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Wednesday
March 31, 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: April 20, 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)

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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.

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

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 316

RIN 3206–A145

Temporary and Term Employment

AGENCY: Office of Personnel Management.

ACTION: Final regulation.

SUMMARY: The Office of Personnel Management (OPM) is issuing final regulations to allow for the possibility for promotion of employees appointed as Worker-Trainees under TAPER appointments through grade GS–4, WG–5, or equivalent grades in the Federal Wage System.

EFFECTIVE DATE: April 30, 1999.

FOR FURTHER INFORMATION CONTACT: Diane Tyrrell on 202–606–0830, FAX 202–606–2329, or TDD 202–606–0023.

SUPPLEMENTARY INFORMATION: On November 18, 1998, [63 FR 64008] OPM published proposed regulations and received comments from six Federal agency headquarters, six agency components, one employee organization, and one individual. Following is a summary of the regulatory provision and the relevant comments.

Providing Added Advancement Opportunity for Individuals Hired as Worker-Trainees Under the TAPER (Temporary Appointment Pending the Establishment of a Register) Authority

We proposed to raise the maximum grade level for promotion to the GS–4, WG–5, or equivalent in the Federal Wage System, for employees who are serving as Worker-Trainees under the TAPER authority. In response to this proposal, one agency component suggested that the opportunity for advancement be increased to the GS–5 level, and one agency headquarters suggested that there be no limitation on the grade level to which these employees may be promoted. These possibilities were considered during the development of the proposed regulatory change. Because these are trainee positions requiring minimal or limited skills, it would be inappropriate to permit promotions beyond the GS–4 and WG–5, or equivalent, as those levels do not reflect trainee level work. We have, therefore, not adopted these suggestions.

One agency component suggested that this regulatory provision be amended to permit initial appointments under the program be made up to the GS–3, and WG–4, or equivalent level in the Federal Wage System. This suggestion is not consistent with the intent of the Worker-Trainee program. This program is designed to provide a simple process to allow individuals with limited skills the opportunity to qualify and apply for positions in the Federal government. Those individuals who do possess skills which qualify them for higher level positions should be recruited using traditional competitive recruitment methods. We have not adopted this suggestion.

One agency requested that the regulatory change include a ‘‘grandfather clause’’ to enable those employees who are already employed under this program to be covered by this change. All employees serving as Worker-Trainees under the TAPER authority will be subject to the changes that are implemented in the final regulation. A grandfather clause is, therefore, unnecessary since all employees employed under the program would receive coverage under the regulatory change.

One agency component suggested modification of the Student Temporary Employment Program Authority which the agency has used in appointing welfare recipients under the President's Welfare to Work initiative. This request is outside the scope of this proposal.

One employee organization and one individual commenter expressed similar concerns about providing added advantage to those hired under the worker-trainee program as opposed to other employees who have not been afforded the same benefits. Their specific concern was with regard to the recruitment method and the perception that unfair advantage had been given to those hired under this program while involuntarily separated federal employees had not been given the same priority in hiring. These commenters also stated that they believe agencies created positions to be filled under this initiative and that the result of this regulation will be to provide additional advantage in the promotion process. They believe these program aspects provide added benefits that other employees do not have. In addressing these concerns, we would like to point out that recruitment for positions under the welfare to work initiative has been accomplished through typical recruitment methods. Federal regulations require the application of displaced employment program procedures as well as veterans preference in the recruitment process, thus providing the opportunity for involuntarily separated federal employees and veterans to receive the same priority and preference in the hiring process as they do for any other position. Positions filled under the worker-trainee program are primarily the result of reengineering existing positions, rather than creating new ones, thus allowing recruitment at lower levels in order to provide experience and training which will help to prepare these employees to perform the higher level duties and to qualify for consideration for promotion. This is the same process that is used when hiring employees into most entry level clerical and trainee positions which have promotion potential to higher grade levels and, therefore, subjects them to the same promotion process. The additional concerns that were raised by these commenters regarding the receipt by worker-trainees of benefits from outside sources and the benefits entitlements of employees under temporary versus TAPER appointments are outside the scope of this proposal.

After considering all of the comments, we believe our original proposal represents a reasonable compromise. Therefore, the final regulation will allow promotion of Worker-Trainees under the TAPER authority to be made up to the GS–4, WG–5 or equivalent level in the Federal Wage System.

Regulatory Flexibility Act

I certify that these regulations will not have a significant economic impact on a substantial number of small entities

because the regulation pertains only to Federal employees and agencies.

List of Subjects in 5 CFR Part 316

Government employees.

Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM is amending part 316 of title 5, Code of Federal Regulations, as follows:

PART 316—TEMPORARY AND TERM EMPLOYMENT

1. The authority citation for part 316 continues to read as follows:

Authority: 5 U.S.C. 3301, 3302: E.O. 10577, (3 CFR 1954–1958 Comp. Page 218).

2. Section 316.201 paragraph (b) is revised to read as follows:

§ 316.201 Purpose and duration.

* * * * *

(b) *Specific authority for Worker-Trainee positions.* Agencies may make TAPER appointments to positions at GS–1, WG–1, and WG–2 and may reassign or promote the appointees to other positions through grade GS–4, WG–5, or equivalent grades in the Federal Wage System consistent with § 330.501 of this chapter. Agencies are authorized to reassign or promote worker-trainees under this authority.

[FR Doc. 99–7789 Filed 3–30–99; 8:45 am]

BILLING CODE 6325–01–P

OFFICE OF PERSONNEL MANAGEMENT

5 CFR Parts 831, 837, 842, 846, 870, and 890

RIN 3206–AI55

Retirement, Health, and Life Insurance Coverage for Certain Employees of the District of Columbia under the District of Columbia Courts and Justice Technical Corrections Act of 1998

AGENCY: Office of Personnel Management.

ACTION: Interim rule with request for comments.

SUMMARY: The Office of Personnel Management is issuing interim regulations to implement the District of Columbia Courts and Justice Technical Corrections Act of 1998. The effect of these regulations is to extend Federal retirement, health insurance, and life insurance coverage to employees of the Public Defender Service of the District of Columbia under section 7 of the Act, and to exclude certain former employees of the District of Columbia who are hired by the Department of Justice or by the Court Services and Offender Supervision Agency from Federal retirement coverage if they elect, under section 3 of the Act, to continue their coverage under a retirement system for employees of the District of Columbia.

DATES: Interim rules effective March 31, 1999; comments must be received on or before June 29, 1999.

ADDRESSES: Send comments to Mary Ellen Wilson, Retirement Policy Division, Office of Personnel Management, P.O. Box 57, Washington, DC 20044; or deliver to OPM, Room 4351, 1900 E Street, NW., Washington DC. Comments may also be submitted by electronic mail to *combox@opm.gov.*

FOR FURTHER INFORMATION CONTACT: For Parts 831, 837, 842, and 846: Robert Girouard, (202) 606–0299; and for Parts 870 and 890: Karen Leibach, (202) 606–0004.

SUPPLEMENTARY INFORMATION:

1. Background

The National Capital Revitalization and Self-Government Improvement Act of 1997 (the 1997 Act), title XI of Public Law 105–33, 111 Stat. 251 (August 5, 1997) provided for transfers of certain functions and liabilities from the government of the District of Columbia (DC) to the Federal Government.

Section 11201 of the 1997 Act provided for transfer of incarceration functions from the Lorton Correctional Complex, D.C. Department of Corrections, to the Bureau of Prisons, Department of Justice. Section 11202 established a Corrections Trustee to oversee the finances of the DC Department of Corrections during this transfer. Section 11232 established a Pretrial Services, Defense Services, Parole, Adult Probation and Offender Supervision Trustee to manage the reorganization and transfer of the DC government's pretrial services, parole, adult probation, and offender supervision functions and funding.

The 1997 Act provided that a former Federal employee who, after a break in service of 3 days or less, is appointed as a Trustee under section 11202 or section 11232, or who becomes employed by the Trustee, shall be treated as a Federal employee for purposes of chapter 83 (Civil Service Retirement System—CSRS); chapter 84 (Federal Employees Retirement System—FERS); chapter 87 (Federal Employees' Group Life Insurance Program—FEGLI); and chapter 89 (Federal Employees Health Benefits program—FEHB) of title 5, United States Code.

Section 11233 of the 1997 Act provided for an Offender Supervision, Defender, and Court Services Agency to be established during the period beginning August 5, 1998 and ending August 5, 2000 to supervise offenders on probation, parole, and supervised release pursuant to the DC Code, subject to a certification that the Agency is ready to assume its duties.

Section 11246 of the 1997 Act provided for nonjudicial employees of the DC courts to be treated as Federal employees for purposes of chapters 81 (relating to compensation for work injuries), 83, 84, 87, and 89 of title 5, United States Code, and for judicial employees of the D.C. courts to be treated as Federal employees only for purposes of chapters 81, 87, and 89 of title 5. On September 30, 1997, OPM published interim regulations (at 62 FR 50995) to implement the retirement, health insurance, and life insurance provisions of the 1997 Act.

The District of Columbia Courts and Justice Technical Corrections Act of 1998 (the 1998 Act), Public Law 105–274, 112 Stat. 2419, was enacted on October 21, 1998. The 1998 Act made technical changes to the 1997 Act, extended Federal employee benefits to additional groups of DC government employees, and provided certain former DC Government employees who work for the Federal Government with the opportunity to continue their DC government benefits. OPM is issuing interim regulations to implement sections 3, 7(b), 7(c), and 7(e) of the 1998 Act.

2. Renaming of Agencies That Affects These Regulations

Section 7(b) and 7(c) of the 1998 Act changes the names of two agencies established by the 1997 Act. The former ''Pretrial Services, Defense Services, Parole, Adult Probation and Offender Supervision Trustee'' is now known as the ''Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee,'' and the former ''Offender Supervision, Defender, and Court Services Agency'' is now known as the ''Court Services and Offender Supervision Agency.'' OPM is making technical revisions to sections 831.201, 842.107, 870.302, and 890.102 of Title 5, Code of Federal Regulations to implement these changes.

3. Retirement and Insurance Provisions for Certain Employees of the Department of Justice and the Court Services and Offender Supervision Agency

Section 3 of the 1998 Act provides that a former employee of the District of

Columbia who is hired by the Department of Justice or by the Court Services and Offender Supervision Agency may elect to retain retirement coverage under a retirement system for employees of the District of Columbia. Employees are eligible to make this election only if they were hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending on the later of 2 dates: (1) one year after the date on which the Lorton Correctional Complex is closed, or (2) one year after the date on which the Court Services and Offender Supervision Agency assumes its duties.

The election to participate in the District of Columbia's retirement system must occur no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later. The election remains in effect until the employee leaves the Department of Justice or the Court Services and Offender Supervision Agency.

Note that under section 11232(h) of the 1997 Act, the Court Services and Offender Supervision Agency cannot be established, and, by extension, cannot make any Federal appointments, until the Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee certifies that the Agency is ready to assume its duties.

OPM is adding new sections 831.201(i) and 842.104(g) to Title 5, Code of Federal Regulations to exclude employees from CSRS and FERS who elect to retain coverage under a retirement system for employees of the District of Columbia. An employee who transfers from the DC government to a Federal Government position covered by CSRS or FERS will initially be placed under CSRS, CSRS-Offset, or FERS, as appropriate. If the employee subsequently elects to retain D.C. government retirement coverage within 60 days of appointment, the employee will be removed from CSRS, CSRS-Offset, or FERS and placed under a retirement plan for employees of the DC government, retroactive to the date of appointment.

OPM is required by section 3 of the 1998 Act to consult with the Department of Justice, the government of the District of Columbia, and the Court Services and Offender Supervision Agency prior to issuing regulations that implement section 3. OPM consulted with the Department of Justice, the Public Defender Service of the District of Columbia, and the Office of Personnel of the District of Columbia, and received their concurrence prior to issuing these regulations. Because the Court Services and Offender Supervision Agency does not yet exist, OPM consulted with its statutory predecessor, the Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, and received its concurrence prior to issuing these regulations.

4. Retirement and Insurance Provisions for the Public Defender Service of the District of Columbia

Sec. 7(e) of the 1998 Act provides that employees of the Public Defender Service of the District of Columbia are to be treated as Federal employees for purposes of chapters 81, 83, 84, 87, and 89 of title 5, United States Code, beginning the first month after the effective date of these regulations. OPM is revising section 831.201(g) of Title 5, Code of Federal Regulations to provide CSRS coverage to eligible employees of the Public Defender Service, and is adding a new section 842.108 to provide FERS coverage to eligible employees of the Public Defender Service. OPM is also revising section 846.201(d) to provide employees of the Public Defender Service who are automatically placed under CSRS or CSRS-Offset with an election opportunity to transfer to FERS.

OPM is also making technical and conforming revisions to sections 837.101 and 837.102 of Title 5, Code of Federal Regulations, concerning reemployment of annuitants.

OPM is revising sections 870.302 and 890.102 to show that employees of the Public Defender Service of the District of Columbia are no longer excluded from coverage under the Federal Employees' Group Life Insurance and Federal Employees Health Benefits Programs.

Waiver of General Notice of Proposed Rulemaking

Under section 553(b)(3)(B) and (d)(3) of title 5, United States Code, I find that good cause exists for waiving the general notice of proposed rulemaking and for making these rules effective in less than 30 days. These regulations will affect the retirement and insurance coverage of employees of the Public Defender Service of the District of Columbia on and after April 1, 1999, and the retirement coverage of certain employees of the Department of Justice and the Court Services and Offender Supervision Agency after March 31, 1999. Publication of a general notice on proposed rulemaking would be contrary to the public interest because it would delay the commencement of Federal retirement and insurance benefits for employees of the Public Defender Service of the District of Columbia, and because it would delay the opportunity for former employees of the District of Columbia who are appointed in Federal positions by the Department of Justice or by the Court Services and Offender Supervision Agency to elect to continue their coverage under a retirement system for employees of the District of Columbia.

Regulatory Flexibility Act

I certify that this regulation will not have a significant economic impact on a substantial number of small entities because it only affects retirement and insurance benefits for certain employees of the Federal Government and the District of Columbia, and their survivors.

Executive Order 12866, Regulatory Review

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

List of Subjects

5 CFR Parts 831, 837, 842, and 846

Administrative practice and procedure, Air traffic controllers, Alimony, Claims, Disability benefits, Firefighters, Government employees, Income taxes, Intergovernmental relations, Law enforcement officers, Pensions, Reporting and recordkeeping requirements, Retirement.

5 CFR Part 870

Administrative practice and procedure, Government employees, Hostages, Iraq, Kuwait, Lebanon, Life insurance, Retirement.

5 CFR Part 890

Administrative practice and procedure, Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Reporting and recordkeeping requirements, Retirement.

Office of Personnel Management.

Janice R. Lachance,

Director.

Accordingly, OPM amends Parts 831, 837, 842, 846, 870, and 890 of Title 5 of the Code of Federal Regulations as follows:

PART 831—RETIREMENT

1. The authority citation for part 831 is revised to read as follows:

Authority: 5 U.S.C. 8347; § 831.102 also issued under 5 U.S.C. 8334; § 831.106 also issued under 5 U.S.C. 552a; § 831.108 also issued under 5 U.S.C. 8336(d)(2); § 831.114

also issued under 5 U.S.C. 8336(d)(2) and section 7001 of Pub. L. 105–174, 112 Stat. 58; § 831.201(b)(1) also issued under 5 U.S.C. 8347(g); § 831.201(b)(6) also issued under 5 U.S.C. 7701(b)(2); § 831.201(g) also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 831.201(g) also issued under sections 7(b) and 7(e) of Pub. L. 105–274, 112 Stat. 2419; § 831.201(i) also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; § 831.204 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; § 831.303 also issued under 5 U.S.C. 8334(d)(2); § 831.502 also issued under 5 U.S.C. 8337; § 831.502 also issued under section 1(3), E.O. 11228, 3 CFR 1964–1965 Comp. p. 317; § 831.663 also issued under 5 U.S.C. 8339(j) and (k)(2); §§ 831.663 and 831.664 also issued under section 11004 (c)(2) of Pub. L. 103–66, 107 Stat. 412; § 831.682 also issued under section 201(d) of Pub. L. 99–251, 100 Stat. 23; subpart V also issued under 5 U.S.C. 8343a and section 6001 of Pub. L. 100–203, 101 Stat. 1330–275; § 831.2203 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388–328.

Subpart B—Coverage

2. Amend § 831.201 to redesignate paragraphs (g)(3) through (g)(5) as paragraphs (g)(4) through (g)(6) respectively; revise new paragraph (g)(5); and add new paragraphs (g)(3) and (i) to read as follows:

§ 831.201 Exclusions from retirement coverage.

* * * * *

(g) * * *

(3) Effective on and after April 1, 1999, the effective date of section 7(e) of Pub. L. 105–274, 112 Stat. 2419, employees of the Public Defender Service of the District of Columbia employed in a position which is not excluded from CSRS under the provisions of this section;

* * * * *

(5) The District of Columbia Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, authorized by section 11232 of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(b) of Pub. L. 105–274, 112 Stat. 2419, and an employee of the Trustee, if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less, and, in the case of an employee of the Trustee, is employed in a position which is not excluded from CSRS under the provisions of this section, and;

* * * * *

(i)(1) A former employee of the District of Columbia who is appointed in a Federal position by the Department of Justice, or by the Court Services and Offender Supervision Agency established by section 11233(a) of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(c) of Pub. L. 105–274, 112 Stat. 2419, is excluded from CSRS beginning on the date of the Federal appointment, if the employee elects to continue coverage under a retirement system for employees of the District of Columbia under section 3 of Pub. L. 105–274, 112 Stat. 2419, and if the following conditions are met:

(i) The employee is hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending 1 year after the date on which the Lorton Correctional Complex is closed, or 1 year after the date on which the Court Services and Offender Supervision Agency assumes its duties, whichever is later; and

(ii) The employee elects to continue coverage under a retirement system for employees of the District of Columbia no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later.

(2) An individual's election to continue coverage under a retirement system for employees of the District of Columbia remains in effect until the individual separates from service with the Department of Justice or the Court Services and Offender Supervision Agency.

PART 837—REEMPLOYMENT OF ANNUITANTS

3. The authority citation for part 837 continues to read as follows:

Authority: 5 U.S.C. 8337, 8344, 8347, 8455, 8456, 8461, and 8468; and sec. 302, Pub. L. 99–335, 100 Stat. 514, as amended by Title I, sec. 134(a), Pub. L. 100–238, 101 Stat. 1762; Title V, sec. 529 [Title I, sec. 108(c)], Pub. L. 101–509, 104 Stat. 1427, 1450; Div. A, Title XII, sec. 1206(j)(3), Pub. L. 101–510, 104 Stat. 1664; Div. A., Title VI, sec. 655(c), Pub. L. 102–190, 105 Stat. 1392; sec. 8(a), Pub. L. 102–378, 106 Stat. 1359.

Subpart A—General Provisions

4. In § 837.101, paragraph (a)(2) is revised to read as follows:

§ 837.101 Applicability.

(a) * * *

(2) Reemployment of an annuitant by the government of the District of Columbia when the annuitant—

(i) Had been employed subject to CSRS by the District of Columbia prior to October 1, 1987;

(ii) Is an employee of the government of the District of Columbia not excluded from CSRS under § 831.201(g) or § 831.201(i); or

(iii) Is an employee of the District of Columbia who is deemed to be a Federal employee for FERS purposes under § 842.107 or § 842.108 of this chapter; and

* * * * *

5. In § 837.102, revise the definition of *Reemployed* to read as follows:

§ 837.102 Definitions.

* * * * *

Reemployed means reemployed in an appointive or elective position with the Federal Government, or reemployed in an appointive or elective position with the District of Columbia (when the annuitant was first employed subject to CSRS by the District of Columbia before October 1, 1987, or is an employee of the government of the District of Columbia not excluded from CSRS under § 831.201(g) or § 831.201(i) of this chapter, or is an employee of the government of the District of Columbia who is deemed to be a Federal employee for FERS purposes under § 842.107 or § 842.108 of this chapter), whether the position is subject to CSRS, FERS, or another retirement system, but does not include appointment as a Governor of the Board of Governors of the United States Postal Service, or reemployment under the provisions of law that exclude offset of pay by annuity, that is, sections 8344(i), (j), or (k), or 8468(f), (g), or (h) of title 5, United States Code.

* * * * *

PART 842—FEDERAL EMPLOYEES RETIREMENT SYSTEM—BASIC ANNUITY

6. The authority citation for section 842 is revised to read as follows:

Authority: 5 U.S.C. 8461(g); §§ 842.104 and 842.106 also issued under 5 U.S.C. 8461(n); § 842.104 also issued under sections 3 and 7(c) of Pub. L. 105–274, 112 Stat. 2419; § 842.105 also issued under 5 U.S.C. 8402(c)(1) and 7701(b)(2); § 842.106 also issued under section 102(e) of Pub. L. 104–8, 109 Stat. 102, as amended by section 153 of Pub. L. 104–134, 110 Stat. 1321; § 842.107 also issued under sections 11202(f), 11232(e), and 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 842.107 also issued under section 7(b) of Pub. L. 105–274, 112 Stat. 2419; § 842.108 also issued under section 7(e) of Pub. L. 105–274, 112 Stat. 2419; § 842.205 also issued under 5 U.S.C. 8414(b)(1)(B); § 842.213 also issued under 5 U.S.C. 8414(b)(1)(B) and section 7001 of Pub. L. 105–174, 112 Stat. 58; §§ 842.604 and 842.611 also issued under 5 U.S.C. 8417; § 842.607 also issued under 5 U.S.C. 8416 and 8417; § 842.614 also issued under 5 U.S.C. 8419; § 842.615 also issued under 5 U.S.C. 8418; § 842.703 also issued under section 7001(a)(4) of Pub. L. 101–508, 104 Stat. 1388; § 842.707 also issued under section 6001 of Pub. L. 100–203, 101 Stat. 1300; § 842.708 also issued under section

4005 of Pub. L. 101–239, 103 Stat. 2106 and section 7001 of Pub. L. 101–508, 104 Stat. 1388; subpart H also issued under 5 U.S.C. 1104.

Subpart A—Coverage

7. In § 842.104, add paragraph (g) to read as follows:

§ 842.104 Statutory exclusions.

* * * * *

(g) *Certain Federal employees who elect to continue coverage under a retirement system for employees of the District of Columbia.*

(1) A former employee of the District of Columbia who is appointed in a Federal position by the Department of Justice, or by the Court Services and Offender Supervision Agency established by section 11233(a) of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(c) of Pub. L. 105–274, 112 Stat. 2419, is excluded from FERS coverage beginning on the date of the Federal appointment, if the employee elects to continue coverage under a retirement system for employees of the District of Columbia under section 3 of Pub. L. 105–274, 112 Stat. 2419, and if the following conditions are met:

(i) The employee is hired by the Department of Justice or by the Court Services and Offender Supervision Agency during the period beginning August 5, 1997, and ending 1 year after the date on which the Lorton Correctional Complex is closed, or 1 year after the date on which the Court Services and Offender Supervision Agency assumes its duties, whichever is later; and

(ii) The employee elects to continue coverage under a retirement system for employees of the District of Columbia no later than June 1, 1999 or 60 days after the date of the Federal appointment, whichever is later.

(2) An individual's election to continue coverage under a retirement system for employees of the District of Columbia remains in effect until the individual separates from service with the Department of Justice or the Court Services and Offender Supervision Agency.

8. In § 842.107, revise paragraph (c) to read as follows:

§ 842.107 Employees covered under the National Capital Revitalization and Self-Government Improvement Act of 1997.

* * * * *

(c) The District of Columbia Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee, authorized by section 11232 of Pub. L. 105–33, 111 Stat. 251, as amended by section 7(b) of Pub. L. 105–274, 112 Stat. 2419, and an employee of the Trustee, if the Trustee or employee is a former Federal employee appointed with a break in service of 3 days or less.

9. Add § 842.108 to subpart A to read as follows:

§ 842.108 Employees covered under the District of Columbia Courts and Justice Technical Corrections Act of 1998.

Employees of the Public Defender Service of the District of Columbia are deemed to be Federal employees for FERS purposes on and after April 1, 1999.

PART 846—FEDERAL EMPLOYEES RETIREMENT SYSTEM—ELECTIONS OF COVERAGE

10. The authority citation for section 846 is revised to read as follows:

Authority: 5 U.S.C. 8347(a) and 8461(g) and Title III of Pub. L. 99–335, 100 Stat. 517; § 846.201(b) also issued under 5 U.S.C. 7701(b)(2) and section 153 of Pub. L. 104–134, 110 Stat. 1321; § 846.201(d) also issued under section 11246(b) of Pub. L. 105–33, 111 Stat. 251; § 846.201(d) also issued under section 7(e) of Pub. L. 105–274, 112 Stat. 2419; § 846.202 also issued under section 301(d)(3) of Pub. L. 99–335, 100 Stat. 517; § 846.726 also issued under 5 U.S.C. 1104; subpart G also issued under section 642 of Pub. L. 105–61, 111 Stat. 1272.

Subpart B—Elections

11. In § 846.201, paragraph (d)(1) is revised to read as follows:

§ 846.201 Elections to become subject to FERS.

* * * * *

(d) *Exceptions.* (1) An individual who is an employee of the government of the District of Columbia may not elect to become subject to FERS except an individual so employed who is covered by CSRS and eligible for FERS coverage by operation of section 11246 of Pub. L. 105–33, 111 Stat. 251, or section 7(e) of Pub. L. 105–274, 112 Stat. 2419.

* * * * *

PART 870—FEDERAL EMPLOYEES' GROUP LIFE INSURANCE PROGRAM

12. The authority citation for part 870 is revised to read as follows:

Authority: 5 U.S.C. 8716; § 870.302(c) also issued under 5 U.S.C. 7701(b)(2); subpart J also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; § 870.302 also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251 and section 7(e) of Pub. L. 105–274, 112 Stat. 2419.

13. Section 870.302 is amended by revising paragraph (a)(3) to read as follows:

§ 870.302 Exclusions.

(a) * * *

(3) An individual first employed by the government of the District of Columbia on or after October 1, 1987. Exceptions:

(i) An employee of St. Elizabeths Hospital, who accepts employment with the District of Columbia Government following Federal employment without a break in service, as provided in section 6 of Pub. L. 98–621 (98 Stat. 3379);

(ii) An employee of the District of Columbia Financial Responsibility and Management Assistance Authority (Authority), who makes an election under the Technical Corrections to Financial Responsibility and Management Assistance Act (section 153 of Pub. L. 104–134 (110 Stat. 1321)) to be considered a Federal employee for life insurance and other benefits purposes; employees of the Authority who are former Federal employees are subject to the provisions of §§ 870.503(d) and 870.705 of this part;

(iii) The Corrections Trustee and the Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee and employees of these Trustees who accept employment with the District of Columbia government within 3 days after separating from the Federal Government;

(iv) Effective October 1, 1997, judicial and nonjudicial employees of the District of Columbia Courts, as provided by Pub. L. 105–33 (111 Stat. 251); and

(v) Effective April 1, 1999, employees of the Public Defender Service of the District of Columbia, as provided by Pub. L. 105–274 (112 Stat. 2419).

PART 890—FEDERAL EMPLOYEES HEALTH BENEFITS PROGRAM

14. The authority citation for part 890 is revised to read as follows:

Authority: 5 U.S.C. 8913; § 890.803 also issued under 50 U.S.C. 403(p), 22 U.S.C. 4069c and 4069c-1; subpart L also issued under sec. 599C of Pub. L. 101–513, 104 Stat. 2064, as amended; § 890.102 also issued under sections 11202(f), 11232(e), and 11246(b) and (c) of Pub. L. 105–33, 111 Stat. 251 and section 7(e) of Pub. L. 105–274, 112 Stat. 2419.

15. Section 890.102 is amended by revising paragraph (c)(8) to read as follows:

§ 890.102 Coverage.

* * * * *

(c) * * *

(8) An individual first employed by the government of the District of Columbia on or after October 1, 1987. However, this exclusion does not apply to:

(i) Employees of St. Elizabeths Hospital who accept offers of employment with the District of Columbia government without a break in service, as provided in section 6 of Pub. L. 98–621 (98 Stat. 3379);

(ii) The Corrections Trustee and the Pretrial Services, Parole, Adult Probation and Offender Supervision Trustee and employees of these Trustees who accept employment with the District of Columbia government within 3 days after separating from the Federal Government;

(iii) Effective October 1, 1997, judges and nonjudicial employees of the District of Columbia Courts, as provided by Pub. L. 105–33 (111 Stat. 251); and

(iv) Effective April 1, 1999, employees of the Public Defender Service of the District of Columbia, as provided by Pub. L. 105–274 (112 Stat. 2419).

[FR Doc. 99–7871 Filed 3–30–99; 8:45 am]

BILLING CODE 6325–01–P

DEPARTMENT OF AGRICULTURE

Farm Service Agency

7 CFR Part 723

Commodity Credit Corporation

7 CFR Part 1464

RIN 0560–AF 20

1998 Marketing Quotas and Price Support Levels for Fire-Cured (Type 21), Fire-Cured (Types 22–23), Maryland (Type 32), Dark Air-Cured (Types 35–36), Virginia Sun-Cured (Type 37), Cigar-Filler (Type 41), Cigar-Filler and Binder (Types 42–44 and 53–55), and Cigar Binder (Types 51–52) Tobaccos

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

ACTION: Affirmation of determination and final rule.

SUMMARY: The purpose of this notice is to codify the national marketing quotas and price support levels for the 1998 crops for several kinds of tobacco announced by press release on February 27, 1998.

In accordance with the Agricultural Adjustment Act of 1938, as amended (the 1938 Act), the Secretary determined the 1998 marketing quotas to be as follows: fire-cured (type 21), 2.725 million pounds; fire-cured (types 22–23), 44.6 million pounds; Maryland (type 32), 5.45 million pounds; dark air-cured (types 35–36), 11.15 million pounds; Virginia sun-cured (type 37), 165,000 pounds; cigar-filler (type 41), 0.665 million pounds; cigar-filler and binder (types 42–44 and 53–55), 6.63 million pounds; and cigar binder (types 51–52), 1.31 million pounds.

Quotas are necessary to adjust the production levels of certain tobaccos to more fully reflect supply and demand conditions, as provided by statute.

In accordance with the Agricultural Act of 1949 as amended (the 1949 Act), the Secretary determined the 1998 levels of price support to be as follows (in cents per pound): fire-cured (type 21), 153.6; fire-cured (types 22–23), 168.1; dark air-cured (types 35–36), 145.0; Virginia sun-cured (type 37), 136.0; and cigar-filler and binder (types 42–44 and 53–55), 121.2. Price support for Maryland (type 32), cigar-filler (type 41), and cigar binder (types 51–52) were not announced because producers of each of these kinds of tobacco had disapproved marketing quotas for many years and were not expected to approve quotas in separate referenda held on March 23–26, 1998. This notice also fixes a technical error in a section heading.

EFFECTIVE DATE: February 27, 1998.

FOR FURTHER INFORMATION CONTACT: Robert L. Tarczy, Tobacco and Peanuts Division, FSA, USDA, STOP 0514, 1400 Independence Avenue, SW, Washington, DC 20250–0514, telephone 202–720–5346. Copies of the cost-benefit assessment prepared for this rule can be obtained from Mr. Tarczy.

SUPPLEMENTARY INFORMATION:

Executive Order 12866

This notice has been determined to be significant and was reviewed by OMB under Executive Order 12866.

Federal Assistance Program

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

Executive Order 12988

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

Regulatory Flexibility Act

It has been determined that the Regulatory Flexibility Act is not applicable to this final rule since neither the Farm Service Agency (FSA) nor the Commodity Credit Corporation (CCC) is required by 5 U.S.C. 553 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject of these determinations.

