriate DOT office shall pursue conciliation for at least 30, but not more than 120, days from the date of your request. The appropriate DOT office may extend the conciliation period for up to 30 days for good cause, consistent with applicable statutes.

(2) If you and the appropriate DOT office sign a conciliation agreement, then the matter is regarded as closed and you are regarded as being in compliance. The conciliation agreement sets forth the measures you have taken or will take to ensure compliance. While a conciliation agreement is in effect, you remain eligible for FHWA or FTA financial assistance.

(3) The concerned operating administration shall monitor your implementation of the conciliation agreement and ensure that its terms are complied with. If you fail to carry out the terms of a conciliation agreement, you are in noncompliance.

(4) If you do not request conciliation, or a conciliation agreement is not signed within the time provided in paragraph (d)(1) of this section, then enforcement proceedings begin.

(e) *Enforcement actions.* (1) Enforcement actions are taken as provided in this subpart.

(2) Applicable findings in enforcement proceedings are binding on all DOT offices.

**§ 26.105 What enforcement actions apply in FAA Programs?**

(a) Compliance with all requirements of this part by airport sponsors and other recipients of FAA financial assistance is enforced through the procedures of Title 49 of the United States Code, including 49 U.S.C. 47106(d), 47111(d), and 47122, and regulations implementing them.

(b) The provisions of § 26.103(b) and this section apply to enforcement actions in FAA programs.

(c) Any person who knows of a violation of this part by a recipient of FAA funds may file a complaint under 14 CFR part 16 with the Federal Aviation Administration Office of Chief Counsel.

**§ 26.107 What enforcement actions apply to firms participating in the DBE program?**

(a) If you are a firm that does not meet the eligibility criteria of subpart D of this part and that attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations

or under circumstances indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(b) If you are a firm that, in order to meet DBE contract goals or other DBE program requirements, uses or attempts to use, on the basis of false, fraudulent or deceitful statements or representations or under circumstances indicating a serious lack of business integrity or honesty, another firm that does not meet the eligibility criteria of subpart D of this part, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29.

(c) In a suspension or debarment proceeding brought under paragraph (a) or (b) of this section, the concerned operating administration may consider the fact that a purported DBE has been certified by a recipient. Such certification does not preclude the Department from determining that the purported DBE, or another firm that has used or attempted to use it to meet DBE goals, should be suspended or debarred.

(d) The Department may take enforcement action under 49 CFR Part 31, Program Fraud and Civil Remedies, against any participant in the DBE program whose conduct is subject to such action under 49 CFR part 31.

(e) The Department may refer to the Department of Justice, for prosecution under 18 U.S.C. 1001 or other applicable provisions of law, any person who makes a false or fraudulent statement in connection with participation of a DBE in any DOT-assisted program or otherwise violates applicable Federal statutes.

**§ 26.109 What are the rules governing information, confidentiality, cooperation, and intimidation or retaliation?**

(a) *Availability of records.* (1) In responding to requests for information concerning any aspect of the DBE program, the Department complies with provisions of the Federal Freedom of Information and Privacy Acts (5 U.S.C. 552 and 552a). The Department may make available to the public any information concerning the DBE program release of which is not prohibited by Federal law.

(2) If you are a recipient, you shall safeguard from disclosure to unauthorized persons information that may reasonably be considered as confidential business information, consistent with Federal, state, and local law.

(b) *Confidentiality of information on complainants.* Notwithstanding the provisions of paragraph (a) of this

section, the identity of complainants shall be kept confidential, at their election. If such confidentiality will hinder the investigation, proceeding or hearing, or result in a denial of appropriate administrative due process to other parties, the complainant must be advised for the purpose of waiving the privilege. Complainants are advised that, in some circumstances, failure to waive the privilege may result in the closure of the investigation or dismissal of the proceeding or hearing. FAA follows the procedures of 14 CFR part 16 with respect to confidentiality of information in complaints.

(c) *Cooperation.* All participants in the Department's DBE program (including, but not limited to, recipients, DBE firms and applicants for DBE certification, complainants and appellants, and contractors using DBE firms to meet contract goals) are required to cooperate fully and promptly with DOT and recipient compliance reviews, certification reviews, investigations, and other requests for information. Failure to do so shall be a ground for appropriate action against the party involved (e.g., with respect to recipients, a finding of noncompliance; with respect to DBE firms, denial of certification or removal of eligibility and/or suspension and debarment; with respect to a complainant or appellant, dismissal of the complaint or appeal; with respect to a contractor which uses DBE firms to meet goals, findings of non-responsibility for future contracts and/or suspension and debarment).