Paperwork Reduction Act

The amendments to 7 CFR parts 723 and 1464 set forth in this final rule do not contain information collections that require clearance by the Office of Management and Budget under the provisions of 44 U.S.C. chapter 35.

Unfunded Federal Mandates

This rule contains no Federal mandates under the regulatory provisions of Title II of the Unfunded Mandate Reform Act of 1995 (UMRA), for State, local, and tribal governments or the private sector. Thus, this rule is not subject to the requirements of sections 202 and 205 of the UMRA.

Statutory Background

This final rule is issued pursuant to the provisions of the 1938 Act and the 1949 Act.

On February 27, 1998, the Secretary determined and announced the national marketing quotas and price support levels for the 1998 crops of fire-cured (type 21), fire-cured (types 22–23), dark air-cured (types 35–36), Virginia sun-cured (type 37), and cigar-filler and binder (types 42–44 and 53–55) tobaccos. In addition, the Secretary announced marketing quotas for Maryland (type 32), cigar-filler (type 41) and cigar-binder (types 51–52). A number of related determinations were made at the same time which this final rule affirms. On the same date, the Secretary also announced that referenda would be conducted by mail with respect to Maryland (type 32), Virginia sun-cured (type 37), cigar-filler (type 41), and cigar-binder (types 51–52) tobaccos.

During March 23–26, 1998, eligible producers of Maryland (types 32), Virginia sun-cured (type 37), cigar-filler (type 41), and cigar binder (types 51–52) tobacco voted in separate referenda to determine whether such producers approved marketing quotas for the 1998, 1999, and 2000 marketing years (MY) for these tobaccos. Of the producers voting, 14.8 percent favored marketing quotas for Maryland (type 32) tobacco; 96.7 percent favored marketing quotas for Virginia sun-cured (type 37) tobacco; 9.1 percent favored marketing quotas for cigar-filler (type 41) tobacco; and 2.5 percent favored marketing quotas for cigar-filler (types 51–52) tobacco. Accordingly, among these tobaccos, quotas and price supports for only Virginia sun-cured (type 37) tobacco are in effect for the 1998 though 2000 MYs. For the other three kinds, neither marketing quotas nor price supports will be in effect for the next 3 MYs.

In accordance with section 312 of the 1938 Act, for tobaccos other than flue-

cured tobacco and burley tobacco, the Secretary of Agriculture is required to proclaim not later than March 1 of any MY a national marketing quota for those tobaccos for which either: (1) are tobaccos for which marketing quotas have been approved in the prior 3 years or (2) are tobaccos for which it has been 3 years since the last quota referendum. There is a vote on quotas for each kind in a 3-year cycle. With respect to Virginia sun-cured (type 37) tobacco, the 1997 MY was the last year of 3 consecutive years of quota. For Maryland (type 32), cigar-filler (type 41), and cigar binder (types 51–52) tobacco, all of which had been without quotas, 1998 represented the beginning of another 3 year cycle. Accordingly, marketing quotas for Maryland (type 32), Virginia sun-cured (type 37), cigar-filler (type 41) and cigar binder (types 51–52) tobaccos were proclaimed for each of the 3 MYs beginning October 1, 1998; October 1, 1999, and October 1, 2000, but subject to producer approval. As indicated, however, only Virginia sun-cured (type 37) producers approved quotas in the four referenda. Quotas for the other tobaccos covered by this notice were approved in referenda which were still effective.

Because of producer approval of quotas, sections 312 and 313 of the 1938 Act required that the Secretary also announce the reserve supply level and the total supply of fire-cured (type 21), fire-cured (types 22–23), dark air-cured (types 35–36), Virginia sun-cured (type 37), and cigar filler and binder (types 42–44 and 53–55) tobaccos for the MY beginning October 1, 1997. The Secretary also announced the amounts of the national marketing quotas, national acreage allotments, national acreage factors for apportioning the national acreage allotments (less reserves) to old farms, and the amounts of the national reserves and parts thereof available for (1) new farms and (2) making corrections and adjusting inequities in old farm allotments.

Under the 1949 Act, price support is required to be made available for each crop of a kind of tobacco for which marketing quotas are in effect or for which marketing quotas have not been disapproved by producers. Since producers of Maryland (type 32), cigar filler (type 41), and cigar binder (types 51–52) tobacco disapproved quotas, price supports were not considered in this notice. With respect to the 1998 crops of the kinds of tobacco that are the subject of this notice which have approved national marketing quotas, the respective maximum levels of price support for these kinds of tobacco is determined in accordance with section 106 of the 1949 Act. Announcement of the price support levels for these five kinds of tobacco are normally made before the planting seasons. Under the provisions of Section 1108(c), of Pub. L. No. 99–272, the price support level announcements do not require prior rulemaking. For the 1998 crops, the price support announcements were made on February 27, 1998, at the same time the quota announcements were made. Quota and price support determinations for burley and flue-cured tobacco are made separately and are the subject of separate notices.

Statutory Provisions

Section 312(b) of the 1938 Act provides, in part, that the national marketing quota for a kind of tobacco is the total quantity of that kind of tobacco that may be marketed such that a supply of such tobacco equal to its reserve supply level is made available during the MY.

Section 313(g) of the 1938 Act provides that the Secretary may convert the national marketing quota into a national acreage allotment for apportionment to individual farms. Since producers of these kinds of tobacco generally produce considerably less than their respective national acreage allotments allow, a larger quota is necessary to make available production equal to the reserve supply level. Further, under section 312(b) of the 1938 Act the amount of the national marketing quota may, not later than the following March 1, be increased by not more than 20 percent over the straight formula amount if the Secretary determines that such increase is necessary in order to meet market demands or to avoid undue restriction of marketings in adjusting the total supply to the reserve supply level.

Section 301(b)(14)(B) of the 1938 Act defines ''reserve supply level'' as the normal supply, plus 5 percent thereof, to ensure a supply adequate to meet domestic consumption and export needs in years of drought, flood, or other adverse conditions, as well as in years of plenty. ''Normal supply'' is defined in section 301(b)(10)(B) of the 1938 Act as a normal year's domestic consumption and exports, plus 175 percent of a normal year's domestic use and 65 percent of a normal year's exports as an allowance for a normal year's carryover.

Normal year's domestic consumption is defined in section 301(b)(11)(B) of the 1938 Act as the average quantity produced and consumed in the United States during the 10 MYs immediately preceding the MY in which such consumption is determined, adjusted for current trends in such consumption. Normal year's exports is defined in section 301(b)(12) of the 1938 Act as the average quantity produced in and exported from the United States during the 10 MYs immediately preceding the MY in which such exports are determined, adjusted for current trends in such exports.

Also, under section 313(g) of the 1938 Act, the Secretary is authorized to establish a national reserve from the national acreage allotment in an amount equivalent to not more than 1 percent of the national acreage allotment for the purpose of making corrections in farm acreage allotments, adjusting for inequities, and for establishing allotments for new farms. The Secretary has determined that the national reserve, noted herein, for the 1998 crop of each of these kinds of tobacco is adequate for these purposes.

The Proposed Rule

On February 2, 1998, a proposed rule was published in the **Federal Register** (63 FR 5285) in which interested persons were requested to comment with respect to setting quotas for the tobacco kinds addressed in this notice.

Discussion of Comments

Seventeen written responses were received during the comment period which ended February 13, 1998. A summary of these comments by kind of tobacco follows:

(1) *Fire-cured (type 21) tobacco.* Three comments were received. All recommended a 15 percent increase in 1998 quotas.

(2) *Fire-cured (types 22–23) tobacco.* Five comments were received. All recommended no change in 1998 quotas.

(3) *Dark air-cured (types 35–36) tobacco.* Six comments were received. All recommended a 20 percent increase in the quota.

(4) *Virginia sun-cured (type 37) tobacco.* Three comments were received. They recommended a quota increase of 15 percent.

(5) *Cigar-filler and binder (types 42–44 and 53–55) tobacco.* No comments were received.

Quota and Related Determinations

The tobacco program is, through assessments, operated at no net cost to taxpayers other than the costs common to all price support operations. Accordingly producer comments are given considerable weight in this review. Based on a review of the comments received and the latest available statistics of the Federal Government, which appear to be the

most reliable data available, the following determinations were made for the five subject tobacco kinds:

(1) Fire-Cured (Type 21) Tobacco

The average annual quantity of fire-cured (type 21) tobacco produced in the United States that is estimated to have been consumed in the United States during the 10 MYs preceding the 1997 MY was approximately 0.8 million pounds. The average annual quantity produced in the United States and exported from the United States during the 10 MYs preceding the 1997 MY was 2.1 million pounds (farm sales weight basis). Both domestic use and exports have trended sharply downward. Because of these considerations, a normal year's domestic consumption has been determined to be 0.6 million pounds, and a normal year's exports have been determined to be 1.6 million pounds. Application of the formula prescribed by section 301(b)(14)(B) of the 1938 Act results in a reserve supply level of 4.4 million pounds.

Manufacturers and dealers reported stocks held on October 1, 1997, of 2.4 million pounds. The 1997 crop is estimated to be 2.0 million pounds. Therefore, total supply for the 1997 MY is 4.4 million pounds. During the 1997 MY, it is estimated that disappearance will total approximately 2.2 million pounds. Deducting this disappearance from total supply results in a 1998 MY beginning stock estimate of 2.2 million pounds.

The difference between the reserve supply level and the estimated carryover on October 1, 1998, is 2.2 million pounds. This represents the quantity that may be marketed that will make available during the 1998 MY a supply equal to the reserve supply level. More than 95 percent of the announced national marketing quota is expected to be produced. Accordingly, it has been determined that a 1998 national marketing quota of 2.271 million pounds is necessary to make available production of 2.2 million pounds. As permitted by section 312(b) of the 1938 Act, it was further determined that the 1998 national marketing quota should be increased by 20 percent over the normal formula amount in order to avoid undue restriction of marketings. This determination took into account the size of last year's quota, the comments, the long storage time for this tobacco and the possibility of changes in demand over expected demand. Thus, the national marketing quota for the 1998 crop is 2.725 million pounds.

In accordance with section 313(g) of the 1938 Act, dividing the 1998 national marketing quota of 2.725 million pounds by the 1993–97, 5-year national average yield of 1,594 pounds per acre results in a 1998 national acreage allotment of 1,709.54 acres.

Pursuant to the provisions of section 313(g) of the 1938 Act, a national acreage factor of 1.15 is determined by dividing the national acreage allotment for the 1998 MY, less a national reserve of 9.25 acres, by the total of the 1998 preliminary farm acreage allotments (previous year's allotments). The preliminary farm acreage allotments reflect the factors specified in section 313(g) of the 1938 Act for apportioning the national acreage allotment, less the national reserve, to old farms.

(2) Fire-Cured (Types 22–23) Tobacco

The average annual quantity of fire-cured (types 22–23) tobacco produced in the United States that is estimated to have been consumed in the United States during the 10 years preceding the 1997 MY was approximately 19.1 million pounds. The average annual quantity produced in the United States and exported during the 10 MYs preceding the 1997 MY was 15.8 million pounds (farm sales weight basis). Domestic use has trended upward while exports have varied. Because of these considerations, a normal year's domestic consumption has been determined to be 30.0 million pounds, and a normal year's exports have been determined to be 18.4 million pounds. Application of the formula prescribed by section 301(b)(14)(B) of the 1938 Act results in a reserve supply level of 118.5 million pounds.

Manufacturers and dealers reported stocks held on October 1, 1997, of 83.3 million pounds. The 1997 crop is estimated to be 40.0 million pounds. Therefore, total supply for the 1997 MY is 123.3 million pounds. During the 1997 MY, it is estimated that disappearance will total approximately 40.0 million pounds. Deducting this disappearance from total supply results in a 1998 MY beginning stock estimate of 83.3 million pounds.

The difference between the reserve supply level and the estimated carryover on October 1, 1998, is 35.2 million pounds. This represents the quantity that may be marketed that will make available during the 1998 MY a supply equal to the reserve supply level. About 95 percent of the announced national marketing quota is expected to be produced. Accordingly, it has been determined that a 1998 national marketing quota of 37.2 million pounds is necessary to make available production of 35.2 million pounds.

Utilizing section 312(b) of the 1938 Act, it was further determined for the same reason as with fire-cured (type 21) tobacco, that the 1998 national marketing quota should be increased by 20 percent over the normal formula amount in order to avoid undue restriction of marketings. Thus, the national marketing quota for the 1998 crop is 44.6 million pounds.

In accordance with section 313(g) of the 1938 Act, dividing the 1998 national marketing quota of 44.6 million pounds by the 1993–97, 5-year average yield of 2,652 pounds per acre results in a 1998 national acreage allotment of 16,817.50 acres.

Pursuant to the provisions of section 313(g) of the 1938 Act, a national acreage factor of 1.0 is determined by dividing the national acreage allotment for the 1998 MY, less a national reserve of 58.00 acres, by the total of the 1998 preliminary farm acreage allotments (previous year's allotments). The preliminary farm acreage allotments reflect the factors specified in section 313(g) of the 1938 Act for apportioning the national acreage allotment, less the national reserve, to old farms.

(3) Dark Air-Cured (Types 35–36) Tobacco

The average annual quantity of dark air-cured (types 35–36) tobacco produced in the United States that is estimated to have been consumed in the United States during the 10 MYs preceding the 1997 MY was approximately 9.5 million pounds. The average annual quantity produced in the United States and exported from the United States during the 10 MYs preceding the 1997 MY was 1.5 million pounds (farm sales weight basis). Domestic use has been erratic while exports have trended downward. Because of these considerations, a normal year's domestic consumption has been determined to be 9.9 million pounds, and a normal year's exports have been determined to be 1.4 million pounds. Application of the formula prescribed by section 301(b)(14)(B) of the 1938 Act results in a reserve supply level of 31.0 million pounds.

Manufacturers and dealers reported stocks held on October 1, 1997, of 23.8 million pounds. The 1997 crop is estimated to be 8.7 million pounds. Therefore, total supply for the 1997 MY is 32.5 million pounds. During the 1997 MY, it is estimated that disappearance will total approximately 10.0 million pounds. Deducting this disappearance from total supply results in a 1998 MY beginning stock estimate of 22.5 million pounds.

The difference between the reserve supply level and the estimated carryover on October 1, 1998, is 8.5

million pounds. This represents the quantity that may be marketed that will make available during the 1998 MY a supply equal to the reserve supply level. About 90 percent of the announced national marketing quota is expected to be produced. Accordingly, it has been determined that a national marketing quota of 9.29 million pounds is necessary to make available production of 8.5 million pounds. In accordance with section 312(b) of the 1938 Act, it has been further determined that the 1998 national marketing quota should be increased by 20 percent over the normal formula amount in order to avoid undue restriction of marketings. This determination took into account the same factors as with fire-cured (type 21) tobacco and industry preferences. This results in a national marketing quota for the 1998 MY of 11.15 million pounds. Otherwise, the quota would be well below the level for the 1997 crop.

In accordance with section 313(g) of the 1938 Act, dividing the 1998 national marketing quota of 11.15 million pounds by the 1993–97, 5-year average yield of 2,284 pounds per acre results in a 1998 national acreage allotment of 4,881.79 acres.

Pursuant to the provisions of section 313(g) of the 1938 Act, a national acreage factor of 1.20 is determined by dividing the national acreage allotment for the 1998 MY, less a national reserve of 34.70 acres, by the total of the 1998 preliminary farm acreage allotments (previous year's allotments). The preliminary farm acreage allotments reflect the factors specified in section 313(g) of the 1938 Act for apportioning the national acreage allotment, less the national reserve, to old farms.

(4) Virginia Sun-Cured (Type 37) Tobacco.

The average annual quantity of Virginia sun-cured (type 37) tobacco produced in the United States that is estimated to have been consumed in the United States during the 10 MYs preceding the 1997 MY was approximately 90,000 pounds. The average annual quantity produced in the United States and exported from the United States during the 10 MYs preceding the 1997 MY was approximately 90,000 pounds (farm sales weight basis). Both domestic use and exports have shown a sharp downward trend. Because of these considerations, a normal year's domestic consumption has been determined to be 30,000 pounds, and a normal year's exports have been determined to be 20,000 pounds. Application of the formula prescribed by section 301(b)(14)(B) of the 1938 Act results in a reserve supply level of 121,000 pounds.

Manufacturers and dealers reported stocks held on October 1, 1997, of 20,000 pounds. The 1997 crop is estimated to be 100,000 pounds. Therefore, total supply for the 1997 MY is 120,000 pounds. During the 1997 MY, it is estimated that disappearance will total approximately 120,000 pounds. Deducting this disappearance from total supply results in a 1998 MY beginning stock estimate of 0 pounds.

The difference between the reserve supply level and the estimated carryover on October 1, 1997, is 121,000 pounds. This represents the quantity that may be marketed that will make available during the 1997 MY a supply equal to the reserve supply level. Less than three-quarters of the announced national marketing quota is expected to be produced. Accordingly, it has been determined that a 1998 national marketing quota of 163,000 pounds is necessary to make available production of 121,000 pounds. Thus, the national marketing quota for the 1998 crop is 163,000 pounds which is greater than the preceding quota by about 15 percent and should not unduly restrict marketings.

In accordance with section 313(g) of the 1938 Act, dividing the 1998 national marketing quota of 163,000 pounds by the 1993–97, 5-year average yield of 1,376 pounds per acre results in a 1998 national acreage allotment of 118.46 acres.

Pursuant to the provisions of section 313(g) of the 1938 Act, a national acreage factor of 1.15 is determined by dividing the national acreage allotment for the 1998 MY, less a national reserve of 0.57 acres, by the total of the 1998 preliminary farm acreage allotments (previous year's allotments). The preliminary farm acreage allotments reflect the factors specified in section 313(g) of the 1938 Act for apportioning the national acreage allotment, less the national reserve, to old farms.

(5) Cigar-Filler and Binder (Types 42–44 and 53–55) Tobacco

The average annual quantity of cigar-filler and binder (types 42–44 and 53–55) tobacco produced in the United States that is estimated to have been consumed in the United States during the 10 MYs preceding the 1997 MY was approximately 12.1 million pounds. The average annual quantity produced in the United States and exported from the United States during the 10 MYs preceding the 1997 MY was less than 100,000 pounds (farm sales weight). Domestic use has trended downward and exports are very small. Thus, a normal year's domestic consumption has been determined to be 7.2 million pounds, and a normal year's exports has been determined to be zero pounds. Application of the formula prescribed by section 301(b)(14)(B) of the 1938 Act results in a reserve supply level of 20.8 million pounds.

Manufacturers and dealers reported stocks held on October 1, 1997, of 17.8 million pounds. The 1997 crop is estimated to be 5.5 million pounds. Therefore, total supply for the 1997 MY is 23.3 million pounds. During the 1997 MY, it is estimated that disappearance will total about 8.0 million pounds. Deducting this disappearance from total supply results in a 1998 MY beginning stock estimate of 15.3 million pounds.

The difference between the reserve supply level and the estimated carryover on October 1, 1998, is 5.5 million pounds. This represents the quantity that may be marketed that will make available during the 1998 MY a supply equal to the reserve supply level. Slightly more than 80 percent of the announced national marketing quota is expected to be produced. Accordingly, it has been determined that a 1998 national marketing quota of 6.63 million pounds is necessary to make available production of 5.5 million pounds. This results in a 1998 national marketing quota of 6.63 million pounds. This determination reflects that there are short reserve supplies and takes into account possible changes in expected demand and the fact that even with this adjustment the 1998 quota will be less than the 1997 crop quota.

In accordance with section 313(g) of the 1938 Act, dividing the 1998 national marketing quota of 6.63 million pounds by the 1993–97, 5-year average yield of 1,921 pounds per acre results in a 1998 national acreage allotment of 3,451.33 acres.

Pursuant to the provisions of section 313(g), of the 1938 Act, a national factor of 0.8 is determined by dividing the national acreage allotment for the 1998 MY, less a national reserve of 15.80 acres, by the total of the 1998 preliminary farm acreage allotments (previous year's allotments). The preliminary farm acreage allotments reflect the factors specified in section 313(g) of the 1938 Act for apportioning the national acreage allotment, less the national reserve, to old farms.

(6) Referendum Results for Virginia Sun-Cured (type 37), Maryland (type 32), Cigar Filler (type 41), and Cigar Binder (types 51–52) Tobaccos

Because of the results of producer referenda, marketing quotas shall be in effect for the 1998 MY for Virginia sun-

cured (type 37). However, they will not be in effect for Maryland (type 32), cigar filler (type 41), nor cigar binder (types 51–52) tobacco. In referenda held March 23–26, 1998, 96.7 percent of Virginia sun-cured producers voted in favor of quotas. However, only 14.8 percent of Maryland (type 32), 9.1 percent of cigar filler (type 41), and 2.5 percent of cigar binder (types 51–52) producers voted for quotas.

REFERENDA DATA

Kind of tobacco	Total votes	Yes votes	No votes	% yes votes
Virginia sun-cured (type 37)	60	58	2	96.7
Maryland (type 32)	698	103	595	14.8
Cigar-filler (type 41)	230	21	209	9.1
Cigar-binder (types 51–52)	120	3	117	2.5

Price Support

Statutory Provisions

Section 106(f)(6)(A) of the 1949 Act provides that the level of support for the 1998 crop of a kind of tobacco (other than flue-cured and burley) shall be the level in cents per pound at which the 1997 crop of such kind of tobacco was supported, plus or minus, as appropriate, the amount by which (i) the basic support level for the 1998 crop, as it would otherwise be determined under section 106(b) of the 1949 Act, is greater or less than (ii) the support level for the 1997 crop, as it would otherwise be determined under section 106(b). To the extent that the price support level would be increased as a result of that comparison, section 106(f) provides that the increase may be modified using the provisions of 106(d). Under 106(d), the Secretary may reduce the level of support for grades the Secretary determines will likely be in excess supply so long as the weighted level of support for all grades maintains at least 65 percent of the increase in the price support (from the previous year). The Secretary must consult with the appropriate tobacco associations and take into consideration the supply, and anticipated demand for the tobacco, including the effect of the action on other kinds of quota tobacco. In determining whether the supply of any grade of any kind of tobacco of a crop will be excessive, the Secretary is required to consider the domestic supply, including domestic inventories, the amount of such tobacco pledged as security for price support loans, and anticipated domestic and export demand, based on the maturity, uniformity, and stalk position of such tobacco.

Section 106(b) of the 1949 Act provides that the ‘‘basic support level’’ for any year is determined by multiplying the support level for the 1959 crop of such kind of tobacco by the ratio of the average of the index of prices paid by farmers, including wage rates, interest and taxes (referred to as the ‘‘parity index’’) for the 3 previous calendar years to the average index of such prices paid by farmers, including wage rates, interest and taxes for the 1959 calendar year.

In addition, section 106(f)(6)(B) of the 1949 Act provides that to the extent requested by the board of directors of an association, through which price support is made available to producers (producer association), the Secretary may reduce the support level determined under section 106(f)(6)(A) of the 1949 Act for the respective kind of tobacco to more accurately reflect the market value and improve the marketability of such tobacco. Accordingly, the price support level for a kind of tobacco set forth in this rule could be reduced if such a request is made.

Price Support Determinations

The following levels of price support for the 1997 crops of various kinds of tobacco, which were determined in accordance with section 106(f)(6)(A) of the 1949 Act, are as follows:

Kind and type	Support level (cents per pound)
Fire-cured (type 21)	149.8
Fire-cured (types 22–23)	162.3
Dark air-cured (types 35–36)	139.8
Virginia sun-cured (type 37)	132.6
Cigar-filler and binder (types 42–44 and 53–55)	116.9

For the 1998 crop year:

(1) Average parity indexes for calendar year periods 1994–1996 and 1995–1997 are as follows:

Year	Index	Year	Index
1994	1,398	1995	1,437
1995	1,437	1996	1,504
1996	1,504	1997	1,527
Average	1,446	Average	1,489

(2) Average parity index, calendar year 1959 = 298.

(3) 1997 ratio of 1,446 to 298 = 4.85; 1998 ratio of 1,488 to 298 = 5.00.

(4) Ratios times 1959 support levels and 1998 increase in basic support levels are as follows:

Kind and type	1959 support level	Basic support level [1]		Increase from 1996 to 1997	
	(¢/lb.)	1997 (¢/lb.)	1998 (¢/lb.)	100% (¢/lb.)	65% (¢/lb.)
Fire-cured (type 21)	38.8	188.2	194.0	5.8	3.8
Fire-cured (types 22–23)	38.8	188.2	194.0	5.8	3.8
Dark air-cured (types 35–36)	34.5	167.3	172.5	5.2	3.4
Virginia sun-cured (type 37)	34.5	167.3	172.5	5.2	3.4
Cigar-filler and binder (types 42–44, 54–55)	28.6	138.7	143.0	4.3	2.8

[1] 1997 ratio is 4.85, 1998 ration is 5.00.

The loan associations for Virginia fire-cured (type 21) and Virginia sun-cured (type 37) tobacco have accepted lower price support levels so their tobacco may remain competitive in world markets. Therefore, for fire-cured (type 21) tobacco and Virginia sun-cured (type 37) tobacco, the 1998-crop support levels were set so as to only add, over 1997-crop levels, 65 percent of the difference between the 1998 crop ''basic support level'' and the 1997-crop ''basic support level.'' For the other tobaccos covered in this notice there was no such recommendation and the support levels were set accordingly. Accordingly, the price support levels for fire-cured (types 22–23), dark air-cured (types 35–36) and cigar filler and binder (types 42–44; 53–55) tobaccos were set to use the MY 1997 level of support increased by 100 percent of the difference between the MY 1998 ''basic support level'' and the MY 1997 ''basic support level.'' Chewing tobacco, smoking tobacco, and snuff manufacturing formulas limit the substitutability of one of these kinds of tobacco for another. Cigarettes, the principal outlet for flue-cured and burley tobaccos, do not require any of these five kinds of tobacco in their blends.

Accordingly, the following price support determinations were announced on February 27, 1998, for the 1998 crops of the tobaccos which are the subject of this notice:

Kind and type	Support level (cents per pound)
Fire-cured (type 21)	153.6
Fire-cured (types 22–23)	168.1
Dark air-cured (types 35–36)	145.0
Virginia sun-cured (type 37)	136.0
Cigar-filler and binder (types 42–44 and 53–55)	121.2

Other Determinations

This rule also amends the heading in 7 CFR 1464.15 because of a technical error. Further, as to that determination and the others addressed in this notice which are driven by statutory deadlines and affect the marketing of current crops, it was determined that to the extent restrictions might otherwise apply, a delay in the effectiveness of the rule for additional notice and procedure would be contrary to the public interest, impracticable, and unnecessary. This conclusion is the same as to prior crop years and for all purposes including for purposes of the Small Business Regulatory Enforcement Act (Pub. L. 104–121). With respect to the quota and price support determinations, this conclusion as to further procedure is based on the statutory deadlines and other timing factors involved. For the other change, the conclusion is based on the technical nature of the change.

List of Subjects

7 CFR Part 723

Acreage allotments, Marketing quotas, Penalties, Reporting and recordkeeping requirements, Tobacco.

7 CFR Part 1464

Price support, Programs, Tobacco.

Accordingly, 7 CFR parts 723 and 1464 are amended to read as follows:

PART 723—TOBACCO

1. The authority citation for 7 CFR part 723 continues to read as follows:

Authority: 7 U.S.C. 1301, 1311–1314, 1314–1, 1314b, 1314b-1, 1314b-2, 1314c, 1314d, 1314e, 1314f, 1314i, 1315, 1316, 1362, 1363, 1372–75, 1377–1379, 1421, 1445–1, and 1445–2.

2. Section 723.113 is amended by adding paragraph (f) to read as follows:

§ 723.113 Fire-cured (type 21) tobacco.

* * * * *

(f) The 1998-crop national marketing quota is 2.725 million pounds.

3. Section 723.114 is amended by adding paragraph (f) to read as follows:

§ 723.114 Fire-cured (types 22–23) tobacco.

* * * * *

(f) The 1998-crop national marketing quota is 44.6 million pounds.

4. Section 723.115 is amended by adding paragraph (f) to read as follows:

§ 723.115 Dark air-cured (types 35–36) tobacco.

* * * * *

(f) The 1998-crop national marketing quota is 11.15 million pounds.

5. Section 723.116 is amended by adding paragraph (f) to read as follows:

§ 723.116 Sun-cured (type 37) tobacco.

* * * * *

(f) The 1998-crop national marketing quota is 163,000 pounds.

6. Section 723.117 is amended by adding paragraph (f) to read as follows:

§ 723.117 Cigar-filler and binder (types 42–44 and 53–55) tobacco.

* * * * *

(f) The 1998-crop national marketing quota is 6.63 million pounds.

PART 1464—TOBACCO

7. The authority citation for 7 CFR part 1464 continues to read as follows:

Authority: 7 U.S.C. 1421, 1423, 1441, 1445, and 1445–1; 15 U.S.C. 714b and 714c.

8. Section 1464.13 is amended by adding paragraph (f) to read as follows:

§ 1464.13 Fire-cured (type 21) tobacco.

* * * * *

(f) The 1998-crop national price support level is 153.6 cents per pound.

9. Section 1464.14 is amended by adding paragraph (f) to read as follows:

§ 1464.14 Fire-cured (types 22–23) tobacco.

* * * * *

(f) The 1998-crop national price support level is 168.1 cents per pound.

10. Section 1464.15 is amended by changing in the heading ''types 22–23'' to ''types 35–36'' and by adding paragraph (f) to read, in the amended section, as follows:

§ 1464.15 Dark air-cured (types 35–36) tobacco.

* * * * *

(f) The 1998-crop national price support level is 145.0 cents per pound.

11. Section 1464.16 is amended by adding paragraph (f) to read as follows:

§ 1464.16 Virginia sun-cured (type 37) tobacco.

* * * * *

(f) The 1998-crop national price support level is 136.0 cents per pound.

12. Section 1464.17 is amended by adding paragraph (f) to read as follows:

§ 1464.17 Cigar-filler and binder (types 42–44 and 53–55) tobacco.

* * * * *

(f) The 1998-crop national price support level is 121.2 cents per pound.

Signed at Washington, DC, on March 24, 1999.

Keith Kelly,

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

[FR Doc. 99–7799 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–05–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 78

[Docket No. 98–060–2]

Brucellosis; Procedures for Retaining Class Free State Status

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Final rule.

SUMMARY: We are amending the brucellosis regulations to allow a State to retain its Class Free status following the detection of an affected herd if the State meets certain conditions. These conditions, which include quarantining, testing, and depopulating the affected herd and conducting an investigation to ensure that brucellosis has not spread from the affected herd, will allow a State to avoid losing its Class Free status due to an isolated case of infection being detected in the State. We believe that providing this option to States will encourage the prompt resolution of isolated cases of brucellosis and thus ensure the continued progress of State and Federal efforts toward the eradication of brucellosis in domestic cattle and bison herds. Without this change in the regulations, a State could lose its Class Free status following the detection of a single affected herd and will not have as great an incentive to take swift and decisive action to determine the source of the infection, eliminate the affected herd, and ensure that the disease had not spread to other herds in the State.

EFFECTIVE DATE: April 30, 1999.

FOR FURTHER INFORMATION CONTACT: Dr. Valerie Ragan, Senior Staff Veterinarian, National Animal Health Programs, VS, APHIS, 4700 River Road Unit 36, Riverdale, MD 20737–1231, (301) 734–7708.

SUPPLEMENTARY INFORMATION:

Background

Brucellosis is a contagious disease affecting animals and humans, caused by bacteria of the genus Brucella. In its principal animal hosts, brucellosis is characterized by abortion and impaired fertility.