(d) *Intimidation and retaliation.* If you are a recipient, contractor, or any other participant in the program, you must not intimidate, threaten, coerce, or discriminate against any individual or firm for the purpose of interfering with any right or privilege secured by this part or because the individual or firm has made a complaint, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this part. If you violate this prohibition, you are in noncompliance with this part.

**Appendix A to Part 26—Guidance Concerning Good Faith Efforts**

I. When, as a recipient, you establish a contract goal on a DOT-assisted contract, a bidder must, in order to be responsible and/or responsive, make good faith efforts to meet the goal. The bidder can meet this requirement in either of two ways. First, the bidder can meet the goal, documenting commitments for participation by DBE firms sufficient for this purpose. Second, even if it doesn't meet the goal, the bidder can document adequate good faith efforts. This means that the bidder must show that it took

all necessary and reasonable steps to achieve a DBE goal or other requirement of this part which, by their scope, intensity, and appropriateness to the objective, could reasonably be expected to obtain sufficient DBE participation, even if they were not fully successful.

II. In any situation in which you have established a contract goal, part 26 requires you to use the good faith efforts mechanism of this part. As a recipient, it is up to you to make a fair and reasonable judgment whether a bidder that did not meet the goal made adequate good faith efforts. It is important for you to consider the quality, quantity, and intensity of the different kinds of efforts that the bidder has made. The efforts employed by the bidder should be those that one could reasonably expect a bidder to take if the bidder were actively and aggressively trying to obtain DBE participation sufficient to meet the DBE contract goal. Mere *pro forma* efforts are not good faith efforts to meet the DBE contract requirements. We emphasize, however, that your determination concerning the sufficiency of the firm's good faith efforts is a judgment call: meeting quantitative formulas is not required.

III. The Department also strongly cautions you against requiring that a bidder meet a contract goal (i.e., obtain a specified amount of DBE participation) in order to be awarded a contract, even though the bidder makes an adequate good faith efforts showing. This rule specifically prohibits you from ignoring *bona fide* good faith efforts.

IV. The following is a list of types of actions which you should consider as part of the bidder's good faith efforts to obtain DBE participation. It is not intended to be a mandatory checklist, nor is it intended to be exclusive or exhaustive. Other factors or types of efforts may be relevant in appropriate cases.

A. Soliciting through all reasonable and available means (e.g. attendance at pre-bid meetings, advertising and/or written notices) the interest of all certified DBEs who have the capability to perform the work of the contract. The bidder must solicit this interest within sufficient time to allow the DBEs to respond to the solicitation. The bidder must determine with certainty if the DBEs are interested by taking appropriate steps to follow up initial solicitations.

B. Selecting portions of the work to be performed by DBEs in order to increase the likelihood that the DBE goals will be achieved. This includes, where appropriate, breaking out contract work items into economically feasible units to facilitate DBE participation, even when the prime contractor might otherwise prefer to perform these work items with its own forces.

C. Providing interested DBEs with adequate information about the plans, specifications, and requirements of the contract in a timely manner to assist them in responding to a solicitation.

D. (1) Negotiating in good faith with interested DBEs. It is the bidder's responsibility to make a portion of the work available to DBE subcontractors and suppliers and to select those portions of the work or material needs consistent with the

available DBE subcontractors and suppliers, so as to facilitate DBE participation. Evidence of such negotiation includes the names, addresses, and telephone numbers of DBEs that were considered; a description of the information provided regarding the plans and specifications for the work selected for subcontracting; and evidence as to why additional agreements could not be reached for DBEs to perform the work.

(2) A bidder using good business judgment would consider a number of factors in negotiating with subcontractors, including DBE subcontractors, and would take a firm's price and capabilities as well as contract goals into consideration. However, the fact that there may be some additional costs involved in finding and using DBEs is not in itself sufficient reason for a bidder's failure to meet the contract DBE goal, as long as such costs are reasonable. Also, the ability or desire of a prime contractor to perform the work of a contract with its own organization does not relieve the bidder of the responsibility to make good faith efforts. Prime contractors are not, however, required to accept higher quotes from DBEs if the price difference is excessive or unreasonable.

E. Not rejecting DBEs as being unqualified without sound reasons based on a thorough investigation of their capabilities. The contractor's standing within its industry, membership in specific groups, organizations, or associations and political or social affiliations (for example union vs. non-union employee status) are not legitimate causes for the rejection or non-solicitation of bids in the contractor's efforts to meet the project goal.