The brucellosis regulations contained in 9 CFR part 78 (referred to below as the regulations) provide a system for classifying States or portions of States (areas) according to the rate of *Brucella abortus* infection present and the general effectiveness of the brucellosis control and eradication program conducted in the State or area. The classifications are Class Free, Class A, Class B, and Class C; States or areas that do not meet the minimum standards for Class C may be placed under Federal quarantine. At this point in the cooperative State/Federal brucellosis eradication program, all States have achieved either Class Free or Class A status.

To maintain Class Free status, the regulations require, among other things, that a State must have a herd infection rate of 0.0 percent or 0 herds per 1,000. A State's herd infection rate is based on the number of herds found to have brucellosis reactors within the State during any 12 consecutive months due to field strain *Brucella abortus*. The required 0.0 percent herd infection rate means that a Class Free State would no longer qualify for Class Free status if a single brucellosis-affected herd was detected in the State. A downgrade in status from Class Free to Class A results in increased costs for States and their livestock owners, with most of those added costs arising from the increased testing requirements that accompany Class A status.

On September 17, 1998, we published in the **Federal Register** (63 FR 49670–49673, Docket No. 98–060–1) a proposed rule to amend the brucellosis regulations to allow a State to retain its Class Free status following the detection of a single affected herd if the State met certain conditions. As described in the proposed rule, those conditions, which include quarantining, testing, and depopulating the affected herd and conducting an investigation to ensure that brucellosis has not spread from the affected herd, would allow a State to avoid losing its Class Free status due to an isolated case of infection being detected in the State.

We solicited comments concerning our proposal for 60 days ending on November 2, 1998. We received five comments by that date. They were from a State office of Federal land policy, a State game and fish agency, a State livestock board, a veterinary medical association, and a national milk producers association. All five commenters supported the proposed rule, although three of them asked for clarification of the following points:

Applicability. Two commenters asked that we clearly state that the provisions of the proposed rule would apply only to domestic livestock and not to wildlife.

The commenters' understanding of the applicability of these provisions is correct. The conditions that would have to be met for a State to retain its Class Free status—i.e., quarantining, testing, and depopulating the affected herd and investigating all adjacent, source, and contact herds to ensure the disease has not spread from the affected herd—simply could not be practically applied to wildlife. The provisions of this rule are applicable only to situations where a herd of domestic livestock in a Class Free State is found to be affected.

Start of the 60-day period. Because a State would be given 60 days following the identification of an infected animal to complete the requirements for retaining Class Free status, one commenter asked that we clearly define the phrase ''identification of the infected animal.'' This commenter pointed out that in some cases, a reactor classification test occurs in which organisms cannot be cultured to differentiate whether Strain 19 or field strain *Brucella abortus* is involved, and those cases must be resolved by an epidemiological investigation. The commenter suggested that the 60-day

period should not begin until an investigation determines that an animal is infected with the field strain of *Brucella abortus* and is not reacting to an official brucellosis test due to its having been vaccinated with a Strain 19 vaccine.

The commenter's understanding of when the 60-day period would begin is correct. If an animal reacts to an official brucellosis test and we are able to determine, through culturing, that the animal is infected with field strain *Brucella abortus,* then the 60-day period would begin on the date of that laboratory confirmation. If culturing proves inconclusive and an investigation is necessary to resolve the case, then the 60-day period would not begin until the date that the investigating epidemiologist reports that the animal is a *Brucella abortus* reactor. If further investigation leads the epidemiologist to conclude that the animal is a Strain 19 associated reactor, the herd will not be considered an affected herd. To make this clearer, we have changed new paragraph § 78.1(b)(4) in this final rule so that it uses the words ''within 60 days of the date an animal in the herd is determined to be infected'' rather than ''within 60 days of the identification of the infected animal.''

Therefore, for the reasons given in the proposed rule and in this document, we are adopting the proposed rule as a final rule with the changes discussed in this document.

Executive Order 12866 and Regulatory Flexibility Act

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

Producers and consumers have realized great financial savings from the success of the cooperative State/Federal brucellosis eradication program. Annual losses from lowered milk production, aborted calves and pigs, and reduced breeding efficiency have decreased from more than $400 million in 1952 to less than $1 million today. Studies indicate that if the brucellosis eradication program efforts were stopped, the costs of producing beef and milk could increase by an estimated $80 million annually in less than 10 years with the gradual spread of brucellosis.

This rule amends the brucellosis regulations to allow a State to retain its Class Free status following the detection of an affected herd if the State meets certain conditions. These conditions, which include depopulating the affected herd and taking measures to ensure that brucellosis has not spread from the affected herd, will allow a State to avoid losing its Class Free status due to an isolated case of infection being detected in the State.

The entities potentially affected by this rule are the 43 States, Puerto Rico, and the U.S. Virgin Islands that currently hold Class Free status and the producers of livestock in those States and territories. The total number of cattle and bison in the United States was approximately 101.4 million in 1997, and was valued at about $53.2 billion. There were 1,167,910 U.S. operations with cattle and bison in 1997. Over 97 percent of these operations are considered to be small entities, with gross cash value of less than $500,000 each (USDA, National Agricultural Statistics Service, ''Agricultural Statistics 1997,'' Washington, DC, 1997).

Allowing a State to retain its Class Free status under certain conditions can be expected to have an overall positive economic effect for several reasons. First, when a State's status is upgraded from Class A to Class Free, the State realizes a cost savings through the reduction in the required level of brucellosis ring test (BRT) surveillance. The BRT must be conducted in a Class A State or area at least four times per year at approximately 90-day intervals, with all herds producing milk for sale in the State being required to be included in at least three of the four brucellosis ring tests conducted each year. When a State attains Class Free status, the level of BRT surveillance is lowered to two brucellosis ring tests per year for each herd producing milk for sale in the State. Thus, allowing a State to retain its Class Free status will enable the State to avoid the added testing and personnel costs associated with the higher level of BRT surveillance required of Class A States.

Second, allowing a State to retain its Class Free status will mean that herd owners in the State can continue to avoid the costs of pre-movement testing of their test-eligible cattle and bison. In a Class A State, test-eligible cattle and bison offered for sale interstate from other than certified-free herds must test negative for brucellosis prior to movement. Because that testing is not required for test-eligible cattle and bison in Class Free States, herd owners in a State allowed to retain its Class Free status under the provisions of this rule will continue to be able to move their cattle or bison interstate without incurring the approximately $3.25 per-head cost of testing.

Finally, in those cases in which a brucellosis-affected herd is depopulated in order for a State to retain its Class Free status, the costs of that depopulation may be largely offset through the payment of Federal indemnity for the destroyed animals. Under the brucellosis indemnity regulations in 9 CFR part 51, any owner whose herd of cattle or bison is destroyed because of brucellosis is eligible for the payment of Federal indemnity. The rate of indemnity is set as either: (1) The appraised value of each animal, minus its salvage value; or (2) a fixed rate of no more than $250 per animal for bison and nonregistered cattle other than dairy cattle and $750 per animal for registered cattle and nonregistered dairy cattle.

Class Free States will not be required to pursue the option offered by this rule for retaining Class Free status following the detection of a brucellosis-affected herd. However, we believe that the economic benefits that a State can realize by taking action to avoid being downgraded to Class A status will far outweigh the costs of the herd depopulation, epidemiological investigation, and testing that will be required to retain Class Free status.

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

Executive Order 12372

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

Executive Order 12988

This rule has been reviewed under Executive Order 12988, Civil Justice Reform. This rule: (1) Preempts all State and local laws and regulations that are in conflict with this rule; (2) has no retroactive effect; and (3) does not require administrative proceedings before parties may file suit in court challenging this rule.

Paperwork Reduction Act

This rule contains no new information collection or recordkeeping requirements under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

List of Subjects in 9 CFR Part 78

Animal diseases, Bison, Cattle, Hogs, Quarantine, Reporting and

recordkeeping requirements, Transportation.

Accordingly, we are amending 9 CFR part 78 as follows:

PART 78—BRUCELLOSIS

1. The authority citation for part 78 continues to read as follows:

Authority: 21 U.S.C. 111–114a–1, 114g, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

2. In § 78.1, in the definition of *Class Free State or area,* a new paragraph (b)(4) is added to read as follows:

§ 78.1 Definitions.

* * * * *

Class free State or area. * * *

(b) * * *

(4) *Retaining Class Free status.* (i) If a single herd in a Class Free State is found to be affected with brucellosis, the State may retain its Class Free status if it meets the conditions of this paragraph. A State may retain its status in this manner only once during any 2-year period. The following conditions must be satisfied within 60 days of the date an animal in the herd is determined to be infected:

(A) The affected herd must be immediately quarantined, tested for brucellosis, and depopulated; and

(B) An epidemiological investigation must be performed and the investigation must confirm that brucellosis has not spread from the affected herd. All herds on premises adjacent to the affected herd (adjacent herds), all herds from which animals may have been brought into the affected herd (source herds), and all herds that may have had contact with or accepted animals from the affected herd (contact herds) must be epidemiologically investigated, and each of those herds must be placed under an approved individual herd plan. If the investigating epidemiologist determines that a herd blood test for a particular adjacent herd, source herd, or contact herd is not warranted, the epidemiologist must include that determination, and the reasons supporting it, in the individual herd plan.

(ii) After the close of the 60-day period following the date an animal in the herd is determined to be infected, APHIS will conduct a review to confirm that the requirements of paragraph (b)(4)(i) have been satisfied and that the State is in compliance with all other applicable provisions.

* * * * *

Done in Washington, DC, this 24th day of March 1999.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99–7804 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

9 CFR Part 78

[Docket No. 98–097–2]

Brucellosis in Cattle; State and Area Classifications; Mississippi

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Affirmation of interim rule as final rule.

SUMMARY: We are adopting as a final rule, without change, an interim rule that amended the brucellosis regulations concerning the interstate movement of cattle by changing the classification of Mississippi from Class A to Class Free. We have determined that Mississippi meets the standards for Class Free status. The interim rule relieved certain restrictions on the interstate movement of cattle from Mississippi.

EFFECTIVE DATE: The interim rule became effective on October 7, 1998.

FOR FURTHER INFORMATION CONTACT: Dr. R.T. Rollo, Jr., Staff Veterinarian, National Animal Health Programs, VS, APHIS, 4700 River Road Unit 36, Riverdale, MD 20737–1231; (301) 734–7709; or e-mail: reed.t.rollo@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

In an interim rule effective and published in the **Federal Register** on October 7, 1998 (63 FR 53780–53781, Docket No. 98–097–1), we amended the brucellosis regulations in 9 CFR part 78 by removing Mississippi from the list of Class A States or areas in § 78.41(b) and adding it to the list of Class Free States or areas in § 78.41(a).

Comments on the interim rule were required to be received on or before December 7, 1998. We did not receive any comments. Therefore, for the reasons given in the interim rule, we are adopting the interim rule as a final rule.

This action also affirms the information contained in the interim rule concerning Executive Order 12866 and the Regulatory Flexibility Act, Executive Orders 12372 and 12988, and the Paperwork Reduction Act.

Further, for this action, the Office of Management and Budget has waived the review process required by Executive Order 12866.

List of Subjects in 9 CFR Part 78

Animal diseases, Bison, Cattle, Hogs, Quarantine, Reporting and recordkeeping requirements, Transportation.

PART 78—BRUCELLOSIS

Accordingly, we are adopting as a final rule, without change, the interim rule that amended 9 CFR part 78 and that was published at 63 FR 53780–53781 on October 7, 1998.

Authority: 21 U.S.C. 111–114a-1, 114g, 115, 117, 120, 121, 123–126, 134b, and 134f; 7 CFR 2.22, 2.80, and 371.2(d).

Done in Washington, DC, this 24th day of March 1999.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99–7802 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 97–NM–87–AD; Amendment 39–11097; AD 99–07–12]

RIN 2120–AA64

Airworthiness Directives; Boeing Model 747–100, -200, and -300 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Boeing Model 747–100, -200, and -300 series airplanes, that requires repetitive inspections to detect cracking of certain lower lobe fuselage frames, and repair, if necessary. This amendment is prompted by reports indicating that fatigue cracks were found in lower lobe frames on the left side of the fuselage. The actions specified by this AD are intended to detect and correct fatigue cracking of certain lower lobe fuselage frames, which could lead to fatigue cracks in the fuselage skin, and consequent rapid decompression of the airplane.

DATES: Effective May 5, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director

of the Federal Register as of May 5, 1999.

ADDRESSES: The service information referenced in this AD may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. 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: Bob Breneman, Aerospace Engineer, Airframe Branch, ANM–120S, FAA, Transport Airplane Directorate, Seattle Aircraft Certification Office, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2776; 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 certain Boeing Model 747–100, -200, and -300 series airplanes was published in the **Federal Register** on August 4, 1998 (63 FR 41483). That action proposed to require repetitive inspections to detect cracking of certain lower lobe fuselage frames, and repair, if necessary.

Comments Received

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 Proposed Rule

Two commenters support the proposed rule.

Request To Increase the Threshold and Allow Discounting of Flights Below 2.0 PSI

One commenter requests that the proposed AD be revised to reflect the threshold of 16,000 flight cycles, as recommended in Boeing Alert Service Bulletin 747–53A2408, dated April 25, 1996 (which is referenced in the proposed AD as the appropriate source of service information for accomplishment of the required actions), and to allow discounting of flight cycles less than 2.0 pounds per square inch (psi). The commenter states that the critical crack is not a severed frame, but a severed frame with a skin crack. The commenter further states that there were no reports of skin cracking associated with the cracked frames, and that analysis shows that an existing skin crack at a severed frame will not grow to critical length prior to the inspection threshold identified in the referenced service bulletin. In addition, the fleet reports used in this analysis were adjusted to account for flights less that 2.0 psi.

The FAA does not concur with the commenter's request. As discussed under the heading ''Differences Between the Proposed AD and Relevant Service Bulletin'' in the preamble of the proposed AD, the FAA has received a report of cracking (i.e., a completely severed frame, consisting of the frame web, inner chord, and fail-safe chord) on an airplane that had accumulated only 15,227 total flight cycles. As a result, the FAA determined that a compliance threshold of 15,000 total flight cycles for initiating the required actions is warranted, in that it represents an appropriate interval of time allowable for affected airplanes to continue to operate without compromising safety.

In the same regard, the FAA does not find that allowing the discount of flight cycles below 2.0 psi would adequately address the unsafe condition. The FAA has received a report of two adjacent frames being completely severed on an airplane that had accumulated 12,817 full pressure cycles, plus 8,761 cycles at less than 2.0 psi differential pressure. As stated in the NPRM, this reported cracking is more indicative of the reported findings on airplanes that had accumulated 20,000 total flight cycles. If the FAA allowed the discount of flight cycles below 2.0 psi, as recommended in the referenced service bulletin, the identified unsafe condition on that airplane would go undetected for several thousand flight cycles. Therefore, the FAA finds that no change to the final rule is necessary.

Explanation of Changes Made to the Proposal

The FAA has revised paragraph (c)(1) of the final rule to also allow repair of any crack in the subject area to be accomplished in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the FAA to make such findings.

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

Interim Action

This is considered to be interim action until the accomplishment of AD 93–08–12, amendment 39–8559 (58 FR 27927, May 12, 1993). That AD requires a detailed visual internal inspection to detect cracks in the Section 46 lower lobe frames, and repair, if necessary, in accordance with Boeing Service Bulletin 747–53–2349, dated June 27, 1991. The initial inspection required by AD 93–08–12 is required prior to the accumulation of 22,000 total flight cycles. The FAA now finds that earlier inspection (i.e., prior to accumulation of 15,000 total flight cycles) of the lower lobe frames is warranted, as required by this AD.

Cost Impact

There are approximately 452 Model Boeing 747–100, -200, and -300 series airplanes of the affected design in the worldwide fleet. The FAA estimates that 152 airplanes of U.S. registry will be affected by this AD, that it will take approximately 2 work hours per airplane to accomplish the required inspection, and that the average labor rate is $60 per work hour. Based on these figures, the cost impact of the inspection required by this AD on U.S. operators is estimated to be $18,240, or $120 per airplane, per inspection cycle.

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

Regulatory Impact

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

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

Flexibility Act. A final evaluation has been prepared for this action and it is contained in the Rules Docket. A copy of it may be obtained from the Rules Docket at the location provided under the caption ADDRESSES.

List of Subjects in 14 CFR Part 39

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

Adoption of the Amendment

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

PART 39—AIRWORTHINESS DIRECTIVES

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

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

§ 39.13 [Amended]

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

99–07–12 Boeing: Amendment 39–11097. Docket 97–NM–87–AD.

Applicability: Model 747–100, –200, and –300 series airplanes, as listed in Boeing Alert Service Bulletin 747–53A2408, dated April 25, 1996; certificated in any category.

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

Compliance: Required as indicated, unless accomplished previously.

To detect and correct fatigue cracking of certain lower lobe fuselage frames, which could lead to fatigue cracks in the fuselage skin, and consequent rapid decompression of the airplane, accomplish the following:

Note 2: Although Boeing Alert Service Bulletin 747–53A2408, dated April 25, 1996, allows discount from the compliance threshold of all flight cycles at or below a cabin pressure differential of 2.0 pounds per square inch (psi), this AD requires that all flight cycles be counted.

(a) For airplanes on which the initial detailed visual internal inspection of the Section 46 lower lobe frames required by paragraph (a)(3) of AD 93–08–12, amendment 39–8559, has not been accomplished: Perform a detailed visual inspection to detect cracking of the lower lobe fuselage frames from Body Station 1820 to Body Station 2100, in accordance with Boeing Alert Service Bulletin 747–53A2408, dated April 25, 1996, at the later of the times specified in paragraphs (a)(1) and (a)(2) of this AD:

(1) Prior to the accumulation of 15,000 total flight cycles; or

(2) Within 1,500 flight cycles or 18 months after the effective date of this AD, whichever occurs first.

Note 3: Paragraph (a)(3) of AD 93–08–12 requires a detailed visual internal inspection to detect cracks in the Section 46 lower lobe frames, in accordance with Boeing Service Bulletin 747–53–2349, dated June 27, 1991. The initial inspection is required prior to the accumulation of 22,000 total flight cycles, or within 1,000 flight cycles after June 11, 1993 (the effective date of AD 93–08–12), whichever occurs later.

Repetitive Inspections

(b) If no cracking is detected during the inspection required by paragraph (a) of this AD, repeat the inspection thereafter at intervals not to exceed 3,000 flight cycles.

Corrective Actions

(c) If any cracking is detected during any inspection required by paragraph (a) of this AD, prior to further flight, accomplish paragraphs (c)(1) and (c)(2) of this AD:

(1) Within 20 inches of the crack location on the frame, perform a detailed visual inspection of the adjacent structure to detect cracking. If any cracking is detected, prior to further flight, repair in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate; the Boeing 747 Structural Repair Manual; or in accordance with data meeting the type certification basis of the airplane approved by a Boeing Company Designated Engineering Representative who has been authorized by the Manager, Seattle ACO, to make such findings.

(2) Repeat the inspection required by paragraph (a) of this AD thereafter at intervals not to exceed 3,000 flight cycles.

Optional Terminating Inspection

(d) Accomplishment of the initial detailed visual internal inspection of the Section 46 lower lobe frames required by paragraph (a)(3) of AD 93–08–12 constitutes terminating action for the requirements of this AD.

Alternative Methods of Compliance

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

Note 4: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

Special Flight Permits

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

Incorporation by Reference

(g) Except as provided by paragraphs (c)(1) and (d) of this AD, the actions shall be done in accordance with Boeing Alert Service Bulletin 747–53A2408, dated April 25, 1996. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207. Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(h) This amendment becomes effective on May 5, 1999.

Issued in Renton, Washington, on March 22, 1999.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 99–7554 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ACE–4]

Amendment to Class E Airspace; Mexico, MO

AGENCY: Federal Aviation Administration, DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of a direct final rule which revises Class E airspace at Mexico, MO.

DATES: The direct final rule published at 64 FR 6799 is effective on 0901 UTC, May 20, 1999.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; telephone: (816) 426–3408.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on February 11, 1999 (64 FR 6799). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse

public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on May 20, 1999. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on March 16, 1999.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 99–7886 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ACE–2]

Amendment to Class E Airspace; Grand Island, NE

AGENCY: Federal Aviation Administration, DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of a direct final rule which revises Class E airspace at Grand Island, NE.

DATES: The direct final rule published at 64 FR 3832 is effective on 0901 UTC, May 20, 1999.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64106; telephone: (816) 426–3408.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on January 26, 1999 (64 FR 3832). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit such an adverse comment, were received within the comment period, the regulation would become effective on May 20, 1999. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on March 16, 1999.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 99–7885 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Airspace Docket No. 99–ACE–1]

Amendment to Class E Airspace; Perryville, MO

AGENCY: Federal Aviation Administration, DOT.

ACTION: Direct final rule; confirmation of effective date.

SUMMARY: This document confirms the effective date of a direct final rule which revises Class E airspace at Perryville, MO.

DATES: The direct final rule published at 64 FR 3834 is effective on 0901 UTC, May 20, 1999.

FOR FURTHER INFORMATION CONTACT: Kathy Randolph, Air Traffic Division, Airspace Branch, ACE–520C, Federal Aviation Administration, 601 East 12th Street, Kansas City, Missouri 64016; telephone: (816) 426–3408.

SUPPLEMENTARY INFORMATION: The FAA published this direct final rule with a request for comments in the **Federal Register** on January 26, 1999 (64 FR 3834). The FAA uses the direct final rulemaking procedure for a non-controversial rule where the FAA believes that there will be no adverse public comment. This direct final rule advised the public that no adverse comments were anticipated, and that unless a written adverse comment, or a written notice of intent to submit an adverse comment, were received within the comment period, the regulation would become effective on May 20, 1999. No adverse comments were received, and thus this notice confirms that this direct final rule will become effective on that date.

Issued in Kansas City, MO on March 16, 1999.

Herman J. Lyons, Jr.,

Manager, Air Traffic Division, Central Region.

[FR Doc. 99–7884 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 4

[T.D. 99–32]

Addition of Brazil to the List of Nations Entitled to Reciprocal Exemption from the Payment of Special Tonnage Taxes

AGENCY: Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to include Brazil in the list of nations whose vessels are entitled to reciprocal exemption from the payment of special tonnage taxes and light money. Brazil was recently removed from the list because the Department of State had informed Customs that Brazil had implemented a law discriminating against U.S. vessels in its preferential tax treatment of cargoes carried on certain specially-registered Brazilian vessels. However, the Department of State now informs Customs that recent actions by the Brazilian government have effectively eliminated this discriminatory tax treatment; thus, Brazil now qualifies for the exemption. Accordingly, Customs is restoring the exemption privileges to vessels of Brazil.

EFFECTIVE DATE: This amendment is effective, and the reciprocal privileges are restored to all Brazilian-registered vessels, as of March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Gerry O'Brien, Entry Procedures and Carriers Branch, (202–927–2320).

SUPPLEMENTARY INFORMATION:

Background

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton denominated ''light money,'' on all foreign vessels which enter U.S. ports (46 U.S.C. App. 121 and 128).

Vessels of a foreign nation, however, may be exempted from the payment of such special tonnage taxes and light money upon presentation of satisfactory proof that no discriminatory duties of tonnage or impost are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. App. 141).

The list of nations whose vessels have been found to be reciprocally exempt from the payment of any higher tonnage duties than are applicable to vessels of the U.S. and from the payment of light money is found at § 4.22, Customs Regulations (19 CFR 4.22). Nations granted these commercial privileges that subsequently impose discriminatory

duties are subject to retaliatory suspension of the exemption from payment of special tonnage tax and light money (46 U.S.C. App. 141).

Brazil had previously been included in the list of nations in § 4.22 whose vessels are exempt from the payment of special tonnage taxes and light money (see T.D. 95–14, 60 FR 6966, dated February 6, 1995). However, Brazil was recently removed from the list because the Department of State had informed Customs that Brazil had enacted a law that discriminated against U.S. vessels and the vessels of other countries in its preferential tax treatment of cargoes carried by certain specially-registered Brazilian vessels (see T.D. 98–79, 63 FR 52967, dated October 2, 1998). Specifically, under that law, the dutiable value of imported merchandise carried by the specially-registered Brazilian vessels did not include freight charges, while identical imports carried by U.S. vessels or the vessels of other countries were subject to duty on freight charges. This violated the reciprocal nature of the exemption privilege granted, and, as such, Brazil no longer qualified for the exemption.

However, the Department of State has now informed Customs that the Brazilian government has since effectively eliminated the discriminatory tax treatment in question and that both the Department of State and the Department of Transportation's Maritime Administration support the restoration of Brazil to the list of nations whose vessels are exempt from the payment of special tonnage taxes and light money.

As a result, the Department of State, in accordance with 46 U.S.C. App. 141 and Executive Order 10289 of September 17, 1951 (16 FR 9499, 3 CFR 1949–1953 Comp. p. 787, as amended, see 3 U.S.C.A. 301 note), has recommended to the Secretary of the Treasury, through Customs, that Brazil be restored to the list of nations in § 4.22.

Finding

The Customs Service has determined that the vessels of Brazil are exempt from the payment of special tonnage taxes and light money, effective as of March 31, 1999, and that § 4.22 of the Customs Regulations should be amended accordingly. The authority to amend this section of the Customs Regulations has been delegated to the Chief, Regulations Branch.

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

Because this amendment concerns a foreign affairs function of the United States, merely implements a statutory mandate, and involves a matter in which the general public has no significant interest, pursuant to 5 U.S.C. 553, notice and public procedure in this case are considered unnecessary; further, for the same reason, good cause exists for dispensing with a delayed effective date under 5 U.S.C. 553(d)(3). Since this document is not subject to the notice and public procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Nor does the amendment meet the criteria for a ''significant regulatory action'' under E.O. 12866.

List of Subjects in 19 CFR Part 4

Cargo vessels, Customs duties and inspection, Entry, Maritime carriers, Vessels.

Amendment to the Regulations

Part 4, Customs Regulations (19 CFR part 4), is amended as set forth below.

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The general and relevant specific authority citations for part 4 continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1431, 1433, 1434, 1624; 46 U.S.C. App. 3, 91.

* * * * *

Section 4.22 also issued under 46 U.S.C. App. 121, 128, 141;

* * * * *

§ 4.22 [Amended]

2. Section 4.22 is amended by adding ''Brazil'', in appropriate alphabetical order, to the list of nations entitled to exemption from special tonnage taxes and light money.

Dated: March 26, 1999.

Harold M. Singer,

Chief, Regulations Branch.

[FR Doc. 99–7916 Filed 3–30–99; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF THE TREASURY

Customs Service

19 CFR Part 144

[T.D. 98–74]

RIN 1515–AB99

Lay Order Period; General Order; Penalties; Correction

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

ACTION: Final rule; correction.

SUMMARY: This document makes a correction to the document published in the **Federal Register** that adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding, among other things, the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by regulation without entry having been completed. The correction involves a conforming change to the Customs Regulations pertaining to rewarehouse entries.

EFFECTIVE DATE: This correction is effective March 31, 1999.

FOR FURTHER INFORMATION CONTACT: For legal matters: Jeremy Baskin, Penalties Branch, Office of Regulations and Rulings (202) 927–2344.

For operational matters: Steven T. Soggin, Office of Field Operations, (202) 927–0765.

SUPPLEMENTARY INFORMATION:

Background

On September 25 1998, Customs published in the **Federal Register** (63 FR 51283) T.D. 98–74 which adopted as a final rule, with some changes, proposed amendments to the Customs Regulations regarding the obligation of the owner, master, pilot, operator, or agent of an arriving carrier to provide notice to Customs and to a bonded warehouse of the presence of merchandise or baggage that has remained at the place of arrival or unlading beyond the time period provided by the regulatory amendments (that is, the fifteenth calendar day after landing) without entry having been completed. The final regulatory texts specifically require one of the arriving carrier's obligated parties, or any party who takes custody from the arriving carrier under a Customs-authorized permit to transfer or in-bond entry, to provide notice of the unentered

merchandise or baggage to Customs and to a bonded warehouse no later than 20 calendar days after landing or after receipt under the permit to transfer or after arrival at the port of destination. The notice to the bonded warehouse proprietor initiates his obligation to arrange for transportation and storage of the unentered merchandise or baggage at the risk and expense of the consignee. The final regulatory texts also provide for penalties or liquidated damages against the owner or master of any conveyance, or agent thereof, for failure to provide the required notice to Customs or to a bonded warehouse proprietor. The final regulations further provide for the assessment of liquidated damages against any party who accepts custody of the merchandise or baggage under a Customs-authorized permit to transfer or in-bond entry and who fails to notify Customs and a bonded warehouse of the presence of such unentered merchandise or baggage and also against the warehouse operator who fails to take required possession of the merchandise or baggage.

The final regulatory texts as summarized above resulted from amendments to the underlying statutory authority effected by sections 656 and 658 contained within the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057) and are primarily reflected in a revised § 4.37 (19 CFR 4.37) and in new §§ 122.50 and 123.10 (19 CFR 122.50 and 123.10), each of which is entitled ‘‘[g]eneral order.’’ (T.D. 98–74 also included a number of conforming changes to the Customs Regulations in order to reflect a number of other statutory amendments and repeals effected by the Customs Modernization provisions and in order to reflect the recent recodification and reenactment of title 49, United States Code; the correction contained in this document bears no relationship to those other regulatory amendments.)

Although T.D. 98–74 also included a number of conforming regulatory changes to ensure consistency with the terms of revised § 4.37 and new §§ 122.50 and 123.10 (involving, for example, the removal or replacement of obsolete references to a ‘‘5-day’’ or ‘‘lay order’’ period or ‘‘extension’’ thereof), § 144.41(g) of the Customs Regulations (19 CFR 144.41(g)) was overlooked in this regard. This provision concerns the treatment of merchandise in a rewarehouse context. The present text, by referring to a rewarehouse entry not filed ‘‘before the expiration of 5 days after its arrival or any authorized extension,’’ is inconsistent with, and thus could give rise to uncertainty regarding the proper and intended applicability of, §§ 4.37, 122.50 and 123.10 in a rewarehouse context. Therefore, T.D. 98–74 should have included an appropriate revision of § 144.41(g) to clarify the operation of those general order provisions in that specific context. This document corrects this oversight.

Correction of Publication

In the document published in the **Federal Register** as T.D. 98–74 on September 25, 1998 (63 FR 51283), on page 51290, in the third column, the following part 144 amendment is added in appropriate numerical order:

PART 144—WAREHOUSE AND REWAREHOUSE ENTRIES AND WITHDRAWALS

1. The authority citation for part 144 continues to read in part as follows:

Authority: 19 U.S.C. 66, 1484, 1557, 1559, 1623, 1624.

* * * * *

2. In § 144.41, paragraph (g) is revised to read as follows:

§ 144.41 Entry for rewarehouse.

* * * * *

(g) *Failure to enter.* If the rewarehouse entry is not filed within 15 calendar days after its arrival, the merchandise shall be disposed of in accordance with the applicable procedures in § 4.37 or § 122.50 or § 123.10 of this chapter. However, merchandise sent to a general order warehouse shall not be sold or otherwise disposed of as unclaimed until the expiration of the original 5-year period during which the merchandise may remain in warehouse under bond.

* * * * *

Dated: March 26, 1999.

John A. Durant,

Acting Assistant Commissioner, Office of Regulations and Rulings.

[FR Doc. 99–7917 Filed 3–30–99; 8:45 am]

BILLING CODE 4820–02–P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 203 and 204

[Docket No. FR–4288–C–02]

RIN 2502–AH08

Builder Warranty for High-Ratio FHA-Insured Single Family Mortgages for New Homes

AGENCY: Office of the Assistant Secretary for Housing-Federal Housing Commissioner, HUD.

ACTION: Interim rule; technical correction.

SUMMARY: On March 25, 1999, HUD published an interim rule revising the warranty requirements applicable to high-ratio FHA-insured single family mortgages on new homes. This document corrects errors in the preamble to that interim rule.

EFFECTIVE DATE: April 27, 1999.

FOR FURTHER INFORMATION CONTACT: Vance Morris, Director, Home Mortgage Insurance Division, Room 9266, Department of Housing and Urban Development, 451 7th St., Washington, DC 20410, 202–708–2700. (This is not a toll-free number.) For hearing- and speech-impaired persons, this number may be accessed via TTY by calling the Federal Information Relay Service at 1–800–877–8339.

SUPPLEMENTARY INFORMATION:

On March 25, 1999, 64 FR 14572, HUD published an interim rule revising the warranty requirements applicable to high-ratio FHA-insured single family mortgages on new homes. Two errors in the preamble for that interim rule need correction. In explaining the meaning of ‘‘new construction’’ or ‘‘new home’’, we inadvertently omitted a ‘‘not’’. In footnote 1, we provided an Internet address that cannot be accessed by non-HUD servers.

Accordingly, FR Doc. 99–7345, Builder Warranty for High-Ratio FHA-Insured Single Family Mortgages for New Homes (FR–4288–I–01), published in the **Federal Register** on March 25, 1999 (64 FR 14572), is corrected as follows:

1. On page 14572, second column, the second complete sentence is revised to read as follows: ‘‘(In this preamble, ‘‘new construction’’ or ‘‘new home’’ refers to any home that was not completed earlier than 1 year before the date of the application for mortgage insurance).’’

2. On page 14572, third column, footnote 1, the Internet address is amended to read ‘‘http://www.hudclips.org/sub-nonhud/html/forms.htm’’.

Dated: March 26, 1999.

Camille E. Acevedo,

Assistant General Counsel for Regulations.

[FR Doc. 99–7920 Filed 3–30–99; 8:45 am]

BILLING CODE 4210–27–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 180

[OPP–300824; FRL–6069–4]

RIN 2070–AB78

Fenbuconazole; Extension of Tolerance for Emergency Exemptions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This regulation extends a time-limited tolerance for residues of the fungicide fenbuconazole and its metabolites in or on blueberry at 1.0 part per million (ppm) for an additional 1-year period. This tolerance will expire and is revoked on December 31, 2000. This action is in response to EPA's granting of an emergency exemption under section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizing use of the pesticide on blueberry. Section 408(l)(6) of the Federal Food, Drug, and Cosmetic Act requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18.

DATES: This regulation becomes effective March 31, 1999. Objections and requests for hearings must be received by EPA, on or before June 1, 1999.

ADDRESSES: Written objections and hearing requests, identified by the docket control number [OPP–300824], must be submitted to: Hearing Clerk (1900), Environmental Protection Agency, Rm. M3708, 401 M St., SW., Washington, DC 20460. Fees accompanying objections and hearing requests shall be labeled "Tolerance Petition Fees" and forwarded to: EPA Headquarters Accounting Operations Branch, OPP (Tolerance Fees), P.O. Box 360277M, Pittsburgh, PA 15251. A copy of any objections and hearing requests filed with the Hearing Clerk identified by the docket control number, [OPP–300824], must also be submitted to: Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring a copy of objections and hearing requests to Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

A copy of objections and hearing requests filed with the Hearing Clerk may also be submitted electronically by sending electronic mail (e-mail) to: opp-docket@epa.gov. Copies of electronic objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Copies of objections and hearing requests will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All copies of electronic objections and hearing requests must be identified by the docket control number [OPP–300824]. No Confidential Business Information (CBI) should be submitted through e-mail. Copies of electronic objections and hearing requests on this rule may be filed online at many Federal Depository Libraries.

FOR FURTHER INFORMATION CONTACT: By mail: Daniel Rosenblatt, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location , telephone number, and e-mail address: Rm. 286, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, 703–308–9375, rosenblatt.dan@epa.gov.

SUPPLEMENTARY INFORMATION: EPA issued a final rule, published in the **Federal Register** of June 10, 1998 (63 FR 31633) (FRL–5791–5), which announced that on its own initiative under section 408 of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 346a and (l)(6), as amended by the Food Quality Protection Act of 1996 (FQPA) (Pub. L. 104–170) it established a time-limited tolerance for the residues of fenbuconazole and its metabolites in or on blueberry at 1.0 ppm, with an expiration date of December 31, 1999. EPA established the tolerance because section 408(l)(6) of the FFDCA requires EPA to establish a time-limited tolerance or exemption from the requirement for a tolerance for pesticide chemical residues in food that will result from the use of a pesticide under an emergency exemption granted by EPA under FIFRA section 18. Such tolerances can be established without providing notice or period for public comment.

EPA received a request to extend the use of fenbuconazole on blueberry for this year growing season due to the fact that there are no registered alternatives to control mummy berry disease in blueberries. After having reviewed the submission, EPA concurs that emergency conditions exist. EPA has authorized under FIFRA section 18 the use of fenbuconazole on blueberry for control of mummy berry disease in blueberry.

EPA assessed the potential risks presented by residues of fenbuconazole in or on blueberry. In doing so, EPA considered the safety standard in FFDCA section 408(b)(2), and decided that the necessary tolerance under FFDCA section 408(l)(6) would be consistent with the safety standard and with FIFRA section 18. The data and other relevant material have been evaluated and discussed in the final rule of June 10, 1998. Based on that data and information considered, the Agency reaffirms that extension of the time-limited tolerance will continue to meet the requirements of section 408(l)(6). Therefore, the time-limited tolerance is extended for an additional 1–year period. EPA will publish a document in the **Federal Register** to remove the revoked tolerance from the Code of Federal Regulations (CFR). Although this tolerance will expire and is revoked on December 31, 2000, under FFDCA section 408(l)(5), residues of the pesticide not in excess of the amounts specified in the tolerance remaining in or on blueberry after that date will not be unlawful, provided the pesticide is applied in a manner that was lawful under FIFRA and the application occurred prior to the revocation of the tolerance. EPA will take action to revoke this tolerance earlier if any experience with, scientific data on, or other relevant information on this pesticide indicate that the residues are not safe.

I. Objections and Hearing Requests

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

Any person may, by June 1, 1999, file written objections to any aspect of this regulation and may also request a hearing on those objections. Objections and hearing requests must be filed with the Hearing Clerk, at the address given under the "ADDRESSES" section (40 CFR 178.20). A copy of the objections and/or hearing requests filed with the Hearing Clerk should be submitted to the OPP docket for this rulemaking. The objections submitted must specify the

provisions of the regulation deemed objectionable and the grounds for the objections (40 CFR 178.25). Each objection must be accompanied by the fee prescribed by 40 CFR 180.33(i). EPA is authorized to waive any fee requirement ''when in the judgement of the Administrator such a waiver or refund is equitable and not contrary to the purpose of this subsection.'' For additional information regarding tolerance objection fee waivers, contact James Tompkins, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: Rm. 239, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA, (703) 305–5697, tompkins.jim@epa.gov. Requests for waiver of tolerance objection fees should be sent to James Hollins, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

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

II. Public Record and Electronic Submissions

EPA has established a record for this regulation under docket control number [OPP–300824] (including any comments and data submitted electronically). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The public record is located in Room 119 of the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Objections and hearing requests may be sent by e-mail directly to EPA at:

opp-docket@epa.gov.

E-mailed objections and hearing requests must be submitted as an ASCII file avoiding the use of special characters and any form of encryption.

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

III. Regulatory Assessment Requirements

A. Certain Acts and Executive Orders

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

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

B. Executive Order 12875

Under Executive Order 12875, entitled *Enhancing the Intergovernmental Partnership* (58 FR 58093, October 28, 1993), 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 the mandate is unfunded, EPA must provide to OMB a description of the extent of EPA's prior consultation with representatives of affected State, local, and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments ''to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates.''

Today's rule does not create an unfunded Federal mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

C. Executive Order 13084

Under Executive Order 13084, entitled *Consultation and Coordination with Indian Tribal Governments* (63 FR 27655, May 19, 1998), EPA may not issue a regulation that is not required by statute, that significantly or uniquely

affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments. If the mandate is unfunded, EPA must provide OMB, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments ''to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities.''

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. This action does not involve or impose any requirements that affect Indian tribes. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

IV. Submission to Congress and the Comptroller General

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 the Congress and the Comptroller General of the United States. 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).

List of Subjects in 40 CFR Part 180

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

Dated: March 17, 1999.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

Therefore, 40 CFR chapter I is amended as follows:

PART 180–[AMENDED]

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

Authority: 21 U.S.C. 321(q), 346(a), and 371.

§ 180.480 [Amended]

2. In § 180.480, by amending the table in paragraph (b), for the commodity ''blueberries'' by changing the date ''12/31/99'' to read ''12/31/00''.

[FR Doc. 99–7436 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

GENERAL SERVICES ADMINISTRATION

48 CFR Part 552

[APD 2800.12A, CHGE 82]

RIN 3090–AG96

General Services Administration Acquisition Regulation; Small Business Subcontracting Program

AGENCY: Office of Acquisition Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration Acquisition Regulation (GSAR) is amended to make the GSAR clauses consistent with FAC 97–10 of the Federal Acquisition Regulation (FAR).

DATES: Effective March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Rhonda Cundiff, GSA Acquisition Policy Division, (202) 501–0044.

SUPPLEMENTARY INFORMATION:

A. Background

This change updates GSAR clauses to include HUBZone small business concerns in subcontracting plan requirements.

B. Executive Order 12886

This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804. The impact on small businesses derives from the changes made to the FAR rule, and the impacts were discussed in that rule's Final Regulatory Flexibility Analysis.

C. Regulatory Flexibility Act

This final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the GSAR do not impose recordkeeping or information collection requirements, or otherwise collect information from offerors, contractors, or members of the public that require approval of the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

List of Subjects in 48 CFR Part 552

Government procurement.

Accordingly, 48 CFR 552 is amended as follows:

1. The authority citation for 48 CFR Part 552 continues to read as follows:

Authority: 40 U.S.C. 486(c).

PART 552 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

2. Section 552.219–72 is revised to read as follows:

552.219–72 Notice to offerers of subcontracting plan requirements.

As prescribed in 519.708(a), insert the following provision:

Notice to Offerers of Subcontracting Plan Requirements (Mar 1999)

The General Services Administration (GSA) is committed to assuring that maximum practicable opportunity is provided to small, HUBZone small, small disadvantaged, and women-owned small business concerns to participate in the performance of this contract consistent with its efficient performance. GSA expects any subcontracting plan submitted pursuant to FAR 52.219–9, Small Business Subcontracting Plan, to reflect this commitment. Consequently, an offeror, other than a small business concern, before being awarded a contract exceeding $500,000 ($1,000,000 for construction), must demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, and women-owned small business concerns as subcontractors in the performance of this contract.

(End of Provision)

3. Section 552.219–73 is revised to read as follows:

552.219–73 Preparation, submission, and negotiation of subcontracting plans.

As prescribed in 519.708(b), insert the following provision:

Preparation, Submission, and Negotiation of Subcontracting Plans (Mar 1999)

(a) An offeror, other than a small business concern, submitting an offer that exceeds $500,000 ($1,000,000 for construction) shall submit a subcontracting plan with its initial offer. The subcontracting plan will be negotiated concurrently with price and any required technical and management proposals, unless the offeror submits a

previously-approved commercial products plan.

(b) Maximum practicable utilization of small, HUBZone small, small disadvantaged, and women-owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits. The General Services Administration (GSA) expects that an offeror's subcontracting plan will reflect a commitment to assuring that small, HUBZone small, small disadvantaged, and women-owned small business concerns are provided the maximum practicable opportunity, consistent with efficient contract performance, to participate as subcontractors in the performance of the resulting contract. An offeror submitting a commercial products plan can reflect this commitment through subcontracting opportunities it provides that relate to the offeror's production generally; i.e., for both its commercial and Government business.

(c) GSA believes that this potential contract provides significant opportunities for the use of small, HUBZone small, small disadvantaged, and women-owned small business concerns as subcontractors. Consequently, in addressing the eleven elements described at FAR 52.219–9(d) of the clause in this contract entitled Small Business Subcontracting Plan, the offeror shall:

(1) Demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, and women-owned small business concerns in performing the contract.

(2) Include a description of the offeror's subcontracting strategies used in any previous contracts, significant achievements, and how this plan will build upon those earlier achievements.

(3) Demonstrate through its plan that it understands the small business subcontracting program's objectives and GSA's expectations, and it is committed to taking those actions necessary to meet these goals or objectives.

(d) In determining the acceptability of any subcontracting plan, the Contracting Officer will take each of the following actions:

(1) Review the plan to verify that the offeror demonstrates an understanding of the small business subcontracting program's objectives and GSA's expectations with respect to the program and has included all the information, goals, and assurances required by FAR 52.219–9.

(2) Consider previous goals and achievements of contractors in the same industry.

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, HUBZone small, small disadvantaged, and women-owned small business concerns.

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, HUBZone small, small disadvantaged, and women-owned small business concerns. The offeror's description can apply to commercial as well as previous Government contracts.

(e) Failure to submit an acceptable subcontracting plan and/or correct deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of Provision)

4. Section 552.219–74 is revised to read as follows:

552.219–74 Goals for subcontracting plan.

As prescribed in 519.708(c), insert the following provision:

Goals for Subcontracting Plan (Mar 1999)

(a) Maximum practicable utilization of small, HUBZone small, small disadvantaged, and women-owned small business concerns as subcontractors is a matter of national interest with both social and economic benefits.

(1) The General Services Administration's (GSA's) commitment to ensuring that maximum practicable opportunity is provided to small, HUBZone small, small disadvantaged, and women-owned small business concerns to participate as subcontractors in the performance of this contract, consistent with its efficient performance, must be reflected in the offeror's subcontracting plan submitted pursuant to the clause of this contract at FAR 52.219–9, Small Business Subcontracting Plan.

(2) In addressing the eleven elements described at FAR 52.219–9(d), the offeror shall demonstrate that its subcontracting plan represents a creative and innovative program for involving small, HUBZone small, small disadvantaged, and women-owned small business concerns in performing this contract. An offeror submitting a commercial products plan can demonstrate its commitment in providing maximum practicable opportunities through subcontracting opportunities it provides to small, HUBZone small, small disadvantaged, and women-owned small business concerns that relate to the offeror's production generally; i.e., for both its commercial and Government business.

(3) The subcontracting plan shall include a description of the offeror's subcontracting strategies used in previous contracts and significant achievements, with an explanation of how this plan will build upon those earlier achievements. Additionally, the offeror shall demonstrate through its plan that it understands the small business subcontracting program's objectives, GSA's expectations, and is committed to taking those actions necessary to meet these goals or objectives.

(b) GSA believes that this contract provides significant opportunities for the use of small HUBZone small, small disadvantaged, and women-owned small business concerns and subcontractors. Accordingly, it is anticipated that an acceptable subcontracting plan will contain at least the following goals:

Small Business: ______percent
HUBZone Small Business: ______ percent
Small Disadvantaged Business: ______ percent
Women-Owned Small Business: ______ percent

Note: Target goals are expressed as a percentage of planned subcontracting dollars.

(c) In determining the acceptability of any subcontracting plan, the Contracting Officer will—

(1) Review the plan to verify that the offeror has demonstrated an understanding of the small business subcontracting program's objectives and GSA's expectations with respect to the programs and has included all the information, goals, and assurances required by FAR 52.219–9;

(2) Consider previous goals and achievements of contractors in the same industry;

(3) Consider information and potential sources obtained from agencies administering national and local preference programs and other advocacy groups in evaluating whether the goals stated in the plan adequately reflect the anticipated potential for subcontracting to small, HUBZone small, small disadvantaged, and women-owned small business concerns; and

(4) Review the offeror's description of its strategies, historical performance and significant achievements in placing subcontracts for the same or similar products or services with small, HUBZone small, small disadvantaged, and women-owned small business concerns. The offeror's description can apply to commercial as well as previous Government contracts.

(d) Failure to submit an acceptable subcontracting plan and/or correct deficiencies in a plan within the time specified by the Contracting Officer shall make the offeror ineligible for award.

(End of Provision)

Alternate I (DEC 1995)

As prescribed in 519.708(c), delete paragraph (b) of the basic provision and redesignate paragraphs (c) and (d) as paragraphs (b) and (c).

Dated: March 25, 1999.

Les Davison,

Acting Deputy Associate Administrator for Acquisition Policy.

[FR Doc. 99–7828 Filed 3–30–99; 8:45 am]
BILLING CODE 6820–61–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[I.D. 032299A]

Fisheries Off West Coast States and in the Western Pacific; Pacific Coast Groundfish Fishery; Renewal of Exempted Fishing Permits

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration, NOAA, Commerce.

ACTION: Renewal of Exempted Fishing Permits (EFPs) for monitoring salmon bycatch in the Washington-Oregon-California (WOC) shore-based Pacific whiting fishery.

SUMMARY: NMFS announces the receipt of an application, and NMFS' intent to renew EFPs to vessels participating in an observation program to monitor the incidental take of salmon and groundfish in the shore-based component of the Pacific whiting fishery. These EFPs are necessary to allow trawl vessels fishing for Pacific whiting to delay sorting of prohibited species and groundfish catch in excess of cumulative trip limits until the point of offloading. These activities are otherwise prohibited by Federal regulations.

DATES: The EFPs will be effective no earlier than April 1, 1999, and would expire no later than May 31, 2000, but could be terminated earlier under terms and conditions of the EFPs and other applicable laws.

ADDRESSES: Copies of the EFPs are available from Katherine King, Northwest Region, NMFS, 7600 Sand Point Way NE., Bldg. 1, Seattle, WA 98115–0070.

FOR FURTHER INFORMATION CONTACT: Katherine King 206–526–6145.

SUPPLEMENTARY INFORMATION: This action is authorized by the Magnuson-Stevens Fishery Conservation and Management Act and implementing regulations at 50 CFR 600.745, which state that EFPs may be used to authorize fishing activities that would otherwise be prohibited.

NMFS received an application requesting renewal of these EFPs from the States of Washington, Oregon, and California at the March 8–12, 1999, Pacific Fishery Management Council (Council) meeting in Portland, OR. An opportunity for public testimony was provided during the Council meeting. The Council recommended that NMFS issue the EFPs, as requested by the States.

Renewal of these EFPs, to about 40 vessels, would continue an ongoing program to collect information on the bycatch of salmon and groundfish in whiting harvests delivered to shoreside processing facilities by domestic trawl vessels operating off WOC. Sorting the catch at sea can hurt the whiting quality because whiting deteriorates rapidly if it is not immediately chilled. Issuing EFPs will allow vessels to delay sorting of groundfish catch in excess of cumulative trip limits and prohibited species until offloading. Delaying sorting until offloading will allow state biologists to collect bycatch data for total catch estimates and will enable whiting quality to be maintained. Without an EFP, groundfish regulations at 50 CFR 660.306(b) require vessels to sort their prohibited species bycatch and return them to sea as soon as practicable with minimum injury. To allow state biologists to sample unsorted whiting, it is also necessary to include provisions for potential overages of groundfish trip limits which is prohibited by regulations at 50 CFR 660.306(h).

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

Dated: March 25, 1999.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–7889 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[I.D. 032599B]

RIN 0648–AL89

Fisheries of the Exclusive Economic Zone Off Alaska; Overfished Fisheries

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

ACTION: Notice of overfished fishery.

SUMMARY: NMFS has identified the eastern Bering sea stock of *C. bairdi* as overfished. The identification of overfished stocks is required by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act), as amended by the Sustainable Fisheries Act (SFA). The purpose of this notice is to notify the public that the North Pacific Fishery Management Council (Council) has been informed that the stock is overfished and has been directed to initiate action to end overfishing and rebuild the stock.

FOR FURTHER INFORMATION CONTACT: George H. Darcy, NMFS, 301/713-2341.

SUPPLEMENTARY INFORMATION:

Background

This action is required by the Magnuson-Stevens Act (16 U.S.C. 1801 *et seq.*) as amended by the SFA, which was signed into law on October 11, 1996. Section 304(e) of the Magnuson-Stevens Act requires that upon determination that a fishery is overfished, the Secretary of Commerce (Secretary) shall immediately notify the appropriate fishery management council and request that action be taken to end overfishing in the fishery and to implement conservation and management measures to rebuild affected stocks. The fishery managment council has one year from the date of notification to prepare a plan to end overfishing in the fishery and to rebuild affected stocks.

On March 3, 1999, the Secretary approved Amendment 7 to the Fishery Management Plan (FMP) for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands (BSAI) (64 FR 11390, March 9, 1999). Pursuant to section 303(a)(10) of the Magnuson-Stevens Act, and the national standard guidelines (50 CFR part 600), the amendment revises the definitions of overfishing, maximum sustainable yield, and optimum yield for the king and Tanner crab fisheries in the BSAI. Under the new definitions, the eastern Bering Sea *C. bairdi* Tanner crab spawning biomass is below the minimum sustainable stock size threshold, and is deemed overfished. Pursuant to section 304 of the Magnuson-Stevens Act, NMFS notified the Council by letter on March 3, 1999, that the stock is overfished, as follows:

Mr. Richard B. Lauber, Chairman
North Pacific Fishery Management Council
605 West 4th Avenue, Suite 306
Anchorage, Alaska 99501–2252

Dear Mr. Lauber:

I have approved Amendment 7 to the Fishery Management Plan (FMP) for the Commercial King and Tanner Crab Fisheries in the Bering Sea/Aleutian Islands and Amendment 6 to the FMP for the Scallop Fishery Off Alaska. These amendments revise the definitions of overfishing for the crab and scallop species or species groups in the FMPs. This action is necessary for compliance with the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) and will advance the Council's ability to achieve, on a continuing basis, the optimum yield from fisheries under its jurisdiction.

A notice of availability for the proposed Amendments 7 and 6, which describes the proposed amendments and invited comments from the public, was published in the **Federal Register** at 63 FR 66112 on December 1, 1998. No regulatory changes are associated with these amendments. A Notice of Approval for the amendments will be published shortly in the **Federal Register**, informing the public of the approval decisions.

Based on the overfishing definitions contained in Amendment 7 to the crab FMP, we determine *C. bairdi* to be overfished. By March 3, 2000, the Council is required by section 304(e) of the Magnuson-Stevens Act to prepare and submit conservation and

management measures to end overfishing and rebuild the *C. bairdi* stock. The rebuilding program must be as short as possible, but not exceed 10 years, except if the biology of the stock or other environmental conditions dictate otherwise.

Sincerely,

Steven Pennoyer, Regional Administrator

Dated: March 25, 1999.

Gary C. Matlock,

Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–7888 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–22–F

Proposed Rules

Federal Register
Vol. 64, No. 61
Wednesday, March 31, 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.

FEDERAL RESERVE SYSTEM

12 CFR Parts 208, 211, and 225

[Regulations H, K and Y; Docket No. R–1019]

Membership of State Banking Institutions in the Federal Reserve System; International Banking Operations; Bank Holding Companies and Change in Bank Control

AGENCY: Board of Governors of the Federal Reserve System.

ACTION: Withdrawal of notice of proposed rulemaking.

SUMMARY: The Board of Governors of the Federal Reserve System (Board) published a Notice of Proposed Rulemaking in the **Federal Register** on December 7, 1998. The proposed regulation would have required state member banks, certain bank holding companies and their nonbank subsidiaries, certain U.S. branches and agencies and nonbank subsidiaries of foreign banks, and Edge and Agreement corporations (collectively referred to as a ''bank'' or ''banks'') to develop and maintain ''Know Your Customer'' programs. The Board received over 17,000 comments, the overwhelming majority of which were strongly opposed to the adoption of the proposed regulation. After considering the issues raised by the comments, and in view of the strong opposition to the proposed regulation, the Board is withdrawing the Notice of Proposed Rulemaking.

DATES: The proposed rule is withdrawn on March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Richard A. Small, Assistant Director, Division of Banking Supervision and Regulation, (202) 452–5235 or Pamela J. Johnson, Senior Anti-Money Laundering Coordinator, Division of Banking Supervision and Regulation, (202) 728–5829. For users of Telecommunications Devices for the Deaf (TDD) only contact Diane Jenkins, (202) 452–3544, Board of Governors of the Federal Reserve System, 20th and C Streets, N.W., Washington, D.C. 20551.

SUPPLEMENTARY INFORMATION: On December 7, 1998, the Board published proposed revisions to Part 208 (Membership of State Banking Institutions in the Federal Reserve System (Regulation H)), Part 211 (International Banking Operations (Regulation K)) and Part 225 (Bank Holding Companies and Change in Bank Control (Regulation Y)) of the Board's Rules (63 FR 67516, December 7, 1998). The proposed revisions were intended to provide guidance to banks to facilitate and ensure their compliance with existing federal reporting and record keeping requirements, such as those found in the Bank Secrecy Act. It was intended to help protect the integrity and reputation of the financial services industry and assist the government in its efforts to combat money laundering and other illegal activities that might be occurring through financial institutions.

The Board's proposal was substantially the same as regulations proposed by the Federal Deposit Insurance Corporation, the Office of the Comptroller of the Currency and the Office of Thrift Supervision.

The Board received more than 17,000 comments. Comments were received from community, regional and multinational banks, members of Congress, trade and industry groups, as well as the general public.

The overwhelming majority of commenters were individual, private citizens who voiced strong opposition to the proposal as an invasion of personal privacy. Other issues raised by these commenters included the Board's authority to issue the proposal; the cost of any ''Know Your Customer'' program would be passed on to customers; and the regulation would be ineffective in preventing money laundering and other illicit financial activities.

Banks and trade associations that commented on the proposal uniformly opposed its implementation. Their arguments against the proposal included the following: (1) The regulation would be very costly to implement, especially for small banks; (2) a ''Know Your Customer'' program would invade customer privacy; (3) commercial banks would be unfairly disadvantaged and lose customers if all segments of the financial services industry were not covered; (4) compliance with the regulation would divert resources from Year 2000 preparation; (5) the Board lacked authority to adopt the regulation; (6) public confidence in the banking industry would be harmed by the regulation; and (7) the regulation is both unnecessary and redundant, as banks are already familiar with their customers and have adequate procedures in place.

The Board has carefully reviewed the comments received during the 90-day comment period. Based upon that review, and in light of the overwhelming objections raised by the public, the Board has decided to withdraw the proposed regulation.

By order of the Board of Governors of the Federal Reserve System, March 25, 1999.

Robert deV. Frierson,

Associate Secretary of the Board

[FR Doc. 99–7837 Filed 3–30–99; 8:45 am]

BILLING CODE 6210–01–P

SECURITIES AND EXCHANGE COMMISSION

17 CFR PARTS 240 and 249b

[Release No. 34–41204; File No. S7–11–99]

RIN 3235–AH44

Revised Transfer Agent Form and Related Rule

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (Commission) is publishing for comment its proposal to amend Rule 17Ac2–2 and related Form TA–2 and its proposal to rescind Rule 17a–24 under the Securities Exchange Act of 1934. The amendment would make technical corrections and provide greater clarity to Form TA–2. Accordingly, the amendments are designed to clarify filing requirements and instructions; eliminate or change ambiguous terms and phrases; delete certain redundant or unnecessary questions; and add questions that would help the Commission to more effectively monitor the transfer agent industry.

DATES: Comments are due on or before May 17, 1999.

ADDRESSES: Comments should be submitted in triplicate to Jonathan G.

Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7–11–99; this file number should be included on the subject line if E-mail is used. All comments received will be available for public inspection and copying in the Commission's Public Reference Room, 450 5th Street, N.W., Washington, D.C. 20549. Electronically submitted comment letters will be posted on the Commission's Internet Web site (http://www.sec.gov).

FOR FURTHER INFORMATION CONTACT: Jerry W. Carpenter, Assistant Director, or Lori R. Bucci, Special Counsel, at 202/942–4187, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, Washington, D.C. 20549–1001.

SUPPLEMENTARY INFORMATION:

I. Introduction

Transfer agents play an essential role in the processing of securities transactions and recordkeeping for securities issuers. The Commission is reviewing the regulations that apply to transfer agents to determine whether changes are necessary or appropriate. In this release, we propose a variety of amendments to Form TA–2,[1] the annual reporting mechanism for all registered transfer agents.

Form TA–2 has not been reviewed since it was adopted in 1986.[2] Since that time, a variety of ambiguities and inconsistencies in the form have come to light. Also, we believe that the quality of the data obtained from transfer agents can be improved. It is essential that the Commission receive accurate information that can be processed and evaluated efficiently by our staff because there is no self-regulatory organization for transfer agents, resulting in more direct oversight responsibility for the Commission and the other appropriate regulatory agencies (ARAs).[3] The amendments proposed today are intended to enhance our oversight capabilities.

A. Rule 17Ac2–2 and Form TA–2

In 1975, Congress enacted legislation for the regulation of the securities processing industry.[4] The legislation requires transfer agents to register, and gives the ARAs the authority to develop registration requirements. Every transfer agent that is subject to registration must file a Form TA–1 with its ARA.[5] Congress gave the Commission broad rulemaking and enforcement authority over all transfer agents[6] although the bank regulatory agencies were given primary responsibility for oversight of bank transfer agents.[7]

In 1986, the Commission adopted Rule 17Ac2–2, which requires all registered transfer agents to file an annual report of their business activities on Form TA–2.[8] As part of the Commission's continuing efforts to improve and simplify rules and forms, the Commission proposes to amend Rule 17Ac2–2 and Form TA–2. The proposed amendments would allow the Commission to obtain clearer and more comprehensive information from transfer agents about their activities. Essentially, the proposed amendments would:

- elicit additional information regarding transfer agent business activities, such as direct purchase and dividend reinvestment plan accounts, buy-ins, and turnaround time for routine items;
- request more useful lost securityholder information;
- enhance service company information;
- eliminate the filing exception;
- clarify the filing requirements and instructions;
- conform reporting periods;
- delete unnecessary questions; and
- make technical changes.

B. Lost Securityholders

To address the problem of lost securityholders,[9] on October 1, 1997, the Commission adopted Rules 17Ad–17 and 17a–24.[10] Rule 17Ad–17 requires transfer agents to conduct data base searches in an effort to locate lost securityholders. Rule 17a–24 requires transfer agents to submit on Form TA–2 aggregate data regarding the accounts of lost securityholders.[11] The purpose of Rule 17a–24 is to gather data to assess the effectiveness of the search requirements of Rule 17Ad–17. As a result of its continuing review of this problem, the Commission now believes that it needs different information than that which is required by Rule 17a–24 to assess the effectiveness of the search requirements of Rule 17Ad–17. Therefore, the Commission is proposing to require transfer agents to report on Form TA–2 specific information about the results of the required data base searches for lost securityholders and to rescind Rule 17a–24.

II. Proposed Changes

A. Rule 17Ac2–2

Rule 17Ac2–2 requires every transfer agent to file Form TA–2 with the Commission by August 31 of each calendar year. The information furnished on Form TA–2 assists the Commission in its transfer agent oversight programs.

The Commission is proposing several modifications to Rule 17Ac2–2. First, to clarify whether a transfer agent must file Form TA–2 if it withdraws its registration during the filing period, Rule 17Ac2–2 would be amended to require every transfer agent that is registered on June 30 to file Form TA–2 by August 31 of that calendar year.

Second, current Rule 17Ac2–2 provides that a registered transfer agent is required to complete only Items 1 through 4 of Form TA–2 if it: received fewer than 500 items for transfer and fewer than 500 items for processing in the six months ending June 30, and did not maintain master securityholder files for more than 1,000 individual securityholder accounts as of June 30. The proposed amendment would revise

[1] 17 CFR 249b.102.

[2] Securities Exchange Act Release No. 23084 (March 27, 1986), 51 FR 12124. Form TA–2 is referenced in 17 CFR 249b.102.

[3] The term ''appropriate regulatory agency'' is defined in Section 3(a)(34) of the Securities Exchange Act of 1934, 17 U.S.C. 78c(a)(34), and includes the Commission, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of the Comptroller of the Currency.