F. Making efforts to assist interested DBEs in obtaining bonding, lines of credit, or insurance as required by the recipient or contractor.

G. Making efforts to assist interested DBEs in obtaining necessary equipment, supplies, materials, or related assistance or services.

H. Effectively using the services of available minority/women community organizations; minority/women contractors' groups; local, state, and Federal minority/women business assistance offices; and other organizations as allowed on a case-by-case basis to provide assistance in the recruitment and placement of DBEs.

V. In determining whether a bidder has made good faith efforts, you may take into account the performance of other bidders in meeting the contract. For example, when the apparent successful bidder fails to meet the contract goal, but others meet it, you may reasonably raise the question of whether, with additional reasonable efforts, the apparent successful bidder could have met the goal. If the apparent successful bidder fails to meet the goal, but meets or exceeds the average DBE participation obtained by other bidders, you may view this, in conjunction with other factors, as evidence of the apparent successful bidder having made good faith efforts.

## Appendix B to Part 26—Forms [Reserved]

## Appendix C to Part 26—DBE Business Development Program Guidelines

The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from the recipient.

(A) Each firm that participates in a recipient's business development program (BDP) program is subject to a program term determined by the recipient. The term should consist of two stages; a developmental stage and a transitional stage.

(B) In order for a firm to remain eligible for program participation, it must continue to meet all eligibility criteria contained in part 26.

(C) By no later than 6 months of program entry, the participant should develop and submit to the recipient a comprehensive business plan setting forth the participant's business targets, objectives and goals. The participant will not be eligible for program benefits until such business plan is submitted and approved by the recipient. The approved business plan will constitute the participant's short and long term goals and the strategy for developmental growth to the point of economic viability in non-traditional areas of work and/or work outside the DBE program.

(D) The business plan should contain at least the following:

(1) An analysis of market potential, competitive environment and other business analyses estimating the program participant's prospects for profitable operation during the term of program participation and after graduation from the program.

(2) An analysis of the firm's strengths and weaknesses, with particular attention paid to the means of correcting any financial, managerial, technical, or labor conditions which could impede the participant from receiving contracts other than those in traditional areas of DBE participation.

(3) Specific targets, objectives, and goals for the business development of the participant during the next two years, utilizing the results of the analysis conducted pursuant to paragraphs (C) and (D)(1) of this appendix;

(4) Estimates of contract awards from the DBE program and from other sources which are needed to meet the objectives and goals for the years covered by the business plan; and

(5) Such other information as the recipient may require.

(E) Each participant should annually review its currently approved business plan with the recipient and modify the plan as may be appropriate to account for any changes in the firm's structure and redefined needs. The currently approved plan should be considered the applicable plan for all program purposes until the recipient approves in writing a modified plan. The recipient should establish an anniversary date for review of the participant's business plan and contract forecasts.

(F) Each participant should annually forecast in writing its need for contract awards for the next program year and the succeeding program year during the review of its business plan conducted under paragraph (E) of this appendix. Such forecast should be included in the participant's business plan. The forecast should include:

(1) The aggregate dollar value of contracts to be sought under the DBE program, reflecting compliance with the business plan;

(2) The aggregate dollar value of contracts to be sought in areas other than traditional areas of DBE participation;

(3) The types of contract opportunities being sought, based on the firm's primary line of business; and

(4) Such other information as may be requested by the recipient to aid in providing effective business development assistance to the participant.

(G) Program participation is divided into two stages: (1) a developmental stage and (2) a transitional stage. The developmental stage is designed to assist participants to overcome their social and economic disadvantage by providing such assistance as may be necessary and appropriate to enable them to access relevant markets and strengthen their financial and managerial skills. The transitional stage of program participation follows the developmental stage and is designed to assist participants to overcome, insofar as practical, their social and economic disadvantage and to prepare the participant for leaving the program.

(H) The length of service in the program term should not be a pre-set time frame for either the developmental or transitional stages but should be figured on the number of years considered necessary in normal progression of achieving the firm's established goals and objectives. The setting of such time could be factored on such items as, but not limited to, the number of contracts, aggregate amount of the contract received, years in business, growth potential, etc.

(I) Beginning in the first year of the transitional stage of program participation, each participant should annually submit for inclusion in its business plan a transition management plan outlining specific steps to promote profitable business operations in areas other than traditional areas of DBE participation after graduation from the program. The transition management plan should be submitted to the recipient at the same time other modifications are submitted pursuant to the annual review under paragraph (E) of this section. The plan should set forth the same information as required under paragraph (F) of steps the participant will take to continue its business development after the expiration of its program term.