[4] Pub. L. 94–29 (June 4, 1975), known as the Securities Acts Amendments of 1975. The securities processing industry refers to both transfer agents and clearing agencies.

[5] Section 17A(c)(2) of the Exchange Act. Form TA–1 is referenced in 17 CFR 249b.100.

[6] Section 17A(d)(3) of the Exchange Act.

[7] Section 17A(d)(3)(A)(ii) of the Exchange Act.

[8] Securities Exchange Act Release No. 23084 (March 27, 1986), 51 FR 12124. Form TA–2 is referenced in 17 CFR 249b.102.

[9] Rule 17Ad–17 generally defines a ''lost securityholder'' as a securityholder to whom an item of correspondence that was sent to the securityholder at the address in the transfer agent's master securityholder file has been returned as undeliverable. Securities Exchange Act Release No. 39176 (October 1, 1997), 62 FR 52229. ''Master securityholder file'' is defined in Rule 17Ad–9(b) as the official list of individual securityholder accounts.

[10] Securities Exchange Act Release No. 39176 (October 1, 1997), 62 FR 52229. The Commission also adopted amendments to Rule 17Ad–7 incorporating the retention time periods for the records relating to compliance with Rule 17Ad–17.

[11] Rule 17a–24 requires registered transfer agents to report the number of lost securityholder accounts as of June 30 of each year and the percentage of total accounts represented by such lost securityholder accounts. These figures are broken down by the length of time the securityholder was classified as lost: one year or less; three years or less; five years or less; or more than five years. Rule 17a–24 also requires that transfer agents annually report information on lost securityholder accounts that escheated to state unclaimed property administrators.

this partial exception to the full filing requirement so that it applies to a registered transfer agent that received fewer than 1,000 items for transfer and fewer than 1,000 items for processing in the twelve months ending June 30 of the year for which the form is being filed.[12] Moving from a six month to a twelve month period would conform this exception to the rule's twelve month reporting period and would provide more complete records regarding the volume of items transferred and processed during the entire reporting period.

Third, Rule 17Ac2–2 currently requires the annual filing of Form TA–2 by all registered transfer agents except named transfer agents [13] that engage a service company [14] to perform all of their transfer and processing functions.[15] As a consequence, in processing Form TA–2 filings, the Commission's staff frequently cannot determine whether a transfer agent that did not file Form TA–2 is properly using the exception or has simply neglected to file. To address this problem, the proposed rule amendment would eliminate the exception.

A named transfer agent that engages a service company to perform all of its transfer and processing functions would be required to complete only the first four questions and the signature section of Form TA–2.[16] Currently, Rule 17Ac2–2 requires a named transfer agent that engages a service company to perform some but not all of its transfer and processing functions to file a Form TA–2 and to enter zero (0) for those questions that relate to functions performed by the service company on behalf of the named transfer agent. This requirement would not be changed by the proposed amendments. Therefore, as a result of the proposed amendments every registered transfer agent would be required to file a Form TA–2 annually.

B. Form TA–2

Current Form TA–2 contains questions regarding the volume and nature of a transfer agent's business activities. The Commission proposes to amend Form TA–2 to obtain more complete information regarding service companies, the transfer agent's amendments to its Form TA–1, direct purchase and dividend reinvestment plan accounts, buy-ins,[17] lost securityholders, and turnaround time for routine items. The proposal also includes numerous technical and conforming changes.

1. Form TA–2 Instructions

Currently, the box at the top left corner of the first page requests the month, day, and year of the filing period. This format enables registrants to put in a date other than the required reporting period. The box at the top left corner of every page of Form TA–2 would be changed to ''For the reporting period ending June 30, *YYYY*.'' This change would help ensure that the correct reporting period for which Form TA–2 is being submitted is indicated.

For clarity and to ease filling out Form TA–2, the proposed form would add definitions for the following terms to the form's instructions: aged record difference, lost securityholder, named transfer agent, outside registrar, record difference, reporting period, and service company. These definitions are the same definitions currently set forth in the existing transfer agent rules. In addition, the proposal would revise the filing requirements to conform with the amendments to Rule 17Ac2–2 discussed above.

Currently, in determining the number of investment company securities for which they act as transfer agents, registrants are instructed to count each prospectus as one issue. The Commission believes that it is more informative to count investment company securities by CUSIP numbers rather than by prospectuses. Therefore, registrants would be instructed to count investment company securities as one issue per CUSIP number.

2. Form TA–2 Questions

Revised Form TA–2 would contain a question asking if the registrant has amended Form TA–1 as required by existing transfer agent rules.[18] In addition, the revised Form TA–2 would request that the transfer agent provide an explanation if it failed to file a required amendment to its Form TA–1. Form TA–2 also would contain a new question asking about the registrant's use of service companies. This information would help the Commission to obtain more complete information about transfer agents and their business activities.

Throughout the form, the request for numbers with ''000s omitted'' or ''in millions—000,000s omitted'' would be deleted to prevent confusion and to ease the staff's analysis. The amended Form TA–2 would request the actual figures with no zeros omitted.

Currently, Form TA–2 requests transfer agents to report the number of items received for transfer and processing during the six months ending June 30. The proposal would amend this reporting period from six months to twelve months ending June 30 in order to have a uniform annual reporting period.

Currently, Form TA–2 elicits information regarding only the number of issues for which dividend reinvestment plan services are provided. However, the number of transfer agents providing direct purchase and dividend reinvestment plan services and the number of direct purchase and dividend reinvestment plan accounts have increased substantially in recent years. Revised Form TA–2 would require that transfer agents reflect direct purchase and dividend reinvestment plan accounts in the total number of individual securityholder accounts maintained, and separately state the number of individual securityholder direct purchase and dividend reinvestment plan accounts.

Currently, Form TA–2 requests the percentage of individual securityholder accounts maintained in six categories: corporate equity securities, corporate debt securities, investment company securities, limited partnership securities, municipal debt securities, and other securities. Revised Form TA–2 would clarify the question by

[12] The master securityholder account element would not change. A transfer agent with this level of activity would be required to complet only Questions 1 through 5, 10, and 11 and the signature section of Form TA–2.

[13] ''Named transfer agent'' is defined in Rule 17Ad–9(j) as the registered transfer agent that is engaged by an issuer to perform transfer agent functions for an issue of securities but has engaged a service company to perform some or all of those functions. 17 CFR 240.17Ad–9(j).

[14] ''Service company'' is defined in Rule 17Ad–9(k) as the registered transfer agent engaged by a named transfer agent to perform transfer agent functions for that named transfer agent. 17 CFR 240.17Ad–9(k).

[15] 17 CFR 240.17Ac2–2.

[16] These questions on Form TA–2 would request basic information such as the transfer agent's name, its use of a service company, the name of its ARA, whether it filed any amendments to its registration, and the number of items it received for transfer and processing during the reporting period.

[17] Rule 17Ad–11(c)(2) generally requires that within ten business days following the end of each calendar quarter, every recordkeeping transfer agent shall report certain information when the aggregate market value of all buy-ins executed pursuant to Rule 240.17Ad–10(g) during that calendar quarter exceeds $100,000. 17 CFR 240.17Ad–11(c)(2).

[18] Transfer agents registered with the Commission are required by Rule 17Ac2–1(c) to amend Form TA–1 or the SEC Supplements to Form TA–1 within 60 calendar days following the date on which information reported therein became inaccurate, incomplete, or misleading. 17 CFR 240.17Ac2–1(c). Federal bank regulators (FBRs) also require their registrants to amend their Form TA–1 within 60 calendar days following the date on which the reported information became inaccurate, incomplete, or misleading. FBRs send copies of the submitted filings to the Commission on behalf of their registrants.

renaming one of the six categories. The category of investment company securities would be renamed as open-end investment company securities. In addition, for purposes of clarification, the Form TA–2 instructions would be amended to state that the corporate equity category would include closed-end investment company securities.

Currently, Form TA–2 requires the transfer agent to determine the number and type of securities issues for which it acted in various transfer agent capacities.[19] Form TA–2 directs the transfer agent to combine corporate debt and equity into one category. In order that the Commission have more precise information on a transfer agent's operations, revised Form TA–2 would require the transfer agent to report separately the number of corporate equity and corporate debt securities issues for which it acted in a specified capacity.[20]

Where a change in transfer agents for an issuer has occurred, current Form TA–2 requests information about the number and aggregate market value of (1) securities record differences[21] that the current transfer agent received as an out of balance issue from the prior transfer agent, and (2) securities record differences resulting from the current transfer agent. The format of this section has been confusing to many registrants. Therefore, because the Commission believes that the current record difference information is the most significant, the form would be revised to require reporting of the current number and aggregate market value of securities differences with no detail as to whether the securities differences occurred before or after the change in transfer agents.

Revised Form TA–2 would add a question about the number of quarterly reports that were filed and that should have been filed by the registrant with its ARA during the reporting period pursuant to Rule 127Ad–11(c)(2).[22] The addition of this question to Form TA–2 should help the Commission monitor registered transfer agent over-issuance and buy-in activities.

The proposal would eliminate the collection of information about transfer agent custodian (TAC) arrangements.[23] The current question tends to glean erroneous responses from many transfer agents while accurate information is readily obtainable from The Depository Trust Company.

As discussed above, the Commission proposes to use a uniform reporting period in Form TA–2. Accordingly, information relating to a transfer agent's dividend disbursement and interest paying agent activities, and information relating to the volume of openend investment company securities purchases and redemptions a transfer agent processes would be reported for the twelve months ending June 30 instead of for the preceding calendar year ending December 31.[24]

Current Form TA–2 requests both the number of transactions processed on a date other than the date of receipt of the order and the ''number of transactions processed on other than on date of receipt of order, expressed as a percentage of total transactions processed.'' Because the Commission can compute the percentage based on other data in the form, the percentage inquiry would be eliminated.

Finally, the proposal would add a question regarding turnaround time. Revised Form TA–2 would ask transfer agents to report the number of months during the reporting period in which the registrant was not in compliance with the specified turnaround time for routine items pursuant to Rule 17Ad–2.[25] Revised Form TA–2 also would ask transfer agents to report the number of written notices the transfer agent filed and should have filed during the reporting period documenting its noncompliance with turnaround time for routine items pursuant to Rule 17Ad–2.

C. Rule 17a–24

Rule 17a–24 requires registered transfer agents to report the aggregate number of lost securityholder accounts as of June 30 of each year and the percentage of total accounts represented by such lost securityholder accounts. These figures currently must be reported for lost securityholder accounts outstanding for: one year or less, three years or less, five years or less, or more than five years. As noted in the adopting release, the Commission adopted Rule 17a–24 to require the reporting of information on aged lost securityholder accounts in order to assess the effectiveness of search techniques employed by transfer agents. Rule 17a–24 also requires information on lost securityholder accounts that escheated to state unclaimed property administrators.

In 1998, transfer agents were required to report information on the aging of lost securityholder accounts for the first time on Form TA–2. Transfer agent representatives, however, have informed Commission staff that compiling information on the aging of lost securityholder accounts has proved to be extremely difficult. Many transfer agents have indicated that their record systems are not designed to produce such information and that to program their systems to provide such information would be extremely burdensome and in some situations not possible.[26]

The Commission has reviewed the information required by Rule 17a–24. The Commission believes that the Commission should refine transfer agents' reporting requirements so that the information transfer agents are required to file would give a better indication of the effectiveness of the data base searches. The new reporting requirements should also be less burdensome for transfer agents to implement. Therefore, the Commission is proposing that: (1) transfer agents be required to report on Form TA–2 the number of lost securityholders for which a first and for which a second

[19] The identified capacities are: (a) receives items for transfer and maintains the master securityholder files; (b) receives items for transfer but does not maintain the master securityholder files; and (c) does not receive items for transfer but maintains the master securityholder files.

[20] The registrant would continue to report the number and type of other securities issues for which it acts in the specified transfer agent capacities.

[21] ''Record difference,'' as defined in Rule 17Ad–9(g), occurs when either (1) the total number of shares or total principal dollar amount of securities in the master securityholder file does not equal the number of shares or principal dollar amount in the control book, or (2) the security transferred or redeemed contains certificate detail different from the certificate detail currently on the master securityholder file, which difference cannot be immediately resolved.

[22] 17 CFR 240.17Ad–11(c)(2). Generally, Rule 17Ad–11(c)(2) requires a transfer agent to file a report at the end of each quarter during which it has an aged record difference (*i.e.*, where the number of shares on the securityholder file does not equal the number of shares authorized and issued by the issuer). The report contains information such as the size and dollar value of the record difference, the reason for the record difference, and the size and dollar value of any buy-ins executed to remedy the record difference. (A buy-in is required when a registered transfer agent overissues shares. The registered transfer agent within 60 days of the discovery of such overissuance buys-in securities equal to the number of shares in the case of equity securities or equal to the principal dollar amount in the case of debt securities. 17 CFR 240.17Ad–10(g).)

[23] TAC agreements, which are more commonly referred to as fast automated securities transfer (FAST) accounts, exist between large transfer agents and The Depository Trust Company.

[24] Revised Form TA–2 would use the more commonly used industry term ''purchases and redemptions'' instead of ''transactions'' when referring to open-end investment company securities processing.

[25] Turnaround times for routine items are set forth in Rule 17Ad–2. 17 CFR 240.17Ad–2.

[26] Because of these conversations, the Commission believes that at this time transfer agents have not made or undertaken any major systems changes.

data base search has been conducted and for which a correct address has been obtained as a result of these searches; (2) transfer agents continue, as required by Rule 17a–24, to report on Form TA–2 the current number of lost securityholder accounts and the number of lost securityholder accounts that were remitted to the states during the last year; (3) the remaining information (*i.e.,* aging of lost securityholder accounts) will no longer be required; and (4) Rule 17a–24 then be rescinded.

III. General Request for Comments

The Commission solicits commenters' views on all aspects of the proposed amendments to Rule 17Ac2–2 and Form TA–2 and the proposed rescission of Rule 17a–24 under the Securities Exchange Act of 1934 (Exchange Act). In particular, the Commission requests comment as to whether the proposed amendments would provide the most effective means for the Commission to obtain adequate information regarding transfer agent operations. Are there other questions that the Commission could ask on Form TA–2 to obtain useful information on transfer agent operations? Is there other specific information regarding transfer agent operations that the Commission should require to be provided on Form TA–2?

In addition, the Commission requests comments on whether the proposed change to the information on lost securityholders collected on Form TA–2 would be a more effective method to track the effectiveness of transfer agents' data base searches than the account aging information currently required. Do transfer agents currently have the aging information readily available to report? Is the proposed change a more efficient and less costly method for transfer agents to report information on their outstanding lost securityholder accounts? What system changes and costs would transfer agents incur if they were only required to report the aging of lost securityholder accounts prospectively? (For example, it would only be five years from now that a transfer agent would be required to report the number of securityholder accounts that had been lost for five years.)

Finally, the Commission refers commenters to its policy statement establishing a regulatory moratorium to facilitate the year 2000 conversion.[27] The Commission anticipates that any amendments to Rule 17Ac2–2 and Form TA–2 would be adopted before the moratorium begins on June 1, 1999. However, the Commission requests comment on the specific extent to which the proposed amendments would require registered transfer agents to make major programming changes to their computer systems.

[27] Securities Exchange Commission Release Nos. 33–7568, 34–40377, 35–26912, IA–1749, and IC–23416 (August 27, 1998), 63 FR 47051. The policy is available at the Commission's website (www.sec.gov).

IV. Costs and Benefits of the Proposed Amendments and Their Effects on Competition

The Commission has identified certain costs and benefits relating to the proposals, which are discussed below, and encourages commenters to discuss any additional costs or benefits. In particular, the Commission requests comment on the potential costs for any necessary modifications to information gathering, management, and recordkeeping systems or procedures as well as any potential benefits resulting from the proposals for issuers, transfer agents, regulators, or others. Commenters should provide analysis and empirical data to support their views on the costs and benefits associated with the proposals.

A. Benefits

These amendments would help the Commission to:

- Keep complete records on all registered transfer agents. Currently, the Commission's staff cannot easily determine whether a transfer agent who did not file a Form TA–2 is properly using an applicable exception or whether the transfer agent has simply neglected to file.
- Use the information gathered from Form TA–2 to monitor the annual business activities of registered transfer agents, including the use of service companies, amendments to Form TA–1, direct purchase and dividend reinvestment plan accounts, buy-ins, and turnaround time for routine items.
- Achieve a consistent reporting period which should eliminate confusion from varying reporting periods. In addition, as the volume of transfer business may not be consistent throughout the entire reporting period, the current reporting requirement of only six months of data is potentially skewed.
- Elicit information regarding the data base searches for lost securityholders. This information should enable the Commission to assess the effectiveness of the search requirements of Rule 17Ad–17 and the scope of the lost securityholder problem.

B. Costs

The proposed amendments to Rule 17Ac2–2 and Form TA–2 should not result in any significant additional costs to transfer agents. The majority of information required by Form TA–2 is available in the internal files of the transfer agents, and a large portion of the information is already required by the Commission to be calculated or maintained.

The primary cost associated with the proposal is the time that it will take transfer agent personnel to complete the form and file it with the Commission. The amount of time needed to comply with the requirements of amended Rule 17Ac2–2 and Form TA–2 would vary. There are approximately 1,210 registered transfer agents. Of this number, approximately 300 registrants would be required to complete only Questions 1 through 4 and the signature section of amended Form TA–2. Based on their low volume of transfer business and number of shareholder accounts, approximately 410 registrants would be required to answer only Questions 1 through 5, 10, and 11 and the signature section. The remaining registrants, approximately 500, would be required to complete the entire Form TA–2.

Additionally, there may be some incremental cost associated with modifying computer systems to report all items for the twelve months ending June 30. This likely would require a simple, one-time change to database reporting functions and should have a negligible cost on transfer agents. The Commission seeks comment on this assumption and specifically requests empirical data on the cost of modifying systems to report all items for the twelve months ending June 30.

C. Effects on Efficiency, Competition, and Capital Formation

Section 23(a)(2) of the Exchange Act precludes the Commission in amending rules under the Exchange Act from adopting any such rule or regulation that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.[28] The Commission is considering the proposed amendments to Rule 17Ac2–2 and Form TA–2 in light of the standards cited in Section 23(a)(2). The Commission is proposing these amendments to enhance the Commission's ability to monitor more effectively the transfer agent industry. The amendments are also intended to make the Form TA–2 more efficient for

[28] 15 U.S.C. 78w(a)(2).

both the Commission and transfer agents. Because transfer agents of a similar size and with similar business are required to complete the form in the same manner, there should be no negative impact on competition. The Commission solicits commenters' views regarding the effects of the proposed amendments to Rule 17Ac2–2 and Form TA–2 on competition, efficiency, and capital formation. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, we also seek comments on the proposed rule's potential impact (including any empirical data) on the economy on an annual basis, any increase in costs or prices for consumers, and any effect on competition, investment or innovation.

V. Summary of Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA), in accordance with the provisions of the Regulatory Flexibility Act,[29] regarding the proposed amendments to Rule 17Ac2–2 and Form TA–2 and the proposed rescission of Rule 17a-24 under the Exchange Act. As discussed more fully in the analysis, some of the transfer agents that the proposed amendments would affect are small entities, as defined by the Commission's rules.

The IRFA states the purpose of the proposal is to allow the Commission to obtain more comprehensive information from transfer agents about their activities while making Form TA–2 clearer and easier for transfer agents to complete. The proposed amendments would: elicit information regarding transfer agent business activities, such as direct purchase and dividend reinvestment plan accounts, buy-ins, and turnaround time for routine items; obtain more comprehensive lost securityholder information; enhance service company information; eliminate the filing exemption; clarify the filing requirements and instructions; conform reporting periods; delete unnecessary questions; and make technical changes.

The IRFA sets forth the statutory authority for the proposed amendments to Rule 17Ac2–2 and Form TA–2 and for the rescission of Rule 17a-24. The IRFA also discusses the effect of the proposal on transfer agents that are small entities pursuant to Rule 0–10(h) under the Exchange Act.[30] Rule 0–10(h) defines the term "small business" or "small organization" to include any transfer agent that: (1) received less than 500 items for transfer and less than 500 items for processing during the preceding six months (or in the time that it has been in business, if shorter); (2) maintained master shareholder files that in the aggregate contained less than 1,000 shareholder accounts or was the named transfer agent for less than 1,000 shareholder accounts at all times during the preceding fiscal year (or in the time that it has been in business, if shorter); (3) only transferred items of issuers with total assets of $5 million or less; and (4) is not affiliated with any person (other than a natural person) that is not a small business or small organization under Rule 0–10.

When the Commission adopted the new definition of "small entity" with respect to transfer agents, the Commission estimated that approximately 180 registered transfer agents would qualify as small entities under Rule 0–10. As a result, the Commission estimates that 180 small entities would be subject to the requirements of the proposed amendments to Rule 17Ac2–2 and Form TA–2.

The proposed amendments to Rule 17Ac2–2 would provide that a registered transfer agent that received fewer than 1,000 items for transfer and fewer than 1,000 items for processing in the twelve months ending June 30, and did not maintain master securityholder files for more than 1,000 individual securityholder accounts as of June 30, would have to complete only a portion of Form TA–2. All "small entities" as defined by Rule 0–10 would continue to have reduced reporting requirements under the proposal.

The IRFA states that the proposal would impose new reporting and compliance requirements on certain transfer agents because it would eliminate the filing exception for named transfer agents using service companies and would require every registered transfer agent to file Form TA–2 annually. In addition, questions regarding the use of service companies, amendments to its Form TA–1, direct purchase and dividend reinvestment plan accounts, buy-ins, lost securityholders, and turnaround time for routine items would be added to Form TA–2. The IRFA states that the incremental annual burden on all "small entities" would be approximately 81 hours and $2,552. The IRFA also states that the proposed amendments to Rule 17Ac2–2 and Form TA–2 would not impose any other reporting, recordkeeping, or compliance requirements, and that the Commission believes that there are no rules that duplicate, overlap, or conflict with the proposed amendments.

The IRFA discusses the various alternatives considered by the Commission in connection with the proposed amendments to Rule 17Ac2–2 and Form TA–2 that might minimize the effect on small entities, including: (a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources of small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the proposed amendments for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule or any part thereof for small entities.

Taking into account the burden that would be imposed on small transfer agents, the Commission is proposing that transfer agents that meet the definition of a "small entity" still be required to respond to only a portion of Form TA–2. Therefore, small entities would be subject to a minimal amount of compliance cost under the proposal. Accordingly, the Commission has determined that it is not feasible to further clarify, consolidate, or simplify the proposed amendments for "small entities." The Commission also believes that it would be inconsistent with the purpose of the Exchange Act to exempt "small entities" from the proposed amendments or to use performance standards to specify different requirements for small entities.

The Commission encourages the submission of written comments with respect to any aspect of the IRFA. Comments should specify costs of compliance with the proposed amendments to Rule 17Ac2–2 and Form TA–2, suggest alternatives that would accomplish the objective of proposed amendments, or indicate how many small entities, if any, would be subject to the rule change. A copy of the IRFA may be obtained by contacting Lori R. Bucci, Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–1001.

VI. Paperwork Reduction Act

Certain provisions of the proposed amendments to Rule 17Ac2–2 and Form TA–2 contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995,[31] and the Commission has submitted them to the Office of

[29] 5 U.S.C. 603.

[30] 17 CFR 240.0–10(h). The Commission recently amended this definition. Securities Exchange Commission Release Nos. 33–7548, 34–40122, IC–23272, and IA–1727 (June 24, 1998), 63 FR 35508.

[31] 44 U.S.C. 3501 *et seq.*

Management and Budget for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission notes that it proposes to rescind Rule 17a–24. However, the Commission proposes to keep two questions generated by Rule 17a–24 on Form TA–2 and to add a question to Form TA–2 about the results of the required data base searches for lost securityholders. The title for the collection of information is: ''Transfer Agents Annual Report 17 CFR 240.17Ac2–2, Form TA–2.'' The OMB control number for the collection of information is 3235–0337.

Under the proposed amendments, Rule 17Ac2–2 would require the collection of additional information on amended Form TA–2. First, the proposal would eliminate the filing exception for named transfer agents and would require every named transfer agent using a service company for all of its transfer and processing functions to complete only the first four questions and the signature section of Form TA–2, which request only simple information. Second, registered transfer agents that meet the criteria based on volume of transfer business and number of shareholder accounts would be required to Questions 1 through 5, 10, 11, and the signature section of Form TA–2. Finally, registered transfer agents that file a complete Form TA–2 would be required to respond to new questions regarding the use of service companies, amendments to Form TA–1, direct purchase and dividend reinvestment plan accounts, buy-ins, lost securityholders, and turnaround time for routine items.

The Commission uses the information on Form TA–2 to monitor the annual business activities of registered transfer agents. The proposed collection of information under amended Rule 17Ac2–2 and Form TA–2 is intended to facilitate greater accuracy of transfer agents' records. Furthermore, the information elicited from the additional question regarding lost securityholders should help the Commission to assess the effectiveness of the search requirements of Rule 17Ad–17 and the scope of the lost securityholder problem.

The collection of information required by the proposed amendments to Rule 17Ac2–2 and Form TA–2 should not result in any new significant burden to transfer agents. All information required by Form TA–2 is available in the internal files of the transfer agents and a large portion of the information is already required by existing Commission transfer agent rules to be calculated or maintained.

The amount of time needed to comply with the requirements of amended Rule 17Ac2–2 and Form TA–2 would vary. There are approximately 1,210 registered transfer agents. From this total number, approximately 300 registrants would be required to complete only Questions 1 through 4 and the signature section of amended Form TA–2, which the Commission estimates would take each registrant about 30 minutes, for a total of 150 hours (300 × .5 hours). Approximately 410 registrants would be required to answer Questions 1 through 5, 10, and 11 and the signature section, which the Commission estimates would take about 1 hour and 30 minutes, for a total of 615 hours (410 × 1.5 hours). The remaining registrants, approximately 500, would be required to complete the entire Form TA–2, which the Commission estimates would take about 6 hours, for a total of 3000 hours (500 × 6 hours). The Commission estimates that the total burden would be 3,765 hours (150 + 615 + 3000).[32]

The collection of information pursuant to the proposed amendments to Form TA–2 and Rule 17Ac2–2 does not contain any new recordkeeping requirements. Providing the information will be mandatory. Responses to the collection of information will not be kept confidential. 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 Office of Management and Budget control number.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

(i) evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility;

(ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information;

(iii) enhance the quality, utility, and clarity of the information to be collected; and

(iv) minimize the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms for information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the following persons: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10202, New Executive Office Building, Washington, D.C. 20503; and Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549–0609, and refer to File No. S7–11-99. The Office of Management and Budget (OMB) is required to make a decision concerning the collection of information between 30 and 60 days after publication of this release in the **Federal Register,** so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of this publication.

[32] Based on an estimated average administrative labor cost of $31.50 per hour, the Commission's staff estimates that the total labor cost to the transfer agent industry for complying with Rule 17Ac2–2 and Form TA–2 would be $118,597.50 annually ($31.50 × 3,765).

VII. Statutory Basis

Pursuant to the Exchange Act and particularly Sections 17, 17A, and 23(a) thereof, 15 U.S.C. 78q, 78q–1, and 78w(a), the Commission proposes to amend § 240.17Ac2–2 and Form TA–2 (referenced in 17 CFR 249b.102) of Chapter II of Title 17 of the Code of Federal Regulations in the manner set forth below.

List of Subjects in 17 CFR Parts in 240 and 249b

Reporting and recordkeeping requirements, Securities.

Text of Amendment

For the reasons set forth in the preamble, the Commission proposes to amend Chapter II of Title 17 of the *Code of Federal Regulations* as follows:

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

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

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

* * * * *

§ 240.17a-24 [Removed]

2. Section 240.17a–24 is removed.

3. Section 240.17Ac2–2 is revised to read as follows:

§ 240.17Ac2–2 Annual reporting requirement for registered transfer agents.

(a) Every transfer agent registered on June 30 shall file an annual report on Form TA–2 (§ 249b.102 of this chapter) by August 31 of that calendar year. Form TA–2 shall be completed in accordance with the instructions contained in the form.

(1) A registered transfer agent that received fewer than 1,000 items for transfer and fewer than 1,000 items for processing in the reporting period and that did not maintain master securityholder files for more than 1,000 individual securityholder accounts as of June 30 of the reporting period shall complete only Questions 1 through 5, 10, 11, and the signature section of Form TA–2 (§ 249b.102 of this chapter).

(2) A named transfer agent, as defined in § 240.17Ad–9(j), that engaged a service company, as defined in § 240.17Ad–9(k), to perform all of its transfer and processing functions during the reporting period shall complete only Questions 1 through 4 and the signature section of Form TA–2 (§ 249b.102 of this chapter).

(3) A named transfer agent, as defined in § 240.17Ad–9(j) that engaged a service company, as defined in § 240.17Ad–9(k), to perform some but not all of its transfer and processing functions during the reporting period shall complete all of Form TA–2, (§ 249b.102 of this chapter) but shall enter zero (0) for those questions which relate to functions performed by the service company on behalf of the named transfer agent.

(b) For purposes of this section, the term *reporting period* shall mean the 12 months ending June 30 of the year for which the form is being filed.

PART 249b—FURTHER FORMS, SECURITIES EXCHANGE ACT OF 1934

4. The authority citation for Part 249b continues to read in part as follows:

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

* * * * *

5. Form TA–2 (referenced in § 249b.102) is revised to read as follows:

[**Note:** Form TA–2 does not and the amendments will not appear in the Code of Federal Regulations.]

United States Securities and Exchange Commission, Washington, D.C. 20549

Instructions for Use of Form TA–2

Form TA–2 is to be used by transfer agents registered pursuant to Section 17A of the Securities Exchange Act of 1934 for filing the annual report of transfer agent activities.

ATTENTION: Certain sections of the Securities Exchange Act of 1934 applicable to transfer agents are referenced below. Transfer agents are urged to review all applicable provisions of the Securities Exchange Act of 1934, the Securities Act of 1933, and the Investment Company Act of 1940, as well as the applicable rules promulgated by the SEC under those Acts.

I. General Instructions for Filing and Amending Form TA–2.

A. *Terms and Abbreviations.* The following terms and abbreviations are used throughout these instructions:

1. ''Act'' means the Securities Exchange Act of 1934.
2. ''Aged record difference'', as defined in Rule 17Ad–11(a)(2), means a record difference that has existed for more than 30 calendar days.
3. ''ARA'' means the appropriate regulatory agency, as defined in Section 3(a)(34)(B) of the Act.
4. ''Form TA–2'' includes the Form TA–2 itself and any attachments.
5. ''Lost securityholder'', as defined in Rule 17Ad–17, means a securityholder: (i) to whom an item of correspondence that was sent to the securityholder at the address contained in the transfer agent's master securityholder file has been returned as undeliverable; provided, however, that if such item is re-sent within one month to the lost securityholder, the transfer agent may deem the securityholder to be a lost securityholder as of the day the re-sent item is returned as undeliverable; and (ii) for whom the transfer agent has not received information regarding the securityholder's new address.
6. ''Named transfer agent'', as defined in Rule 17Ad-9(j), means a registered transfer agent that has been engaged by an issuer to perform transfer agent functions for an issue of securities but has engaged a service company (another registered transfer agent) to perform some or all of those functions.
7. ''Outside registrar'', as defined in Rule 17Ad-1(b), means a transfer agent which performs only the registrar function for the certificate or certificates presented for transfer and includes the persons performing similar functions with respect to debt issues. See also Section 3(a)(25)(B) of the Act.
8. ''Record difference'' means any of the imbalances described in Rule 17Ad-9(g).
9. ''Registrant'' means the transfer agent on whose behalf the Form TA–2 is filed.
10. ''Reporting period'' means the 12 months ending June 30 of the year for which Form TA–2 is being filed.
11. ''Rule'' or ''Rules'' are found in Volume 17, Section 240 of the Code of Federal Regulations (CFR) (e.g., Rule 17Ad-1 is found at 17 CFR 240.17Ad-1).
12. ''SEC'' means the United States Securities and Exchange Commission.
13. ''Service company'' means the registered transfer agent engaged by a named transfer agent to perform transfer agent functions for that named transfer agent, as defined in Rule 17Ad-9(k).
14. ''Transfer agent'', as defined in Section 3(a)(25) of the Act, means any person who engages on behalf of an issuer of securities or on behalf of itself as an issuer in at least one of the functions enumerated therein.