(J) When a participant is recognized as successfully completing the program by substantially achieving the targets, objectives and goals set forth in its program term, and has demonstrated the ability to compete in the marketplace, its further participation within the program may be determined by the recipient.

(K) In determining whether a concern has substantially achieved the goals and

objectives of its business plan, the following factors, among others, should be considered by the recipient:

(1) Profitability;

(2) Sales, including improved ratio of non-traditional contracts to traditional-type contracts;

(3) Net worth, financial ratios, working capital, capitalization, access to credit and capital;

(4) Ability to obtain bonding;

(5) A positive comparison of the DBE's business and financial profile with profiles of non-DBE businesses in the same area or similar business category; and

(6) Good management capacity and capability.

(L) Upon determination by the recipient that the participant should be graduated from the developmental program, the recipient should notify the participant in writing of its intent to graduate the firm in a letter of notification. The letter of notification should set forth findings, based on the facts, for every material issue relating to the basis of the program graduation with specific reasons for each finding. The letter of notification should also provide the participant 45 days from the date of service of the letter to submit in writing information that would explain why the proposed basis of graduation is not warranted.

(M) Participation of a DBE firm in the program may be discontinued by the recipient prior to expiration of the firm's program term for good cause due to the failure of the firm to engage in business practices that will promote its competitiveness within a reasonable period of time as evidenced by, among other indicators, a pattern of inadequate performance or unjustified delinquent performance. Also, the recipient can discontinue the participation of a firm that does not actively pursue and bid on contracts, and a firm that, without justification, regularly fails to respond to solicitations in the type of work it is qualified for and in the geographical areas where it has indicated availability under its approved business plan. The recipient should take such action if over a 2-year period a DBE firm exhibits such a pattern.

#### **Appendix D to Part 26—Mentor-Protégé Program Guidelines**

(A) The purpose of this program element is to further the development of DBEs, including but not limited to assisting them to move into non-traditional areas of work and/or compete in the marketplace outside the DBE program, via the provision of training and assistance from other firms. To operate a mentor-protégé program, a recipient must obtain the approval of the concerned operating administration.

(B)(1) Any mentor-protégé relationship shall be based on a written development plan, approved by the recipient, which clearly sets forth the objectives of the parties and their respective roles, the duration of the arrangement and the services and resources to be provided by the mentor to the protégé. The formal mentor-protégé agreement may set a fee schedule to cover the direct and indirect cost for such services rendered by

the mentor for specific training and assistance to the protégé through the life of the agreement. Services provided by the mentor may be reimbursable under the FTA, FHWA, and FAA programs.

(2) To be eligible for reimbursement, the mentor's services provided and associated costs must be directly attributable and properly allowable to specific individual contracts. The recipient may establish a line item for the mentor to quote the portion of the fee schedule expected to be provided during the life of the contract. The amount claimed shall be verified by the recipient and paid on an incremental basis representing the time the protégé is working on the contract. The total individual contract figures accumulated over the life of the agreement shall not exceed the amount stipulated in the original mentor/protégé agreement.

(C) DBEs involved in a mentor-protégé agreement must be independent business entities which meet the requirements for certification as defined in subpart D of this part. A protégé firm must be certified *before* it begins participation in a mentor-protégé arrangement. If the recipient chooses to recognize mentor/protégé agreements, it should establish formal general program guidelines. These guidelines must be submitted to the operating administration for approval prior to the recipient executing an individual contractor/ subcontractor mentor-protégé agreement.

#### **Appendix E to Part 26—Individual Determinations of Social and Economic Disadvantage**

The following guidance is adapted, with minor modifications, from SBA regulations concerning social and economic disadvantage determinations (see 13 CFR 124.103(c) and 124.104).

#### **Social Disadvantage**

I. Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias within American society because of their identities as members of groups and without regard to their individual qualities. Social disadvantage must stem from circumstances beyond their control. Evidence of individual social disadvantage must include the following elements:

(A) At least one objective distinguishing feature that has contributed to social disadvantage, such as race, ethnic origin, gender, disability, long-term residence in an environment isolated from the mainstream of American society, or other similar causes not common to individuals who are not socially disadvantaged;

(B) Personal experiences of substantial and chronic social disadvantage in American society, not in other countries; and

(C) Negative impact on entry into or advancement in the business world because of the disadvantage. Recipients will consider any relevant evidence in assessing this element. In every case, however, recipients will consider education, employment and business history, where applicable, to see if the totality of circumstances shows disadvantage in entering into or advancing in the business world.

(1) *Education.* Recipients will consider such factors as denial of equal access to institutions of higher education and vocational training, exclusion from social and professional association with students or teachers, denial of educational honors rightfully earned, and social patterns or pressures which discouraged the individual from pursuing a professional or business education.

(2) *Employment.* Recipients will consider such factors as unequal treatment in hiring, promotions and other aspects of professional advancement, pay and fringe benefits, and other terms and conditions of employment; retaliatory or discriminatory behavior by an employer or labor union; and social patterns or pressures which have channeled the individual into non-professional or non-business fields.

(3) *Business history.* The recipient will consider such factors as unequal access to credit or capital, acquisition of credit or capital under commercially unfavorable circumstances, unequal treatment in opportunities for government contracts or other work, unequal treatment by potential customers and business associates, and exclusion from business or professional organizations.

II. With respect to paragraph I.(A) of this appendix, the Department notes that people with disabilities have disproportionately low incomes and high rates of unemployment. Many physical and attitudinal barriers remain to their full participation in education, employment, and business opportunities available to the general public. The Americans with Disabilities Act (ADA) was passed in recognition of the discrimination faced by people with disabilities. It is plausible that many individuals with disabilities—especially persons with severe disabilities (e.g., significant mobility, vision, or hearing impairments)—may be socially and economically disadvantaged.

III. Under the laws concerning social and economic disadvantage, people with disabilities are not a group presumed to be disadvantaged. Nevertheless, recipients should look carefully at individual showings of disadvantage by individuals with disabilities, making a case-by-case judgment about whether such an individual meets the criteria of this appendix. As public entities subject to Title II of the ADA, recipients must also ensure their DBE programs are accessible to individuals with disabilities. For example, physical barriers or the lack of application and information materials in accessible formats cannot be permitted to thwart the access of potential applicants to the certification process or other services made available to DBEs and applicants.

#### **Economic Disadvantage**

(A) *General.* Economically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged.

(B) *Submission of narrative and financial information.*

(1) Each individual claiming economic disadvantage must describe the conditions which are the basis for the claim in a narrative statement, and must submit personal financial information.

(2) When married, an individual claiming economic disadvantage also must submit separate financial information for his or her spouse, unless the individual and the spouse are legally separated.

(C) *Factors to be considered.* In considering diminished capital and credit opportunities, recipients will examine factors relating to the personal financial condition of any individual claiming disadvantaged status, including personal income for the past two years (including bonuses and the value of company stock given in lieu of cash),

personal net worth, and the fair market value of all assets, whether encumbered or not. Recipients will also consider the financial condition of the applicant compared to the financial profiles of small businesses in the same primary industry classification, or, if not available, in similar lines of business, which are not owned and controlled by socially and economically disadvantaged individuals in evaluating the individual's access to credit and capital. The financial profiles that recipients will compare include total assets, net sales, pre-tax profit, sales/working capital ratio, and net worth.

(D) *Transfers within two years.*

(1) Except as set forth in paragraph (D)(2) of this appendix, recipients will attribute to an individual claiming disadvantaged status any assets which that individual has transferred to an immediate family member, or to a trust, a beneficiary of which is an immediate family member, for less than fair market value, within two years prior to a concern's application for participation in the DBE program, unless the individual claiming disadvantaged status can demonstrate that the transfer is to or on behalf of an immediate family member for that individual's education, medical expenses, or some other form of essential support.

(2) Recipients will not attribute to an individual claiming disadvantaged status any assets transferred by that individual to an immediate family member that are consistent with the customary recognition of special occasions, such as birthdays, graduations, anniversaries, and retirements.

(3) In determining an individual's access to capital and credit, recipients may consider any assets that the individual transferred within such two-year period described by paragraph (D)(1) of this appendix that are not considered in evaluating the individual's assets and net worth (e.g., transfers to charities).

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# Reader Aids

## Federal Register

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**RULES GOING INTO EFFECT FEBRUARY 2, 1999****AGRICULTURE DEPARTMENT****Agricultural Marketing Service**

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**HEALTH AND HUMAN SERVICES DEPARTMENT****Food and Drug Administration**

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##### **Federal Highway Administration**

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#### **TRANSPORTATION DEPARTMENT**

##### **National Highway Traffic Safety Administration**

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