B. Who Must File; When to File

1. Every transfer agent that is registered on June 30 shall file Form TA–2 in accordance with the instructions contained therein by August 31 of that calendar year.

a. A registered transfer agent that received fewer than 1,000 items for transfer and fewer than 1,000 items for processing during the reporting period and that did not maintain master securityholder files for more than 1,000 individual securityholder accounts as of June 30 of the reporting period is required to complete only Questions 1 through 5, 10, and 11, and the signature section of Form TA–2.

b. A named transfer agent that engaged a service company to perform all of its transfer and processing functions during the reporting period is required to complete only Questions 1 through 4 and the signature section of Form TA–2.

c. A named transfer agent that engaged a service company to perform some but not all of its transfer and processing functions during the reporting period must complete all of Form TA–2 but should enter zero (0) for those questions that relate to functions performed by the service company on behalf of the named transfer agent.

2. The date on which any filing is actually received by the SEC is the Registrant's filing date provided that the filing complies with all applicable requirements. A filing that does not comply with applicable requirements may be rejected by the SEC. The SEC's receipt of a filing, however, shall not constitute an SEC finding that the filing has been filed as required or that the information therein is accurate, current, or complete.

C. Number of Copies; How and Where to File.

The Registrant must file the original and two copies of Form TA–2 with the SEC. The original copy of Form TA–2 must be manually signed and any additional copies may be photocopies of the signed original copy. All copies must be legible and on good quality 8½×11 inch white paper. The Registrant must keep an exact copy of any filing for its records.

The Registrant must file Form TA–2 directly with the SEC at: Securities and

Exchange Commission, Office of Filings and Information Services, Mail Stop A–2, 450 5th Street, N.W., Washington, DC 20549.

II. Special Instructions for Filing Form TA–2

A. Indicate the year for which Form TA–2 is filed in the box at the upper left hand corner. A transfer agent registered on June 30 shall file Form TA–2 by August 31 of that calendar year even if the transfer agent conducted business for less than the entire reporting period.

B. In answering Question 4, indicate the number of items received for transfer and the number of items received for processing during the reporting period. Omit the purchase and redemption of open-end investment company shares. Report those items in response to Question 9.

C. In answering Questions 5 and 6, include closed-end investment company securities in the corporate equity securities category.

In answering Question 5.a, include direct purchase and dividend reinvestment plan accounts in the total number of individual securityholder accounts maintained. In Question 5.b., include dividend reinvestment plan accounts only. In Question 5.c., include direct purchase plan accounts only. In Question 5.d., include American Depositary Receipts (ADRs) in the corporate equity or corporate debt category, as appropriate, and include direct purchase and dividend reinvestment plan accounts in the corporate equity or open-end investment company securities category, as appropriate.

In answering Question 6, all series of debt securities issued under a single indenture are to be counted as one issue. Open-end investment company securities portfolios are to be counted as one issue per CUSIP number.

D. In answering Question 8.c., exclude coupon payments and transfers of record ownership as a result of corporate actions.

E. In answering Question 9, exclude non-value transactions such as name or address changes.

III. Federal Information Law and Requirements

SEC's Collection of Information: An Agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number. Under Sections 17, 17A(c) and 23(a) of the Act and the rules and regulations thereunder, the SEC is authorized to solicit from registered transfer agents the information required to be supplied on Form TA–2. The filing of this Form is mandatory for all registered transfer agents. The information will be used for the principal purpose of regulating registered transfer agents but may be used for all routine uses of the SEC or of the ARAs. Information supplied on this Form will be included routinely in the public files of the ARAs and will be available for inspection by any interested person. Any member of the public may direct to the Commission any comments concerning the accuracy of the burden estimate on the application facing page of this Form, and any suggestions for reducing this burden. This collection of information has been reviewed by the Office of Management and Budget in accordance with the clearance requirements of 44 U.S.C. 3507. The applicable Privacy Act system of records is SEC–2. This form is subject to the routine uses set forth at 40 FR 39255 (Aug. 27, 1975) and 41 FR 5318 (Feb. 5, 1976).

File Number:

____

For the reporting period ending June 30, ________

United States Securities and Exchange Commission, Washington, D.C. 20549

FORM TA–2—Form for Reporting Activities of Transfer Agents Registered Pursuant to Section 17A of the Securities Exchange Act of 1934

1. Full name of Registrant as stated in Question 3 of Form TA–1: (Do not use Form TA–2 to change name or address.)

____

2. a. During the reporting period, has the Registrant engaged a service company to perform any of its transfer and processing functions? (Check appropriate box.)

____ All ____ Some ____ None

b. If the answer to subsection (a) is all or some, list on the lines provided the name(s) and address(es) of all service company(ies) engaged.

____

____

____

____

____

3. a. Appropriate regulatory agency (Check one box only.)

____ Comptroller of the Currency
____ Federal Deposit Insurance Corporation
____ Board of Governors of the Federal Reserve System
____ Securities and Exchange Commission

b. During the reporting period, has the Registrant amended Form TA–1 within 60 calendar days following the date on which information reported therein became inaccurate, incomplete, or misleading? (Check appropriate box.)

____ Yes, filed amendment(s)
____ No, failed to file amendment(s)
____ Not applicable

c. If the answer to subsection (b) is no, provide an explanation on the lines provided.

____

____

____

____

If the response to any question is none or zero, enter ''0''

4. Number of items received during the reporting period:

a. Transfer .... ________

b. Processing (outside registrar function) .... ________

5. a. Number of individual securityholder accounts, including direct purchase and dividend reinvestment plan accounts, maintained as of June 30 .... ______
   b. Number of individual securityholder dividend reinvestment plan accounts maintained as of June 30 .... ______
   c. Number of individual securityholder direct purchase plan accounts maintained as of June 30 .... ______
   d. Approximate percentage of individual securityholder accounts, including direct purchase and dividend reinvestment plan accounts, from subsection (a) maintained in the following categories as of June 30:.

Corporate equity securities	Corporate debt securities	Open-end investment company securities	Limited partnership securities	Municipal debt securities	Other securities

6. Number of securities issues for which Registrant acts in the following capacities, as of June 30:
   a. Receives items for transfer and maintains the master securityholder files:
   b. Receives items for transfer but does not maintain the master securityholder files:
   c. Does not receive items for transfer but maintains the master securityholder files:

	Corporate equity securities	Corporate debt securities	Open-end investment company securities	Limited partnership securities	Municipal debt securities	Other securities
a.						
b.						
c.						

7. a. Number and aggregate market value of securities aged record differences, existing for more than 30 days, as of June 30:
   i. Number of issues .... ______
   ii. Market value (in dollars) .... ______
   b. Number of quarterly reports regarding buy-ins filed by the Registrant with its ARA (including the SEC) during the reporting period pursuant to Rule 17Ad–11(c)(2) .... ______
   c. During the reporting period, has the Registrant been notified by its ARA (including the SEC) that it failed to file quarterly reports regarding buy-ins pursuant to Rule 17Ad–11(c)(2)?.

____ Yes ____ No

   d. If the answer to subsection (c) is yes, provide an explanation for each notification on the lines provided..

____
____
____
____

8. Scope of certain additional types of activities performed:
   a. Number of issues for which dividend reinvestment plan services are provided, as of June 30 .... ______
   b. Number of issues for which direct purchase plan services are provided, as of June 30 .... ______
   c. Dividend disbursement and interest paying agent activities conducted during the reporting period:
   i. number of issues .... ______
   ii. amount (in dollars) .... ______
9. Number of open-end investment company securities purchases and redemptions (''transactions'') excluding dividend and distribution postings processed during the reporting period:
   a. Total number of transactions processed .... ______
   b. Number of transactions processed on a date other than date of receipt of order (''as ofs'') .... ______
10. a. Number of lost securityholder accounts as of June 30 .... ______
   b. Percentage of total accounts represented by lost securityholder accounts as of June 30 .... ______
   c. Number of lost securityholder accounts that have been remitted to states during the reporting period .... ______
   d. Percentage of total accounts represented by lost securityholder accounts that have been remitted to states as of June 30 ______
11. Number of lost securityholder accounts listed on the transfer agent's master securityholder files during the reporting period:
   a. For which a first data base search has been conducted .... ______
   b. For which a correct address has been obtained through the first data base search .... ______
   c. For which a second data base search has been conducted .... ______
   d. For which a correct address has been obtained through the second data base search .... ______
12. a. During the reporting period, has the Registrant (except when acting as an outside registrar) always been in compliance with the turnaround time for routine items as set forth in Rule 17Ad–2(a)?

____ Yes ______ No

If the answer to subsection (a) is no, complete subsections (i) through (iii).
   i. Provide the number of months during the reporting period in which the Registrant was not in compliance with the turnaround time for routine items according to Rule 17Ad-2(a) .... ______
   ii. Provide the number of written notices Registrant filed during the reporting period with the SEC and with its ARA pursuant to Rule 17Ad-2(c) that reported its noncompliance with turnaround time for routine items according to Rule 17Ad-2(a) .... ______
   iii. Provide the number of times during the reporting period that the Registrant was notified by its ARA that it failed to file written notices with its ARA pursuant to Rule 17Ad-2(c) to report its noncompliance with turnaround time for routine items according to Rule 17Ad-2(a) .... ______
b. Has the Registrant, acting as an outside registrar, always been in compliance during the reporting period with the turnaround time for routine items as set forth in Rule 17Ad-2(b)?

____ Yes ______ No

If the answer to subsection (b) is no, complete subsections (i) through (iii).

i. Provide the number of months during the reporting period in which the Registrant was not in compliance with the turnaround time for routine items according to Rule 17Ad-2(b) ______

ii. Provide the number of written notices Registrant filed during the reporting period with the SEC and with its ARA pursuant to Rule 17Ad-2(d) that reported its noncompliance with turnaround time for routine items according to Rule 17Ad-2(b) ______

iii. Provide the number of times during the reporting period that the Registrant was notified by its ARA that it failed to file written notices with its ARA pursuant to Rule 17Ad-2(d) to report its noncompliance with turnaround time for routine items according to Rule 17Ad-2(b) ______

ATTENTION: INTENTIONAL MISSTATEMENTS OR OMISSIONS OF FACT CONSTITUTE FEDERAL CRIMINAL VIOLATIONS. See 18 U.S.C. 1001 and 15 U.S.C. 78ff(a)

SIGNATURE: The Registrant submitting this Form, and the person signing the Form, hereby represent that all the information contained in the Form is true, correct, and complete.

Manual signature of Official responsible for Form:

______

Title:

______

Telephone number:

______

Name of Official responsible for Form: (First name, Middle name, Last name)

______

Date signed (Month/Day/Year):

______

By the Commission.

Dated: March 23, 1999.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7840 Filed 3–30–99; 8:45 am]

BILLING CODE 8010–01–P

DEPARTMENT OF THE INTERIOR

Minerals Management Service

30 CFR Part 256

RIN 1010–AC49

Leasing of Sulphur or Oil and Gas in the Outer Continental Shelf—Bonus Payments with Bids

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Proposed rule.

SUMMARY: We are revising the current rule to allow us to require a specific payment method for 1/5 of the bonus payment due when we hold a sale to lease Federal offshore Outer Continental Shelf (OCS) lands. The current rule does not give us the authority to require bidders to use any single method for submitting 1/5 bonus payments with OCS bids. As electronic commerce becomes more efficient, reliable, and economical, we need to be able to require bidders to use automated payment methods when they are appropriate. This revision will allow us to require a specific form of bonus payment on a sale-by-sale basis to reduce the administrative burdens for both Government and industry.

DATES: We will consider all comments we receive by April 30, 1999. We will begin reviewing comments then and may not fully consider comments we receive after April 30, 1999.

ADDRESSES: If you wish to comment, you may submit your comments (three copies) by mail or hand-carry to the Department of the Interior; Minerals Management Service; Mail Stop 4024; 381 Elden Street; Herndon, Virginia 20170–4817; Attention: Rules Processing Team.

FOR FURTHER INFORMATION CONTACT: Jan Arbegast, Program Analyst, at (703) 787–1227.

SUPPLEMENTARY INFORMATION: The Federal Government has been receiving bonus bid payments to acquire leases offered at OCS lease sales since the mid-1950s. Prospective bidders submit the required 1/5 bonus payment in the form of a check or bank draft, which accompanies a sealed bid on a specific offshore tract of land. Since August 1997, we have offered prospective bidders the option of using electronic funds transfer (EFT) to submit their 1/5 bonus payment rather than a check or bank draft. As technology has progressed and as banking transactions become routinely automated, we need to have in place a rule that allows us to require automated payment such as EFT or other methods that may be more efficient. This revision allows flexibility so that we can require the specific method of bonus payment that is most efficient and administratively advantageous to the Government and industry.

Procedural Matters

Public Comments Procedure

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address from the rulemaking record, which we will honor to the extent allowable by law. There may be circumstances in which we would withhold from the rulemaking record a respondent's identity, as allowable by the law. If you wish us to withhold your name and/or address, you must state this prominently at the beginning of your comment. However, we will not consider anonymous comments. We will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Federalism (Executive Order (E.O.) 12612)

In accordance with E.O. 12612, the rule does not have significant Federalism implications. A Federalism assessment is not required.

Takings Implications Assessment (E.O. 12630)

In accordance with E.O. 12630, the rule does not have significant Takings Implications. A Takings Implication Assessment is not required.

Regulatory Planning and Review (E.O. 12866)

This document is not a significant rule and is not subject to review by the Office of Management and Budget under E.O. 12866.

(1) This rule will not have an effect of $100 million or more on the economy. It will not adversely affect in a material way the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

Ultimately, this rule is administratively advantageous to prospective bidders on the OCS. It will save time and paperwork in their bid-preparation process and will also use current technology, improving efficiency both for industry and the Government.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. Using EFT is common practice in private industry. Through the use of electronic commerce, we reduce the number of transactions required by bidders. This does not interfere with other agencies' actions.

(3) This rule does not alter the budgetary effects or entitlements, grants, user fees, or loan programs or the rights or obligations of their recipients. This

rule has no effect on these programs or rights of the programs' recipients.

(4) This rule does not raise novel legal or policy issues. As previously stated, the intent of this rule is to give the Government flexibility in requiring a specific form of bonus payment, including EFT. It is commonplace in private industry and creates no novel policy issues.

Civil Justice Reform (E.O. 12988)

In accordance with E.O. 12988, the Office of the Solicitor has determined that this rule does not unduly burden the judicial system and meets the requirements of §§ 3(a) and 3(b)(2) of the Order.

National Environmental Policy Act (NEPA)

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the NEPA of 1969 is not required.

Paperwork Reduction Act (PRA) of 1995

This regulation does not require information collection, and a submission under the PRA is not required.

Regulatory Flexibility Act (RFA)

The Department certifies that this document will not have a significant economic effect on a substantial number of small entities under the RFA. (5 U.S.C. 601 *et seq.*). This revised rule does not have a significant effect on a substantial number of small entities. We are revising this rule to allow us the flexibility to select the method for a prospective bidder at an OCS lease sale to submit a bonus payment by the most efficient method. If we select EFT for the method of submitting bonus payments, any small company has access to a commercial bank that routinely uses EFT. All current lessees must transmit the remaining 80 percent of their bonus payment and their first year rental payment via EFT. The regulation has been effective since 1984. This should not be a significant burden. The cost for establishing an account for a small company should be nominal. The bank will charge a fee per wire transfer which may be as high as $30, but if a company has a large volume of wire transfers, the bank may only charge about a dollar or less per wire transfer. In the worst case scenario, if 30 small companies (average for recent sales) bid at $30 per EFT wire transfer, to total cost for all small companies for a typical sale is $900.

This rule only affects lessees on the OCS. We use Standard Industry Code 1381, Drilling Oil and Gas Wells, to characterize this group. There are 1,380 firms that drill oil and gas wells onshore and offshore. Of these, approximately 130 companies who are offshore lessees/operators need to follow our rule. According to Small Business Administration (SBA) estimates, 39 companies qualify as large firms and 91 as small firms. The SBA defines a small business as having either (a) annual revenues of $5 million or less for exploration service and field service companies, or (b) less than 500 employees for drilling companies and for companies that extract oil, gas, or natural gas liquids.

The rule gives us the flexibility to select the most efficient method for a bidder at an OCS lease sale to submit a bonus payment. We believe this efficiency is realized by both bidders and MMS. When using EFT, a bidder will need to advise its commercial bank to submit its bonus payment via EFT, which is now commonplace. When using EFT, the bidder will contact the MMS Royalty Management Office designated in the final sale notice for the proposed lease sale.

If EFT is used, overall lessee (prospective bidder's) costs will decrease as well as bid preparation time. This is not a major rule. The cost of implementation should be minimal, regardless of company size. Since one EFT transaction can be used per sale, and it costs $30 for the wire transfer compared to the administrative costs of preparing a cashier's check for each bid, there is little doubt that using EFT is more cost effective and more efficient.

The rule should not affect the price that a company will charge for its product or service. It should increase efficiency and decrease administrative burden. The rule should not cause any company to go out of business. In fact, this rule will give the MMS the ability to establish on a sale-by-sale basis, the most efficient and effective payment method for both MMS and industry. If EFT is used, hundreds of dollars in staff time may be saved by the MMS and industry.

Some small companies may consider a change in the method by which they submit bids at lease sales to be significant (from paper check to EFT). Other companies may think the change is trivial. Several small companies may experience a short-term effect as they revise current business practices. The rule should not have a significant economic effect on any company qualified to participate in OCS lease sales.

Your comments are important. 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 MMS, call toll-free (888) 734–3247.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under (5 U.S.C. 804(2)) the SBREFA. This rule:

(a) Does not have an annual effect on the economy of $100 million or more. This rule will increase the efficiency and reduce the administrative burden of both the Government and private industry.

(b) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. This rule will decrease costs and time for prospective bidders preparing for bid submission. It will reduce the Government's administrative burden as well. If EFT is used, the Government and industry will save potentially hundreds of dollars in bid preparation time and administrative costs. Since one EFT transaction can be used per sale, and it costs $30 for the wire transfer compared to the administrative costs of preparing a cashier's check for each bid, there is little doubt that using EFT is more cost effective and more efficient.

(c) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or ability of U.S.-based enterprises to compete with foreign-based enterprises. The rule will increase productivity, innovation, and ability of U.S.-based enterprises.

Unfunded Mandate Reform Act (UMRA) of 1995

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than $100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. A statement containing the information required by the UMRA. (2 U.S.C. 1531 *et seq.*) is not required.

List of Subjects in 30 CFR Part 256

Administrative practice and procedure, Continental shelf, Environmental protection, Government contracts, Intergovernmental relations, Oil and gas exploration, Public lands-

mineral resources, Public lands-rights-of-way, Reporting and recordkeeping requirements, Surety bonds.

Dated: March 23, 1999.

Sylvia V. Baca,

Acting Assistant Secretary, Land and Minerals Management.

For the reasons stated in the preamble, Minerals Management Service (MMS) proposes to amend 30 CFR part 256 as follows:

PART 256—LEASING OF SULPHUR OR OIL AND GAS IN THE OUTER CONTINENTAL SHELF

1. The authority citation for part 256 continues to read as follows:

Authority: 43 U.S.C. 1331 *et seq.*

2. In § 256.46, revise paragraph (b) to read as follows:

§ 256.46 Submission of bids.

* * * * *

(b) MMS requires a deposit for each bid. The notice of sale will specify the bid deposit amount and method of payment.

* * * * *

[FR Doc. 99–7894 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–M–P

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 724, 773, 774, 778, 842, 843, and 846

RIN 1029–AB94

Application and Permit Information Requirements; Permit Eligibility; Definitions of Ownership and Control; the Applicant/Violator System; Alternative Enforcement Actions

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Proposed rule; reopening and extension of comment period.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSM) is reopening and extending the comment period for the proposed rule published on December 21, 1998 (63 FR 70580). The comment period originally closed on February 19, 1999, and was extended to March 25, 1999 (64 FR 8763; February 23, 1999). We are again reopening and extending the comment period for an additional 15 days.

DATES: We will accept written comments on the proposed rule until 5 p.m., Eastern time, on April 15, 1999.

ADDRESSES: You may mail or hand-deliver comments to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, Room 101, 1951 Constitution Avenue, NW, Washington, D.C. 20240. You may also submit comments to OSM via the Internet at: osmrules@osmre, gov.

FOR FURTHER INFORMATION CONTACT: Earl D. Bandy, Jr., Office of Surface Mining Reclamation and Enforcement, Applicant/Violator System Office, 2679 Regency Road, Lexington, Kentucky 40503. Telephone: (606) 233–2796 or (800) 643–9748. E-Mail: ebandy@osmre.gov.

SUPPLEMENTARY INFORMATION: In response to requests from members of the public, we are reopening and extending the public comment period for the proposed rule published on December 21, 1998 (63 FR 70580). We are extending the comment period an additional 15 days. In the rule, we are proposing revised permit eligibility requirements for surface coal mining operations under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). In particular, we propose to revise how ownership and control of mining operations is determined under section 510(c) of SMCRA so that applicants who are responsible for unabated violations do not receive new permits. We have designed this proposal to be effective, fair, and consistent with a 1997 decision by the U.S. Court of Appeals for the D.C. Circuit addressing ownership and control issues.

In addition, we are proposing other changes to other aspects of our regulations in response to comments we received when we sought public participation in developing this proposed rule. Our intent is to improve, clarify, and simplify current regulations as well as to reduce duplicative and burdensome permit information requirements.

Dated: March 25, 1999.

Stephen Sheffield,

Acting Assistant Director, Program Support.

[FR Doc. 99–7874 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–05–M

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 110

[CGD01–97–086]

Anchorage Grounds: Hudson River, Hyde Park, NY

AGENCY: Coast Guard, DOT.

ACTION: Supplemental notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes a change to proposed Anchorage 19–A in the Hudson River near Hyde Park, NY. This supplemental proposal is the result of comments received on the Notice of Proposed rulemaking. This proposal restricts vessels less than 20 meters in length from using Anchorage Ground 19–A without prior approval from the Captain of the Port, New York.

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

ADDRESSES: Comments may be mailed to the Waterways Ovesight Branch (CGD01–97–086), Coast Guard Activities New York, 212 Coast Guard Drive, Staten Island, New York 10305, or deliver them to room 205 at the same address between 8 a.m. and 3 p.m., Monday through Friday, except Federal holidays.

The Waterways Oversight Branch of Coast Guard Activities New York maintains the public docket for this rulemaking. Comments, and documents as indicated in this preamble, will become part of this docket and will be available for inspection or copying at room 205, Coast Guard Activities New York, between 8 a.m. and 3 p.m., Monday thorugh Friday, except Federal holidays.

FOR FURTHER INFORMATION CONTACT: Lieutenant J. Lopez, Waterways Oversight Branch, Coast Guard Activities New York (718) 354–4193.

SUPPLEMENTARY INFORMATION:

Request for Comments

The Coast Guard encourages interested persons to participate in this rulemaking by submitting written data, views, or arguments. Persons submitting comments should include their names and addresses, identify this rulemaking (CGD01–97–086) and the specific section of this document to which each comment applies, and give the reason for each comment. Please submit two copies of all comments and attachments in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. Persons wanting acknowledgment of receipt of comments should enclose stamped, self-addressed postcards or envelopes.

The Coast Guard will consider all comments received during the comment period. It may change this proposed rule in view of the comments.

The Coast Guard plans no public hearing. Persons may request a public hearing by writing to the Waterways Oversight Branch at the address under **ADDRESSES.** The request should include the reasons why a hearing would be beneficial. If it determines that the opportunity for oral presentations will

aid this rulemaking, the Coast Guard will hold a public hearing at a time and place announced by a later notice in the **Federal Register.**

Regulatory History

On July 20, 1998, the Coast Guard published a notice of proposed rulemaking (NPRM) entitled Anchorage Grounds; Hudson River, Hyde Park, NY in the **Federal Register** (63 FR 37297). The Coast Guard received two letters commenting on the proposed rulemaking. No public hearing was requested, and none was held.

Background and Purpose

The Hudson River Pilots Association requested that the Coast Guard establish a federal anchorage ground in the Hudson River near Hyde Park, New York. The closest anchorage to the requested anchorage is down river to anchorage number 17, the northern boundary of which lies between the Yonkers municipal pier and the pilot station just to the north. The area that the Pilots Association has suggested for consideration is bound by the following coordinates:

NW corner 41° 48′ 35″N 073° 57′ 00″W.
NE corner 41° 48′ 35″N 073° 56′ 44″W.
SE corner 41° 47′ 32″N 073° 56′ 50″W.
SW corner 41° 47′ 32″N 073° 57′ 10″W.
(NAD 1983)

The Coast Guard received two letters commenting on the proposed rule. Comments received prompted the Coast Guard to reevaluate the proposal.

One comment recommended that a minimum size of 65 feet in length be established for vessels authorized to use the anchorage because the smaller vessels would be less visible at anchor, even if they displayed the required lights or day shapes, and pose a potential hazard to mariners. The comment noted that the entire anchorage area. including the area outside the designated navigation channel, is routinely transited by vessels of various sizes and that the Special Anchorage Area at Hyde Park, NY, (33 CFR 110.60(p-3)) is available for use by vessels less than 65 feet in length. This Special Anchorage Area at Hyde Park, NY that the comment referred to was disestablished on June 1, 1998 (63 FR 23663). However, in response to these safety concerns, the Coast Guard re-evaluated the proposed rule. Upon further analysis, the Coast Guard also believes that safety concerns warrant a minimum vessel length restriction. The safety concerns stem from the high number of vessels that transit the area of the proposed anchorage and from background lighting on shore that will interfere with smaller vessel's anchorage lights. The Coast Guard is now proposing additional regulations to restrict vessels less than 20 meters in length from using this anchorage ground without prior approval from the Captain of the Port, New York. The Coast Guard believes this proposed restriction is reasonable given the noted safety concerns and that there are over 75 transient berths at 8 marinas within approximately 15 nautical miles of this anchorage ground for use by vessels less than 20 meters in length. Additionally, the Coast Guard is aware that transient vessels anchor to the east of Esopus Island in order to use the island as a breakwater to block the wake action caused by commercial shipping transiting the Hudson River. This protected area may be easily used by vessels less than 20 meters in length as an alternative to Anchorage 19–A because Esopus Island is approximately 500 yards north of Anchorage 19–A.

The comment also stated the anchorage ground is in a ''No Discharge Zone'', designated by the United States Environmental Protection Agency, and the discharge of waste from any marine sanitation device on board a vessel is prohibited. The Coast Guard agrees. However, the Coast Guard considers this to be purely informational and it does not need to be further addressed in this regulation.

Finally, the comment noted that masters of vessels at anchor in this anchorage ground should be aware that a Water Transportation Permit under Article 15 of the New York State Environmental Conservation Law is required for taking on water for ballast or any other uses within the waters of the State of New York. The information regarding Water Transportation Permits is not being addressed in this regulation as it already applies to all waters of New York State.

The second comment received in response to the NPRM agreed with the Coast Guard's determination that establishment of this anchorage ground is consistent with New York's Coastal Zone Management Plan. No changes to the proposed rule were suggested.

Discussion of Proposed Rule

The Coast Guard proposes to change the regulations governing proposed Anchorage Ground 19–A. Safety concerns regarding the size of vessels authorized to use the proposed anchorage ground were raised by one of the comments to the NPRM. The Coast Guard, after further analyzing the safety concerns associated with proposed Anchorage Ground 19–A, is proposing additional regulations to restrict vessels less than 20 meters in length from using this anchorage ground without prior approval from the Captain of the Port, New York.

Regulatory Evaluation

This proposed 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 proposed rule to be so minimal that a full Regulatory Evaluation under paragraph 10e of the regulatory policies and procedures of DOT is unnecessary. This finding is based on the following reasons: due to icing of the river in winter months, the anchorage will be seasonal in nature, recreational traffic can still traverse the anchorage when necessary, there are over 75 transient berths at 8 marinas within approximately 15 nautical miles of this anchorage ground for vessels less than 20 meters in length to tie up in, and the anchorage ground permits unobstructed navigation in the western 350 yards of the Hudson River.

Small Entities

Under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Coast Guard considered whether this proposed rule will 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.

For reasons discussed in the Regulatory Evaluation above, the Coast Guard certifies under section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that this proposed rule will not have a significant impact on a substantial number of small entities.

Collection of Information

This proposed rule does not provide for a collection of information under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

Federalism

The Coast Guard has analyzed this proposed rule under the principles and criteria contained in Executive Order 12612 and has determined that this proposed rule does not have sufficient implications for federalism to warrant

the preparation of a Federalism Assessment.

Unfunded Mandates

Under the Unfunded Mandates Reform Act of 1995 (Pub. L. 104–4), the Coast Guard must consider whether this rule will result in an annual expenditure by state, local, and tribal governments, in the aggregate of $100 million (adjusted annually for inflation). If so, the act requires that a reasonable number of regulatory alternatives be considered, and that from those alternatives, the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule be selected. No state, local, or tribal government entities will be effected by this rule, so this rule will not result in annual or aggregate costs of $100 million or more. Therefore, the Coast Guard is exempt from any further regulatory requirements under the Unfunded Mandates Act.

Environment

The Coast Guard has considered the environmental impact of this proposed rule and concluded that under paragraph 2–1, paragraph 34(f), of Commandant Instruction M16475.1C, this proposed rule is categorically excluded from further environmental documentation. A ''Categorical Exclusion Determination'' is available in the docket for inspection or copying where indicated under ADDRESSES.

List of Subjects in 33 CFR 110

Anchorage grounds.

Regulation

For the reasons discussed in the preamble, the Coast guard proposes to amend 33 CFR Part 110 as follows:

PART 110—[AMENDED]

1. The authority citation for Part 110 continues to read as follows:

Authority: 33 U.S.C. 471, 1221 through 1236, 2030, 2035, 2071; 49 CFR 1.46 and 33 CFR 1.05–1(g).

2. In § 110.155, add paragraph (c)(6) to read as follows:

§ 110.155 Port of New York.

* * * * *

(c) * * *

(6) Anchorage No. 19–A. An area located west of Hyde Park enclosed by the coordinates starting at 41° 48′ 35″N, 073° 57′ 00″W; to 41° 48′ 35″N, 073° 56′ 44″W; to 41° 47′ 32″N, 073° 56′ 50″W; to 41° 47′ 32″N, 073° 57′ 10″W; thence back to 41° 48′ 35″N, 073° 57′ 00″W (NAD 1983).

(i) No vessel may anchor in Anchorage 19–A form December 16 to the last day of February without permission from the Captain of the Port, New York.

(ii) No vessel less than 20 meters in length may anchor in Anchorage 19–A without prior approval of the Captain of the Port, New York.

* * * * *

Dated: March 22, 1999.

R.M. Larrabee,

Rear Admiral, U.S. Coast Guard Commander, First Coast Guard District.

[FR Doc. 99–7838 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–15–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 372

[OPPTS–400136; FRL–6051–1]

Combustion for Energy Recovery Toxic Release Inventory Reporting; Notice of Receipt of Petition

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of receipt of petition and request for comments.

SUMMARY: This document announces the receipt of a petition from Safety Kleen Corporation (Safety Kleen) requesting that EPA modify its current interpretation of combustion for energy recovery under section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA) and section 6607 of the Pollution Prevention Act (PPA). The petition was submitted pursuant to sections 553(e) and 555(e) of the Administrative Procedure Act (APA). Also, as part of this document, EPA is publishing the main text of the petition. Finally, EPA is seeking comments from interested or potentially affected parties concerning issues associated with the current interpretation of combustion for energy.

DATES: Written comments in response to this request for comments must be received on or before June 1, 1999.

ADDRESSES: Comments may be submitted by mail, electronically, or in person. Please follow the detailed instructions for each method as provided in Unit II. of this document.

FOR FURTHER INFORMATION CONTACT: For specific information regarding this document contact: Sara Hisel McCoy at (202) 260–7937, e-mail: hisel-mccoy.sara@epa.gov. For further information on EPCRA section 313, contact the Emergency Planning and Community Right-to-Know Hotline, Environmental Protection Agency, Mail Code 5101, 401 M St. SW., Washington DC 20460, Toll-free: 1–800–424–9346, in Virginia and Alaska: 703–412–9877 or Toll free TDD: 800–553–7672.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Document Apply To Me?

This document does not make any changes to existing regulations, however you may be interested in this document if you combust toxic chemicals in waste on-site or transfer these toxic chemicals off-site for this purpose. Potentially interested categories and entities may include, but are not limited to the following:

Category	Examples of Potentially Interested Entities
Industry; facilities that manufacture, process, or otherwise use certain chemicals	Manufacturing, Metal mining, Coal mining, Electric utilities, Commercial hazardous waste treatment, Chemicals and allied products-wholesale, Petroleum bulk terminals and plants wholesale, and Solvent Recovery services
Facilities with hazardous waste incinerators	Facilities regulated under Subtitle C of the Resource Conservation and Recovery Act

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be interested in this document. Other types of entities not listed in this table may also be interested in this document. Additional businesses that may be interested in this document are those covered under 40 CFR part 372, subpart B. If you have any questions regarding whether a particular entity is covered by this section of the CFR, consult the technical person listed in the ''FOR FURTHER INFORMATION CONTACT'' section.

B. How Can I Get Additional Information or Copies of This Document or Other Support Documents?

1. *Electronically*. You may obtain electronic copies of this document as well as the appendices to the petition from the EPA Internet Home Page at http://www.epa.gov/. On the Home Page select ''Laws and Regulations'' and then look up the entry for this document under the ''**Federal Register** - Environmental Documents.'' You can also go directly to the ''**Federal Register**'' listings at http://www.epa.gov/fedrgstr/. You may also obtain electronic copies of the complete

petition and appendices at http://www.epa.gov/opptintr/tri/.

2. *In person or by phone*. If you have any questions or need additional information about this action, please contact the technical person identified in the ''FOR FURTHER INFORMATION CONTACT'' section. Copies of a complete petition including the appendices to the Safety Kleen petition are also available by calling the EPCRA Hotline at 1–800–424–9346, in Virginia and Alaska: 703–412–9877 or Toll free TDD: 800–553–7672. In addition, the official record for this document, including the public version, has been established under docket control number OPPTS–400136. This record includes not only the documents physically contained in the docket, but all of the doucments included as references in those documents. A public version of this record, including printed, paper versions of any electronic comments, which does not include any information claimed as Confidential Business Information (CBI), is available for inspection from 12 noon to 4 p.m., Monday through Friday, excluding legal holidays. The official record is located in the TSCA Nonconfidential Information Center, Rm. NE–B607, 401 M St., SW., Washington, DC 20460. The TSCA Nonconfidential Information Center telephone number is 202-260–7099.

II. How Can I Respond To This Document?

A. How and To Whom Do I Submit the Comments?

You may submit comments through the mail, in person, or electronically. Be sure to identify the appropriate docket control number, OPPTS–400136, in your correspondence.

1. *By mail*. Submit written comments to: Document Control Office (7407), Office of Pollution Prevention and Toxics (OPPT), Environmental Protection Agency, 401 M St., SW., Rm. G–099, East Tower, Washington, DC 20460.

2. *In person or by courier*. Deliver written comments to: Document Control Office in Rm. G–099, East Tower, Waterside Mall, 401 M St., SW., Washington, DC, Telephone: 202–260–7093.

3. *Electronically*. Submit your comments and/or data electronically by e-mail to: oppt.ncic@epa.gov. Please note that you should not submit any information electronically that you consider to be CBI. Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in WordPerfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket control number OPPTS–400136. Electronic comments on this document may also be filed online at many Federal Depository Libraries.

B. How Should I Handle CBI Information That I Want To Submit To the Agency?

You may claim information that you submit in response to this document as CBI by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult with the technical person identified in the ''FOR FURTHER INFORMATION CONTACT'' section.

III. Background

Section 313 of EPCRA requires certain facilities manufacturing, processing, or otherwise using listed toxic chemicals in amounts above reporting threshold levels, to report their releases of such chemicals annually. These facilities must also report other waste management activities for such chemicals, pursuant to section 6607 of the PPA, 42 U.S.C. 13106. Specifically, these facilities must report the quantities of toxic chemicals in wastes that are released (including disposed), treated for destruction, combusted for energy recovery or recycled on-site or transferred off-site for such purposes.

In the final industry expansion rule (62 FR 23891, May 1, 1997) (FRL–5578–3), EPA interpreted combustion for energy recovery to include the combustion of a section 313 chemical that is (1)(a) a Resource Conservation and Recovery Act (RCRA) hazardous waste or waste fuel, (b) a constituent of a RCRA hazardous waste or waste fuel, or (c) a spent or contaminated ''otherwise used'' material; and that (2) has a significant heating value and is combusted in an energy or materials recovery device. Also, currently EPA defines an energy recovery device as a boiler or industrial furnace as defined in 40 CFR 372.3.

On March 18, 1998, the Environmental Protection Agency received a petition from Safety Kleen Corporation requesting EPA to modify its guidance regarding EPA's interpretation of the term ''combustion for energy recovery'' under section 313 of the EPCRA and section 6607 of the PPA. (Note: At the time of the submission of this petition, the company that petitioned EPA was known as Laidlaw Environmental Services. Subsequent to this submission, the company has changed its name to Safety Kleen Corporation. Therefore the references in the text of the petition to Laidlaw Environmental Services refer to Safety Kleen Corporation).

EPA is reproducing Safety Kleen's petition in its entirety (except for the appendices and the table of contents) in Unit IV. of this document, to solicit public comment on its content. In addition, in Unit V. of this document, EPA is soliciting comment on specific issues associated with the petition on combustion for energy recovery.

IV. Safety Kleen's Petition

STATEMENT OF INTEREST

Laidlaw Environmental Services Inc., and its wholly-owned subsidiary companies, is a full service company engaged in the blending, incineration, treatment, disposal, destruction, and transportation of hazardous and toxic wastes. Our interests are directly affected by the issues addressed in this petition.

I. EXECUTIVE SUMMARY

In 1991, the EPA designated ''Energy Recovery'' as an acceptable method of handling toxic organic chemicals under the Toxic Release Inventory program. To receive credit for ''Energy Recovery'' a generator has to transfer energetic (> 5,000 Btus/lb) toxic organic chemicals to an ''energy or materials recovery device''. The Agency defines an ''energy or materials recovery device'' as a Boiler or Industrial Furnace.

Present guidance on ''Energy Recovery'' does not allow a generator to claim credit for the energy recovered when energetic toxic chemicals are used to destroy other toxic organics in a hazardous waste incinerator. This two-tiered approach to the recognition, or lack of recognition, of the process of ''Energy Recovery'', depending on the type of unit combusting the toxic organic chemicals has led to a situation where globally there is no reduction in the use of fossil fuel.

TRI data for 1991–95 show that annually larger quantities of energetic toxic organic chemicals are being transferred to EPA designated ''energy or materials recovery devices'', while reduced percentages of these same chemicals are being shipped to hazardous waste incinerators. While ''energy or materials recovery devices'' may be using less fossil fuel because they may be utilizing the energy from these toxic chemicals in their processes, incinerators have had to substitute fossil fuels on a Btu for Btu basis for every Btu of energetic toxic organic chemicals they have lost.

This situation has led to a game where a preferential designation has provided ''energy or materials recovery devices'' with an advantage in procuring high energy

organic chemicals, and incinerators have been placed at a comparative disadvantage in procuring these same chemicals. However, this is a "zero-sum game" because both EPA designated "energy or materials recovery devices" and incinerators utilize the energy from these chemicals in their process, and the movement of waste energy from one type of unit to the other also necessitates the movement of fossil fuel from one type of unit to another. In reality, there are no global net energy savings.

Laidlaw maintains that in light of the data presented in this petition, EPA should recognize that:

– Sufficient energy input is necessary to properly destroy all forms of toxic organic chemicals in a hazardous waste incinerator;

– Hazardous waste incinerators harness the Btus from high energy organics to destroy less energetic toxic organic chemicals;

– Incinerators are forced to use fossil fuels to supplement the energy input as the highest Btu energetic wastes are diverted from incinerators; and

– Hazardous waste incinerators perform "Energy Recovery" in the process of using high energy toxic organic chemicals to destroy low energy organics.

Laidlaw requests and recommends in this petition that the EPA modify its guidance on "Energy Recovery" to include the combustion of high energy toxic organic chemicals for the purpose of destroying low energy toxic organic chemicals in a hazardous waste incinerator.

II. THE EMERGENCY PLANNING AND COMMUNITY RIGHT TO KNOW ACT

The Emergency Planning and Community Right to Know Act ("EPCRA") was signed into law in 1986. The law was designed to prevent an occurrence in the U.S. of the type of tragedy that befell Bhopal, India just a couple of years prior to its passage. EPCRA was a comprehensive statute that greatly enhanced the knowledge of the states, local governments, workers, and citizens about the chemicals handled at facilities around the nation. This statute also put into place the mechanisms to handle unplanned releases of chemicals from a facility, so that threats to the local community, and workers would be minimized.

EPCRA, for the first time, provided minimum reporting requirements for facilities handling one or more "extremely hazardous substances" (defined in 40 CFR, Part 355, Appendices A and B) above a threshold limit. Depending on the specific section of EPCRA, a facility had to notify its State Emergency Response Commission ("SERC"), Local Emergency Planning Committee ("LEPC"), Local Fire Department, and/or the EPA about the extremely hazardous substances on-site. More Specifically, under EPCRA[1] a facility must report:

– EPCRA Sections 302–303: If a facility has one or more extremely hazardous substances on-site in quantities greater than a threshold level, it must notify its SERC and LEPC that it is subject to the emergency planning requirements of these sections, a facility representative must be designated to participate in the local emergency planning process, and the facility must provide information necessary for the development and implementation of a local emergency plan;

– EPCRA Section 304: The facility must notify the LEPC and SERC immediately after the release of any extremely hazardous substance, or CERCLA hazardous substance, at or above the Reportable Quantity ("RQ") established for the substance, the facility must furnish a written statement with details of the release after the initial notification;

– EPCRA Section 311: The facility must submit to the LEPC, SERC, and local fire department a list, or copies, of Material Data Safety Sheets ("MSDSs") for any Occupational Safety and Health Administration ("OSHA") defined hazardous chemicals or extremely hazardous substances that are present on-site above defined threshold limits;

– EPCRA Section 312: The facility must submit annually to the LEPC, SERC, and the local fire department a report on the hazardous chemicals or extremely hazardous substances on-site that includes the type of hazard the material may pose, quantities of the material stored on-site, and the location and type of storage for the materials; and

– EPCRA Section 313: Facilities in certain EPA defined SIC codes, meeting size and threshold requirements, are required to report annually to the EPA (and some states) the amounts of chemicals listed in EPCRA's Section 313 released or otherwise managed.

EPCRA's Section 313 (a copy of this section is included in this submission as Appendix 1) is more commonly known as the Toxic Release Inventory ("TRI") and is the subject of the information in this petition (the issues addressed in this petition are specific to TRI, and do not pertain to the other facets of EPCRA.)

III. THE TOXIC RELEASE INVENTORY

EPCRA established the legal framework for the Toxic Release Inventory The TRI program was designed to provide information to the public and regulators about the fate of designated toxic chemicals (chemicals referenced in Section 313) at a facility, local, state, and national level. The EPCRA statute required that this collected TRI information be maintained in a computer database, and be readily available to "any person" requesting it.

EPCRA outlined, at a minimum, the types of facility that had to submit TRI reports and the information to be contained on those reports. The statute provided discretion to the Environmental Protection Agency as to what types of facility they can require to report TRI information in the future, and the types of information they can require on the TRI report in the future. EPCRA also allowed the Agency, but to a lesser extent than in other areas, discretion to add or subtract chemicals from the Section 313 list.

TRI reporting by facilities was initially required for the calender year 1987, with subsequent reports required annually on a calender year basis. While TRI reporting was initially required only for facilities with SIC codes between 20 and 39 (these facilities also had to meet employee size and threshold limits for the quantity of Section 313 chemicals to qualify for reporting requirements), in May of 1997 the EPA finalized rulemaking that expanded the types of industries to be included in TRI reporting. At the time of this petition the facilities[1] meeting the following criteria are required to report TRI information:

– The facility must be in SIC code 10 (except 1011, 1081, and 1094), or 12 (except 1241), or 20–39 (manufacturing facilities), or 4911 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce), 4931 (limited to facilities that combust coal and/ or oil for the purpose of generating power for distribution in commerce) and 4939 (limited to facilities that combust coal and/or oil for the purpose of generating power for distribution in commerce), or 4953 (limited to facilities regulated under RCRA subtitle C), or 5169, or 5171, or 7389 (limited to facilities primarily engaged in solvent recovery services on a contract or fee basis) hereafter "covered SIC codes"; and,

– Facility must have 10 or more full-time employees (or the total hours worked by all employees is greater than 20,000 hours), and

– The facility manufactures (defined to include importation), or processes, or otherwise uses any Section 313 chemical in quantities greater than the established threshold in the course of a calendar year.

In addition to the recent industry expansion, other facets of the TRI program have changed over the years. The list of chemicals to be tracked for TRI purposes changes almost annually, and today this number is almost double the starting number. Also, the type of information required to be reported has changed over the years. Originally the EPCRA[2] statute required, at a minimum, the following information be included on each TRI report:

(g) Form

(1) Information required

Not later than June 1, 1987 the Administrator shall publish a uniform toxic chemical release form for facilities covered by this section. If the Administrator does not publish such a form, owners and operators of facilities subject to the requirements of this section shall provide the information required under this subsection by letter postmarked on or before the date on which the form is due. Such form shall -

(A) provide for the name and location of, and principal business activities at, the facility;

(B) include an appropriate certification, signed by a senior official with management responsibility for the person or persons completing the report, regarding the accuracy and completeness of the report; and

(C) provide for submission of each of the following items of information for each listed toxic chemical known to be present at the facility:

(I) Whether the toxic chemical at the facility is manufactured, processed, or otherwise used, and the general category or categories of use of the chemical.

(ii) An estimate of the maximum amounts (in ranges) of the toxic chemical present at the facility at any time during the preceding calendar year.

(iii) For each wastestream, the waste treatment or disposal methods employed, and an estimate of the treatment efficiency

typically achieved by such methods for that wastestream.

(iv) The annual quantity of the toxic chemical entering each environmental medium.

The data outlined in sections i–iv was the basic TRI data mandated by EPCRA and these sections formed the basis for the original Form R (TRI reporting form) until reporting year 1991. In 1991 the next statute to impact TRI, the Pollution Prevention act of 1990, modified some of the reporting requirements for TRI.

IV. THE POLLUTION PREVENTION ACT OF 1990

In November, 1990 the Pollution Prevention Act of 1990 (''PPA'') was signed into law (a copy of this Act is included in this submission as Appendix 2). This statute established pollution prevention as a ''national objective'', and noted[3]:

''There are significant opportunities for industry to reduce or prevent pollution at the source through cost-effective changes in production, operation, and raw materials use... The opportunities for source reduction are often not realized because existing regulations, and the industrial resources they require for compliance, focus upon treatment and disposal, rather than source reduction... Source reduction is fundamentally different and more desirable than waste management and pollution control.''

The Pollution Prevention Act established a hierarchy of methods for dealing with real or potential pollutants. Following is an outline of this hierarchy in order of preference:

– Wherever feasible, pollution should be prevented or reduced at the source;

– Pollution that cannot be prevented should be recycled in an environmentally sound manner;

– Pollution that cannot be prevented or recycled should be treated; and

– Pollution that cannot be prevented, recycled, or treated should be disposed or released into the environment as a last resort.

In addition to this hierarchy, the Act[4] authorized a state grant program to promote source reduction by businesses, established the Office of Pollution Prevention and Toxics, an independent office to carry out the functions required by the PPA, and directed the EPA to:

– Facilitate the adoption of source reduction techniques by businesses and federal agencies;

– Establish standard methods of measurement for source reduction;

– Review regulations to determine their effect on source reduction;

– Investigate opportunities to use federal procurement to encourage source reduction;

– Develop improved methods for providing public access to data collected under federal environmental statutes;

– Develop a training program on source reduction opportunities, model source reduction auditing procedures, a source reduction clearinghouse, and an annual award program; and

– Report to Congress within 18 months, and biennially afterwards, on actions needed to implement a strategy to promote source reduction, and an assessment of the clearinghouse and grant program.

Finally, the PPA made the first statutorily mandated changes to the TRI reporting requirements since EPCRA established the requirement for TRI reporting in 1986. Under the Pollution Prevention Act, facilities already required to report TRI information to the EPA were now required to provide information on pollution prevention and recycling for each TRI chemical reported. Specifically, Section 6607 of the PPA[3] established the following requirements for source reduction and recycling data collection:

(a)Reporting Requirements- Each owner or operator of a facility required to file an annual toxic chemical release form under section 313 of the Superfund Amendments and Reauthorization Act of 1986 (''SARA'') for any toxic chemical shall include with each such annual filing a toxic chemical source reduction and recycling report for the preceding calender year. The toxic chemical source reduction and recycling report shall cover each toxic chemical required to be reported in the annual toxic chemical release form filed by the owner or operator under section 313(c) of that Act. This section shall take effect with the annual report filed under section 313 for the first full calender year beginning after the enactment of this subtitle.

(b)Items Included in the Report- The toxic chemical source reduction and recycling report required under subsection (a) shall set forth each of the following on a facility-by-facility basis for each toxic chemical:

(1) The quantity of any chemical entering any waste stream (or otherwise released into the environment) prior to recycling, treatment, or disposal during the calender year for which the report is filed and the percentage change from the previous year. The quantity reported shall not include any amount reported under paragraph (7). When actual measurements of the quantity of a toxic chemical entering the waste streams are not readily available, reasonable estimates should be made base on best engineering judgment.

(2) The amount of the chemical from the facility which is recycled (at the facility or elsewhere) during such calender year, the percentage change from the previous year, and the process of recycling used.

(3) The source reduction practices used with respect to that chemical during such year at the facility. Such practices shall be reported in accordance with the following categories unless the Administrator finds other categories to be more appropriate:

(A) Equipment, technology, process, or procedure modifications.

(B) Reformulation or redesign of products.

(C) Substitution of raw materials.

(D) Improvement in management, training, inventory control, materials handling, or other general operational phases of industrial facilities.

(4) The amount expected to be reported under paragraph (1) and (2) for the two calender years immediately following the calender year for which the report is filed. Such amount shall be expressed as a percentage change from the amount reported in paragraphs (1) and (2).

(5) A ratio of production in the reporting year to production in the previous year. The ration should be calculated to most closely reflect all activities involving the toxic chemical. In specific industrial classifications subject to this section, where a feedstock or some variable other than production is the primary influence on waste characteristics or volumes, the report may provide an index based on that primary variable for each toxic chemical. The Administrator is encouraged to develop production indexes to accommodate individual industries for use on a voluntary basis.

(6) The techniques which were used to identify source reduction opportunities. Techniques listed should include, but are not limited to, employee recommendations, external and internal audits, participative team management, and material balance audits. Each type of source reduction listed under paragraph (3) should be associated with the techniques or multiples of techniques used to identify the source reduction technique.

(7) The amount of any toxic chemical released into the environment which resulted from a catastrophic event, remedial action, or other one-time event, and is not associated with production processes during the reporting year.

(8)The amount of the chemical from the facility which is treated (at the facility or elsewhere) during such calender year and the percentage change from the previous year. For the first year of reporting under this subsection, comparison with the previous year is required only to the extent such information is available.

(c)SARA Provisions- The provisions of sections 322, 325 (c), and 326 of the Superfund Amendments and Reauthorization Act of 1986 shall apply to the reporting requirements of this section in the same manner as to the reports required under section 313 of that Act. The Administrator may modify the form required for purposes of reporting information under section 313 of that Act to the extent he deems necessary to include the additional information required under this section.

(d) Additional Optional Information- Any person filing a report under this section for any year may include with the report additional information regarding source reduction, recycling, and other pollution control techniques in earlier years.

(e) Availability of Data- Subject to section 322 of the Superfund Amendments and Reauthorization Act of 1986, the Administrator shall make data collected under this section publicly available in the same manner as the data collected under section 313 of the Superfund Amendments and Reauthorization Act of 1986.

The new requirements of the PPA mandated that EPA make changes to the TRI reporting form and the program. EPA incorporated these changes in to the Form R for the 1991 reporting year. Although it was not specifically covered in the PPA, the Agency formalized the category of Energy Recovery at this time.

V. STRUCTURE OF TRI DATA REQUIREMENTS

Data for TRI reporting is submitted to the EPA on a completed ''Form R'' (a copy of the

1996 Form R is included in this submission as Appendix 3). Regulated facilities must submit a completed Form R to the EPA that summarizes activity for the previous calender year by July 1 of the subsequent calender year.

Form R is available both in electronic and hard copy form. The hard copy form is accompanied by a set of instructions[5] that include guidance on the most common TRI issues. TRI data requirements are listed on the Form R. The Form R is broken into two parts, Part I: Facility Identification Information, and Part II: Chemical Specific Information.

Part I is one page in length consisting of five sections that identify the reporting year; any trade secret information; the facility; the parent company; and a certification by a responsible official of the reporting entity.

Part II is specific to each chemical a facility is reporting. It is four pages long, and is broken into eight sections that identify the toxic chemical; the mixture it may be in; the activities and use(s) of the chemical at the facility; the maximum amount of the chemical on-site during the year; the quantity of the chemical released to each environmental media during the year; the quantity of the chemical transferred in waste to off-site locations; on-site treatment, energy recovery, or recycling processes for the chemical; and source reduction and recycling activities.

This petition is concerned with the definition of the information required in Part II of the Form R. Specifically this petition is requesting EPA reevaluate its definition of ''Energy Recovery'' and various types of ''Incineration'' that are used in Section 6: Transfers to Off-Site Locations in light of the data provided within this petition.

VI. TRI CATEGORIZATION OF OFF-SITE TRANSFERS

Data on transfers of toxic chemicals to off-site locations must be reported in Part II, Section 6 of Form R. Section 6 is itself composed of two primary subsections: 6.1 Discharges to Publicly Owned Treatment Works (POTWs); and 6.2 Transfers to other Off-Site Locations. This petition is concerned with the categorization of some of the data in subsection 6.2, specifically 6.2C ''Type of Waste Treatment/ Disposal/ Recycling/ Energy Recovery'' for transfers to other off-site locations.

In the instructions[5] for completing Form R, methods and codes are listed that are applicable to completing subsection 6.2C (a list of these methods and codes is included in this submission as Appendix 4). There are eight codes listed for Disposal, six codes listed for Waste Treatment, five codes for Recycling, and two codes for Energy Recovery. Within the method ''Waste Treatment'' there are two codes designated for Incineration:

– M50 Incineration/Thermal Treatment; and

– M54 Incineration/Insignificant Fuel Value

listed under the method of waste treatment. There is another code that could include toxic chemicals eventually bound for incineration, M95 Transfer to Waste Broker-Waste Treatment, however this code also includes toxic chemicals that are bound for several other types of treatment.

The method ''Energy Recovery'' contains two codes and they are solely for Energy Recovery:

– M56 Energy Recovery; and

– M92 Transfer to Waste Broker-Energy Recovery.

This method of ''Energy Recovery'' and its corresponding codes were not specifically mandated by either EPCRA or the PPA. In subsection 6.2C of Form R the EPA decided to go beyond the statutory mandates of the Pollution Prevention Act of 1990 and the Emergency Planning and Community Right to Know Act of 1986 and create a method of off-site transfer, Energy Recovery, that implies a positive connotation in comparison to Incineration, which is considered Waste Treatment.

Under the PPA, Waste Treatment is the third method in order of preference for dealing with toxic chemicals, behind source reduction and recycling. Energy Recovery is not listed in the PPA, or in EPCRA, but due to its recognition in TRI it is marketed by service providers and treated by generators and many states with hazardous waste taxes as a form of Recycling.

In the recent final rule[6] on the expansion of industries required to report TRI information, the Agency provided its general interpretation of what Energy Recovery is (page 23852):

''EPA believes that for the purposes of the PPA, reporting quantities ''combusted for energy recovery'' should be restricted to devices where energy is produced from the combustion of the toxic chemical and harnessed.''

Several lines after this broad definition, the Agency becomes more specific:

''Specifically, EPA interprets ''combustion for energy recovery'' as the combustion of a toxic chemical that (1) is (I) a RCRA hazardous waste or waste fuel, (ii) a constituent of a RCRA hazardous waste or waste fuel, or (iii) a spent or contaminated ''otherwise used'' material; and that (2) has a heating value greater than or equal to 5,000 Btus per pound in an ''energy or materials recovery device.''. . . EPA considers an ''energy or materials recovery device'' to be an industrial furnace or boiler as defined in 40 CFR 372.3.''

However, a toxic chemical combusted in an ''energy or materials recovery device'' can also be considered as being ''treated for destruction'' if the chemical contained less than 5,000 Btus per pound:

''EPA considers any toxic chemical that is burned and meets the criteria described in part (1) of the interpretation, but which has a heating value less than 5,000 Btus per pound, as provided in part (2) of the definition interpretation, to be ''treated for destruction'' rather than ''combusted for energy recovery.'' This is regardless of the type of device in which it is combusted.''

Therefore under EPA's guidance, an ''energy or materials recovery device'' can perform both Energy Recovery and Treatment for Destruction depending on the energy value of the toxic chemical being combusted.

In this same final rule EPA defines Treatment for Destruction as:

''Treatment for destruction means the destruction of the toxic chemical in waste such that the substance is no longer the toxic chemical subject to reporting under EPCRA section 313. This does not include the destruction of a toxic chemical in waste where the toxic chemical has a heat value greater than 5,000 British thermal units and is combusted in any device that is an industrial furnace or boiler as defined at 40 CFR 260.10.''

Under this guidance on Treatment for Destruction and Energy Recovery, the determinant of whether the energy from a toxic chemical is ''recovered'' is the type of unit that performs the combustion, not whether the energy from the combustion is actually harnessed and used to replace fossil fuel.

VII. DESCRIPTION OF AN ''ENERGY OR MATERIALS RECOVERY DEVICE''

EPA defines an ''energy or materials recovery device'' to be an industrial furnace or boiler as it is described in 40 CFR 372.3:

''(1) Boiler means an enclosed device using controlled flame combustion and having the following characteristics:

(I) The unit must have physical provisions for recovering and exporting thermal energy in the form of steam, heated fluids, or heated gases; and

(ii) The unit's combustion chamber and primary energy recovery sections(s) must be of integral design. To be of integral design, the combustion chamber and the primary energy recovery section(s) (such as waterwalls and superheaters) must be physically formed into one manufactured or assembled unit. A unit in which the combustion chamber and the primary energy recovery section(s) are joined only by ducts or connections carrying flue gas is not integrally designed; however, secondary energy recovery equipment (such as economizers or air preheaters) need not be physically formed into the same unit as the combustion chamber and the primary energy recovery section. The following units are not precluded from being boilers solely because they are not of integral design: process heaters (units that transfer energy directly to a process stream), and fluidized bed combustion units; and

(iii) While in operation, the unit must maintain a thermal energy recovery efficiency of at least 60 percent, calculated in terms of the recovered energy compared with the thermal value of the fuel; and

(iv) The unit must export and utilize at least 75 percent of the recovered energy, calculated on an annual basis. In this calculation, no credit shall be given for recovered heat used internally in the same unit. (Examples of internal use are the preheating of fuel or combustion air, and the driving of induced or forced draft fans or feedwater pumps); or

(2) The unit is one which the Regional Administrator has determined, on a case-by-case basis, to be a boiler, after considering the standards in Sec. 260.32 of this chapter.

Industrial furnace means any of the following enclosed devices that are integral components of manufacturing processes and that use thermal treatment to accomplish recovery of materials or energy:

(1) Cement kilns.
(2) Lime kilns.
(3) Aggregate kilns.
(4) Phosphate kilns.
(5) Coke ovens.
(6) Blast furnaces.
(7) Smelting, melting and refining furnaces (including pyrometallurgical devices such as cupolas, reverberator furnaces, sintering machine, roasters, and foundry furnaces).
(8) Titanium dioxide chloride process oxidation reactors.
(9) Methane reforming furnaces.
(10) Pulping liquor recovery furnaces.
(11) Combustion devices used in the recovery of sulfur values from spent sulfuric acid.
(12) Halogen acid furnaces (HAFs) for the production of acid from halogenated hazardous waste generated by chemical production facilities where the furnace is located on the site of a chemical production facility, the acid product has a halogen acid content of at least 3%, the acid product is used in a manufacturing process, and, except for hazardous waste burned as fuel, hazardous waste fed to the furnace has a minimum halogen content of 20% as-generated.
(13) Such other devices as the Administrator may, after notice and comment, add to this list on the basis of one or more of the following factors:
(I) The design and use of the device primarily to accomplish recovery of material products;
(ii) The use of the device to burn or reduce raw materials to make a material product;
(iii) The use of the device to burn or reduce secondary materials as effective substitutes for raw materials, in processes using raw materials as principal feedstocks;
(iv) The use of the device to burn or reduce secondary materials as ingredients in an industrial process to make a material product;
(v) The use of the device in common industrial practice to produce a material product; and
(vi) Other factors, as appropriate.''

The present guidance that the EPA uses for an ''energy or materials recovery device'' for the purposes of TRI reporting does not include the hazardous waste incinerator.

VIII. DESCRIPTION OF A HAZARDOUS WASTE INCINERATOR

A typical hazardous waste incinerator consists of a primary combustion chamber, secondary combustion chamber, and an air pollution control system.

The primary combustion chamber can be a rotary kiln, fluidized bed, fixed hearth, or liquid injection assembly. Typically, commercial incinerators utilize a rotary kiln as the primary combustion chamber, and this form of primary combustion chamber will be the one described in greater detail in this section.

Both solid and liquid wastes are introduced into the rotary kiln, in which the temperature is typically above 1800° F. Liquid wastes generally are pumped into the kiln through nozzles which atomize the waste into fine droplets for optimal combustion. Solid wastes are fed into the kiln either in bulk or containers (drums).

While the kiln is brought up to operating temperature utilizing fossil fuels such as natural gas or fuel oil, once the permitted temperature is reached operators try to maintain this temperature by feeding energetic liquid and solid wastes. If the wastes do not contain sufficient energy to maintain the permitted temperature the operator must supplement the waste feed with fossil fuels.

The kiln is set on an incline and rotates during operation causing the solid wastes fed into it to slowly migrate from the feed end to the discharge end utilizing gravity. The rotation and incline of the kiln tumbles the solid wastes inside assuring they are exposed on all sides to the high temperature and airflow in the kiln. A large fan draws excess air (containing oxygen) over the rotating solids and towards the secondary combustion chamber. The high temperature of the kiln causes the some of the organics in the waste feed to combust and be destroyed, while others volatilize and migrate with the combustion gas and excess air toward the secondary combustion chamber for combustion and destruction. Inorganic material that has not been volatilized is fed out of the discharge end of the kiln as ash into awaiting containers.

The secondary combustion chamber, often known as an afterburner, is brought up to permitted temperature along with the primary combustion chamber utilizing fossil fuels. Typically temperatures in the secondary combustion chamber are maintained at 2200° F. Once permitted temperature is achieved, the operator can begin feeding atomized energetic liquid wastes to maintain this temperature. If the liquid waste feed does not contain sufficient energy to maintain the permitted temperature, the operator will supplement this waste feed with fossil fuel.

The volatilized organics and excess air from the kiln are mixed with air and passed through the hot flame[1] of the secondary combustion chamber. Generally all feeds into the secondary combustion chamber are retained within it for 2.5–3 seconds. While the organic vapors are in the secondary combustion chamber the temperature, air turbulence, and excess oxygen work to break the chemical bonds of the organics to form primarily carbon dioxide, water, and acid gasses. In addition to these byproducts, some inorganic particulate matter is also mixing with the turbulent air of the secondary combustion chamber.

The combustion gas from the secondary combustion chamber flows to the air pollution control system (APCS) for cooling and cleansing prior to discharge to the atmosphere. APCSs have a variety of configurations, but their purpose is to cool and remove the acid gasses, particulate, and volatilized inorganics contained in the secondary combustion chamber off gasses.

IX. ENERGY REQUIREMENTS OF A HAZARDOUS WASTE INCINERATOR

Hazardous waste incinerators thermally decompose organic compounds. They do this by introducing the organic material into an environment where the temperature, residence time, air turbulence, and oxygen level are designed and controlled to achieve strict destruction and removal efficiencies (''DRE'') for each permitted organic.

Hazardous waste incinerators are permitted to burn toxic chemicals after a lengthy and comprehensive permitting process. This process is overseen by the state and/or federal environmental agency. Towards the end of this process, a trial burn for the permitted incineration unit is conducted. The purpose of the trial burn is to verify that the unit meets state and federal guidelines, and to set the operating parameters the unit must operate under while destroying toxic chemicals. Once a trial burn is successfully completed and a permit is issued the incineration facility is allowed to combust hazardous waste under the terms of the permit and operating parameters of the trial burn.

As mentioned earlier, temperature, time, turbulence, and oxygen are four of the key conditions needed to properly destroy organic compounds. Generally to achieve good combustion of organics, incinerators must maintain a minimum temperature of greater than 2,000° F in the secondary combustion chamber, a residence time greater than a couple of seconds, and a minimum oxygen level of 3% in the post combustion zone. All permitted hazardous waste burning incinerators have operating parameters set around these numbers (there are many other operating parameters that must be met to combust toxic chemicals; however, for the purpose of this petition, these other parameters do not need to be listed).

An incinerator does not combust toxic chemicals until it is operating within the permitted parameters. To reach the temperature required for toxic chemical combustion the incinerator will burn fossil fuel, generally a combination of fuel oil and natural gas. Once the minimum temperature is reached (and all other parameters are within permitted levels), operators begin feeding toxic organic chemicals to the incinerator for combustion.

Just like the fossil fuel they are replacing, these toxic chemicals have energy content and provide energy to the incinerator to maintain the permitted temperature. However, waste toxic chemicals are significantly more variable than refined fossil fuels in their energy content and composition. The BTU content of toxic organic chemicals varies greatly depending on the composition of the compounds. The BTU content also varies depending on the purity of the organic and what impurities it is mixed with (soil, water, etc.).

Ideally, the incinerator operator tries to blend a mixture of relatively pure, high energy waste, with other lower energy wastes (highly chlorinated or fluorinated wastes, contaminated media, etc.) so that combustion of all toxic chemicals is achieved without the addition of fossil fuel. Remember, to combust wastes a minimum temperature must be maintained within the incinerator. The amount of energy required to do this is dependent on the size of the incinerator;

[1] The flame of the secondary combustion chamber is derived from the combustion of energetic liquid wastes, fossil fuel, or a combination of the two.

however, once the minimum temperature is achieved this energy can come from fossil fuel or the waste organic chemicals (if the waste has sufficient energy content).

Since the advent of the ''Energy Recovery'' designation for off-site transfers, data indicate that incinerators are using increasing quantities of fossil fuel to combust the less energetic organic wastes they are receiving. The ''Energy Recovery'' designation is not available for toxic chemicals shipped to incinerators, and because of this a distortion has occurred that preferentially directs high energy wastes to go to ''energy or materials recovery devices''. Incinerators are not considered ''energy or materials recovery devices'', and must replace these high energy wastes with fossil fuel to be able to burn the less energetic wastes they still receive.

X. IMPACT OF ''ENERGY RECOVERY'' DESIGNATION

The impact of providing the ''Energy Recovery'' designation for the transfer of TRI regulated toxic organic chemicals shipped to an ''energy or materials recovery device'' was steady and predictable. The favorable connotations of ''Energy Recovery'' has induced manufacturers to transfer their high energy wastes to ''energy or materials recovery devices'' from incinerators.

This shifting of waste to ''energy or materials recovery devices'' allows the manufacturer to achieve some of the recycling goals they have established. Also, the ''Energy Recovery'' designation has led, in some instances, to regressive state tax structures that tax waste going to an incinerator at a higher rate than waste going to ''Energy Recovery''

With all of these incentives to ship high energy wastes to ''energy or materials recovery devices'', and what experience indicated was occurring in the marketplace and at incineration facilities, it appeared that larger quantities of organic TRI chemicals were going to ''Energy Recovery''. To test our hypothesis we queried the TRI database for trends in the Off-Site Transfer of organic chemicals. We queried the database for the total of all chemicals going to each type of off-site transfer for the years 1991–95 (1991 was the first year the ''Energy Recovery'' designation was formally available, and 1995 is the last year TRI data is now available.) For consistency and comparability of data, we searched for information only on the ''core chemicals'' that were listed for all five years.

The database we searched was the TRI database available through RTKnet. Following is the concluding data (a spreadsheet summarizing all of the data from this search is included as Appendix 5) we queried from this database.

Chart 1

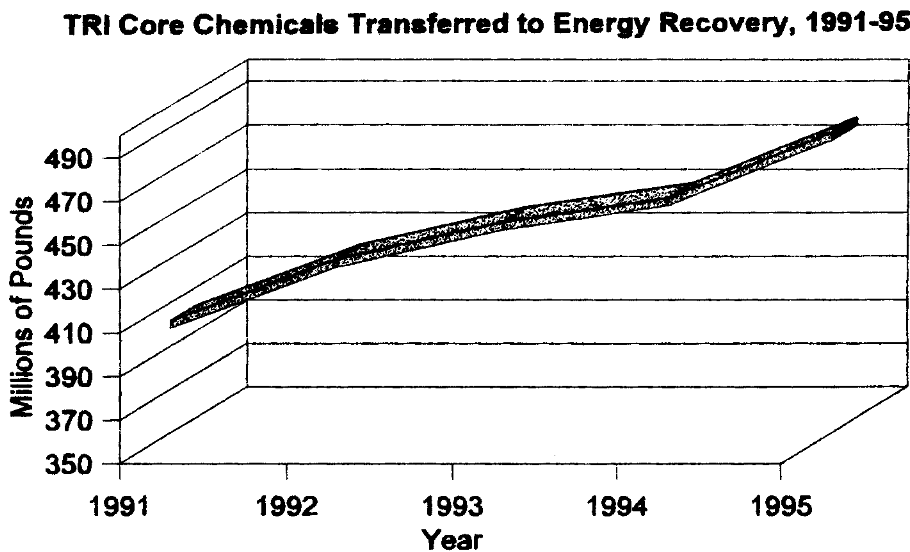

Table 1

YEAR	TOTAL POUNDS TRANSFERRED TO ENERGY RECOVERY
1991	400,285,225
1992	427,987,876
1993	445,839,753
1994	455,895,352
1995	486,366,712

As you can see from the above chart and table, there has been a steady increase in the quantity of TRI toxic chemicals being transferred off-site to energy recovery. Now lets contrast this to the data for TRI toxic chemicals being transferred to incineration.

Chart 2

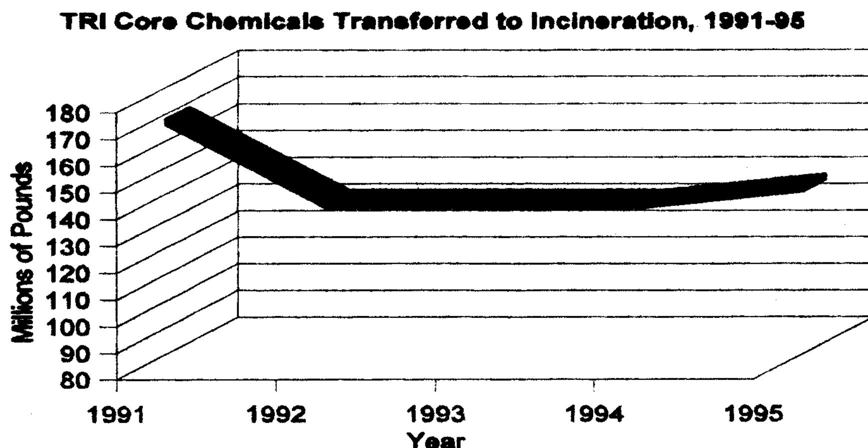

Table 2

YEAR	TOTAL POUNDS TRANSFERRED TO INCINERATION
1991	166,532,302
1992	135,767,217
1993	136,025,939
1994	136,423,218
1995	141,932,667

In contrast to the data for Energy Recovery, the quantity of TRI toxic chemicals going to incineration has dropped significantly over the 1991–95 time frame. Most of this drop occurred in the 1991–92 time frame.

Chart 3

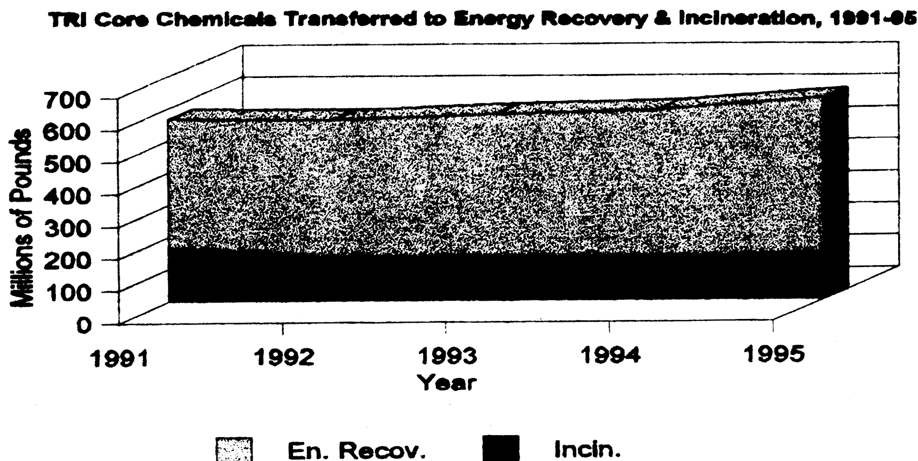

Table 3

YEAR	TOTAL POUNDS TRANSFERRED TO ENERGY RECOVERY AND INCINERATION	PERCENTAGE OF TOTAL POUNDS TRANSFERRED FROM ENERGY RECOVERY	PERCENTAGE OF TOTAL POUNDS TRANSFERRED FROM INCINERATION
1991	566,817,527	70.6%	29.4%
1992	563,755,093	75.9%	24.1%

Table 3—Continued

YEAR	TOTAL POUNDS TRANSFERRED TO ENERGY RECOVERY AND INCINERATION	PERCENTAGE OF TOTAL POUNDS TRANSFERRED FROM ENERGY RECOVERY	PERCENTAGE OF TOTAL POUNDS TRANSFERRED FROM INCINERATION
1993	581,865,692	76.6%	23.4%
1994	592,318,570	77.0%	23.0%
1995	628,299,379	77.4%	22.6%

Finally, combining the data for off-site transfers to incineration and energy recovery show that in every year but one (1992) the quantity of TRI toxic chemicals going to some form of combustion is increasing. While the total quantity going to combustion is increasing, the share, and total quantity, of these toxic chemicals going to incineration is decreasing and the share, and total quantity, going to energy recovery is increasing.

The data indicates that the positive connotation of the "Energy Recovery" designation has shifted large quantities of toxic chemicals away from incineration and into EPA classified "energy or materials recovery devices". This data then leads to a question of whether this movement of high energy wastes from incinerators to "energy or materials recovery devices" actually saves energy on a net basis, or just transfers the need for fossil fuel from "energy or materials recovery devices" to incinerators.

XI. INCINERATORS NEED HIGH ENERGY WASTE FUEL TO REPLACE FOSSIL FUEL

As stated in Section VIII of this petition, once an incinerator is operating within its permitted levels it can begin combusting toxic organic chemicals. Just like the fossil fuel they are replacing, these toxic chemicals have energy content and provide energy to the incinerator to maintain the permitted temperature. Ideally, the incinerator operator tries to blend a mixture of relatively pure, high energy waste, with other lower energy wastes (highly chlorinated or fluorinated wastes, contaminated media, etc.) so that combustion of all toxic chemicals is achieved without the addition of fossil fuel. Unfortunately, since the EPA designation of "Energy Recovery" is not available to incinerators, large quantities of high energy toxic chemicals have migrated from incinerators to "energy or materials recovery devices". This movement of energetic wastes away from incinerators forces the incinerator operator to find other sources of energy to maintain the unit within its permitted limits. The only other source of energy available is fossil fuel.

The data in this area confirms that from 1991–95 fossil fuel usage has increased at incineration sites (Laidlaw Environmental Services, Inc. raw data is attached as Appendix 6). Laidlaw combined supplemental energy use data from its subsidiaries that had the type of data needed, for the years 1991–95. These subsidiaries include Laidlaw Environmental Services (Bridgeport), Inc. located in Bridgeport NJ, and Laidlaw Environmental Services (Deer Park), Inc. located in Deer Park, TX. Together these facilities represent about 20% of the available commercial incineration capacity in the U.S. for the years 1991–95. What was found is entirely predictable based on the information already in this petition. Following is data on the Btus of fossil fuel that had to be added to the incinerator to fully combust a pound of toxic chemicals for the years 1991–95.

Chart 4

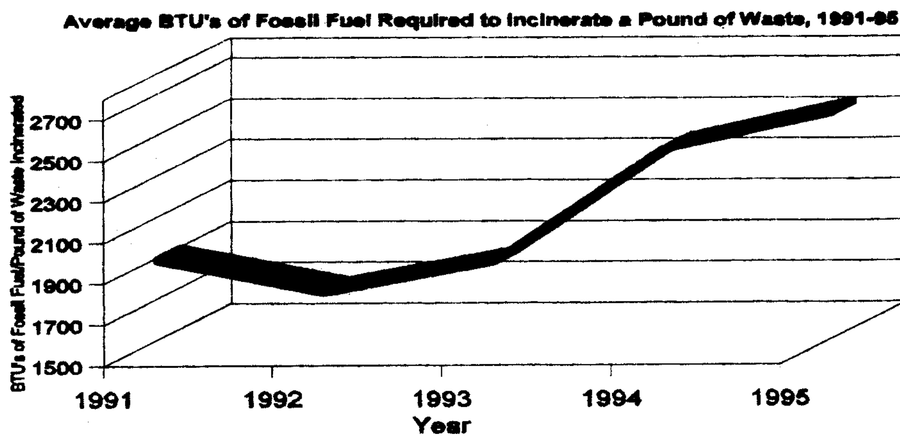

Table 4

YEAR	BTUs OF FOSSIL FUEL ADDED TO COMBUST 1 POUND OF TOXIC CHEMICALS
1991	1,894
1992	1,734
1993	1,882
1994	2,432
1995	2,605

The Btus of Fossil Fuel Added to Combust 1 Pound of Toxic Chemicals can also be converted into the total barrels of oil (equivalents) that are needed to combust waste at these facilities.

Chart 5

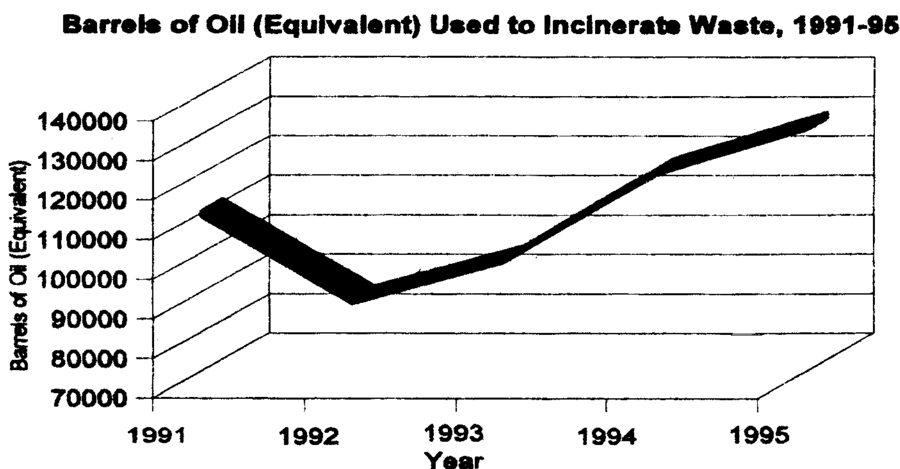

Table 5

YEAR	BARRELS OF OIL (EQUIVALENTS) USED TO COMBUST TOXIC CHEMICALS
1991	109,925
1992	87,931
1993	98,213
1994	120,398
1995	131,962

The above graphic and table indicate that the cited incineration facilities were utilizing 22,037 more barrels of oil (equivalent) to combust toxic chemicals in 1995 than in 1991. Due to their geographical location and size, the cited facilities should be fairly representative of the commercial hazardous waste incineration industry[2]. Therefore, extrapolating this data[3] would mean that in 1995 the entire commercial hazardous waste incineration industry needed a little over 110,000 more barrels of oil to combust the toxic chemicals they were receiving than they needed in 1991.

To compare the change in fossil fuel needs for incinerators between 1991 and 1995, a model was constructed that kept incineration's share of the TRI toxic chemical market the same in 1991 and 1995 we find:

[2]To determine the Barrels of Oil Equivalents multiply the BTUs from Table 4 times the total lbs. in Appendix 6, divide this number by 19,000 BTUs/lb oil, divide again by 7lbs/gallon, and divide again by 42 gallons/barrel.

[3]The cited facilities represented approximately 20% of the commercial incineration capacity, to extrapolate to the entire capacity the cited numbers are multiplied by five.

Table 6

INCINERATION'S 1991 SHARE	29.4%
INCINERATION'S 1995 SHARE	22.6%
INCINERATION'S 1995 POUNDS OF TRI TOXIC CHEMICALS	141,932,667
INCINERATION'S PROJECTED 1995 POUNDS OF TRI TOXIC CHEMICALS USING 1991 SHARE	184,720,017
DIFFERENCE IN POUNDS	42,787,350
ENERGY VALUE OF DIFFERENCE ASSUMING 15,000 BTU/LB	641,810,000,000 BTU's
BARRELS OF OIL EQUIVALENT OF ENERGY VALUE[4]	114,899

[4]Assumes oil is 19,000 Btus/lb, and has a density of 7 lbs./gal

This model is hypothetical, and only looks at the quantity of energetic toxic chemicals incinerators would receive if they maintained their 1991 share of the market.

However, the results are very interesting. The model's energy from toxic chemicals, 114,899 barrels of oil (equivalents), incinerator's lost because of the ''Energy Recovery'' designation given to ''energy or materials recovery devices'' is almost exactly equal to the additional amount of fossil fuel, 110,000 barrels of oil (equivalents), that incinerators had to burn in 1995.

This information strongly indicates that the ''Energy Recovery'' designation did not actually reduce the use of fossil fuels. It only shifted the high energy toxic chemicals from incinerators to ''energy or materials recovery devices''. The incinerators then had to replace the lost energy with fossil fuels of similar energy content.

XII. RECOMMENDATION TO EPA: EXPAND ENERGY RECOVERY TO INCLUDE COMBUSTION OF HIGH BTU WASTE AT INCINERATORS

The treatment method of ''Energy Recovery'' is not mandated by either EPCRA or the PPA. It was a designation that was created without statutory requirement. Unfortunately, while the idea of ''Energy Recovery'' is a noble one, the unintended impact over its first five years was to shift the high energy toxic chemicals from incinerators to ''energy or materials recovery devices'' designated by the EPA.

To properly destroy the remaining toxic chemicals they received, incinerators had to backfill the unit with an amount of fossil fuel comparable to the quantity of high energy toxic chemicals that were lost to ''energy or materials recovery devices''. On a global basis, there was no ''Energy Recovery'', only a shifting of demand for fossil fuel.

The main issue is what is an ''energy or materials recovery device''? The EPA's guidance defines it primarily as a boiler or industrial furnace. However, this definition overlooks the fact that an incinerator requires energy to perform its designed task- the destruction of many of the most toxic organic chemicals known to humanity. In destroying these toxic chemicals, the incinerator is providing a valuable service to the environment, economy, and the nation, every bit as important as the manufacture of cement or steam.

To maintain, as the Agency does today, that energy from waste toxic chemicals is ''Recovered'' if it is used to manufacture steam or cement, but is ''Treated for Destruction'' if it is used to destroy other

toxic chemicals infers that harnessing energy for the proper destruction of organic chemicals is not recognized by the EPA as a valuable service.

We do not believe this is the Agency's position, only one that is implied by their present guidance on this issue. We believe it is important, both from a philosophical and a business point, that the EPA recognize that their present interpretation of ''Energy Recovery'' devalues the important service hazardous waste incinerators provide by destroying all forms of toxic organic chemicals, and only shifts the burden for fossil fuels from one type of thermal device to another. In light of the information provided in this petition, we strongly urge the EPA to address this matter by issuing guidance allowing the combustion of energetic toxic organic chemicals in an incinerator to be considered ''Energy Recovery''

Endnotes

1. ''Emergency Planning and Community Right to Know Act Section 313, Guidance for RCRA Subtitle C TSD Facilities and Solvent Recovery Facilities (Version 1.0)'', United States Environmental Protection Agency, October, 1997

2. ''The Emergency Planning and Community Right to Know Act of 1986'', Public Law 99–499, Title III, Section 11023, Toxic Chemical Release Forms, October 17, 1986

3. ''The Pollution Prevention Act of 1990'', Public Law 101–508, Title VI, Sections 6601–6610, November 5, 1990

4. ''Pollution Prevention Fact Sheet, Pollution Prevention Act of 1990'', United States Environmental Protection Agency, September, 1993

5. ''Toxic Chemical Release Inventory Reporting Form R and Instructions, Revised 1996 Version'' United States Environmental Protection Agency, May 1997

6. ''Addition of Facilities in Certain Industry Sectors; Revised Interpretation of Otherwise Use; Toxic Release Inventory Reporting; Community Right to Know; Final Rule'' Federal Register, V 62, #84, May 1, 1997 Pages 23834–23892

V. Request for Comment

With regard to this interpretation of combustion for energy recovery and Safety Kleen's petition, EPA is requesting comment on several issues. These issues include:

1. Whether EPA should include incinerators as energy recovery units.

2. Whether EPA should include other types of combustion units under this designation.

3. Whether toxic chemicals with high British thermal units/pound values in wastes should be considered as replacements for fossil fuels in incinerators when the toxic chemical is in waste.

4. Whether EPA should distinguish between toxic chemicals in waste used to start up incinerators and toxic chemicals in waste used for maintaining combustion.

EPA is in the process of reproposing rulemaking pursuant to section 6607 of the PPA. When reviewing comments relating to a regulatory definition of ''combustion for energy recovery,'' EPA will consider comments submitted in response to this document.

List of Subjects in 40 CFR Part 372

Environmental protection, Chemicals, Community right-to-know, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements, Superfund, Toxic chemicals.

Dated: March 19, 1999.

Susan H. Wayland,

Acting Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 99–7915 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 648

[I.D. 032299B]

New England Fishery Management Council; Public Meeting

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

ACTION: Public meeting.

SUMMARY: The New England Fishery Management Council (Council) will hold a 2-day public meeting on April 14 and April 15, 1999, to consider actions affecting New England fisheries in the exclusive economic zone.

DATES: The meeting will be held on Wednesday, April 14, 1999, at 9:30 a.m. and on Thursday, April 15, 1999, at 8:30 a.m.

ADDRESSES: The meeting will be held at the Providence Biltmore Hotel, 11 Dorrance Street, Kennedy Plaza, Providence, RI; telephone (401) 421–0700. Requests for special accommodations should be addressed to the New England Fishery Management Council, 5 Broadway, Saugus, MA 01906–1036; telephone: (781) 231–0422.

FOR FURTHER INFORMATION CONTACT: Paul J. Howard, Executive Director, New England Fishery Management Council (781) 231–0422.

SUPPLEMENTARY INFORMATION:

Wednesday, April 14, 1999

The meeting will begin with consideration of final action on Framework Adjustment 11 to the Fishery Management Plan (FMP) for the Atlantic Sea Scallop Fishery in conjunction with Framework Adjustment 29 to the Northeast Multispecies Fishery FMP. Management measures being considered would allow sea scallop dredge vessels in Closed Area II and possibly the Nantucket Lightship Closed Area—areas in which scallop fishing is now prohibited because of an associated groundfish bycatch. The Council will consider decisions/recommendations regarding groundfish and scallop conservation, habitat impacts, gear conflicts, enforceability, and the mandates of the Sustainable Fisheries Act. Measures may include, but are not limited to: A target scallop total allowable catch (TAC) in Closed Area II and the Nantucket Lightship Closed Area; trip allocations; days-at sea (DAS) adjustments for fishing inside versus outside the closed areas; trip limits, with trip declaration and notice of landing requirements; area restrictions on scallop fishing within Closed Area II and the Nantucket Lightship Area; gear restrictions to reduce bycatch, such as dredge twine top regulations; a demarcation line for counting DAS; a TAC set-aside for research and observation of fishing activity; and an adjustment to the 300–lb (136–kg) regulated species possession limit to reduce discards. Once this matter is concluded, the Sea Scallop Committee will identify and the Council will seek approval of issues to be addressed in Amendment 10 to the Sea Scallop FMP. Amendment 10 will be developed later this year and is expected to go into effect on or about March 1, 2000.

Thursday, April 15, 1999

The second session will begin with reports from the Council Chairman; the Executive Director; the Acting Regional Administrator, Northeast Region, NMFS (Acting Regional Administrator); the Northeast Fisheries Science Center and Mid-Atlantic Fishery Management Council liaisons; and representatives of the Coast Guard, the Atlantic States Marine Fisheries Commission, and the U.S. Fish and Wildlife Service. Following reports, the Chairman of the Groundfish Committee will seek approval of final action on Framework Adjustment 30 to the Northeast Multispecies FMP. Management measures would reduce fishing effort on Georges Bank cod by 22 percent in the 1999 fishing year through any of the following measures: DAS reductions, trip limits, closed areas, reductions in the amount of hook gear and gillnets

allowed, and a minimum size increase for cod to 21 inches (53 cm).

During the afternoon session, the Habitat Annual Review Report will be presented. This will consist of a review of habitat-related activities, on-going research projects, new and additional habitat-related information on the distribution and abundance of fish species, important areas and habitats, and impacts to fish habitat. There will be proposals for revising the Council's Essential Fish Habitat (EFH) designations and Habitat Areas of Particular Concern (HAPC). Options for minimizing fishing-related impacts to EFH and HAPC and a prioritized list of research and information needs will also be included. Following the annual review, the Habitat Committee may recommend action based on the information presented. The meeting will adjourn once any other outstanding Council business has been addressed.

Announcement of Experimental Fishery Application

The Acting Regional Administrator is considering renewal of an experimental fishing proposal that would involve fishing for, retention, and limited landings of various species of fish, including invertebrates and regulated multispecies, using small mesh in the Gulf of Maine/Georges Bank Regulated Mesh Area. The experimental fishery would be conducted by the Mount Desert Oceanarium to collect various species for public display. An exempted fishing permit would be issued to the participating vessel to exempt it from the possession limit, mesh size, minimum fish size, and DAS restrictions of the Northeast Multispecies FMP.

Although other issues not contained in this agenda may come before this Council for discussion, in accordance with the Magnuson-Stevens Fishery Conservation and Management Act, those issues may not be the subject of formal Council action during this meeting. Council action will be restricted to those issues specifically listed in this document.

Special Accommodations

This meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Paul J. Howard (see **ADDRESSES**) at least 5 days prior to the meeting date.

Dated: March 25, 1999.

Bruce C. Morehead,

Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 99–7890 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–22–F

Notices

Federal Register
Vol. 64, No. 61
Wednesday, March 31, 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.

JOINT BOARD FOR THE ENROLLMENT OF ACTUARIES

Advisory Committee on Actuarial Examinations; Meeting

Notice is hereby given that the Advisory Committee on Actuarial Examinations will meet in the Conference Room of William M. Mercer, Incorporated, 30th Floor, Conference Room 30C, 1166 Avenue of the Americas, New York, New York, on Monday, March 29, 1999, beginning at 8:30 a.m.

The purpose of the meeting is to discuss topics and questions which may be recommended for inclusion on future Joint Board examinations in actuarial mathematics and methodology referred to in Title 29 U.S. Code, Section 1242 (a)(1)(B).

We have determined as required by section 10(d) of the Federal Advisory Committee Act (Pub. L. 92–463), that the subject of the meeting falls with the exception to the open meeting requirement set forth in Title 5 U.S. Code, section 552(c)(9)(B), and that the public interest requires that such meeting be closed to public participation.

Dated: March 24, 1999.

Patrick W. McDonough,

Advisory Committee Management Officer, Joint Board for the Enrollment of Actuaries.

[FR Doc. 99–7790 Filed 3–30–99; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF AGRICULTURE

Submission for OMB Review; Comment Request

March 25, 1999.

The Department of Agriculture has submitted the following information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1995, Public Law 104–13. Comments regarding (a) whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (b) the accuracy of the agency's estimate of burden including the validity of the methodology and assumptions used; (c) ways to enhance the quality, utility and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology should be addressed to: Desk Officer for Agriculture, Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Washington, DC 20503 and to Departmental Clearance Office, USDA, OCIO, Mail Stop 7602, Washington, DC 20250–7602. Comments regarding these information collections are best assured of having their full effect if received within 30 days of this notification. Copies of the submission(s) may be obtained by calling (202) 720–6746.

An agency may not conduct or sponsor a collection of information unless the collection of information displays a currently valid OMB control number and the agency informs potential persons who are to respond to the collection of information that such persons are not required to respond to the collection of information unless it displays a currently valid OMB control number.

Farm Service Agency

Title: Emergency Loan Policies, Procedures and Authorizations—7 CFR part 1945–D.

OMB Control Numbers: 0560–0159.

Summary of Collection: The Consolidated Farm and Rural Development Act of 1972 authorizes emergency loss loans to assist farmers who have suffered physical or production losses in areas declared by the President, designated by the Secretary of Agriculture, or named for physical loss loans by the Farm Service Agency (FSA) Administrator. Funds may be used to restore or replace essential property, pay all or part of production costs associated property, pay all or part of production costs associated with the disaster year, essential family living expenses, reorganize the farming operation, or refinance debts. Emergency loss loans are low interest direct loans which are made and serviced by FSA officials. FSA will document and verify the extent of losses suffered because of the natural disaster, and account for loan funds that will be disbursed to borrowers in more than one installment.

Need and Use of the Information: FSA will collect information using forms to determine an applicant's eligibility and property loss and account for loan funds that will be disbursed. The collected information will be used to protect the government's financial interests by ensuring that only farming operations which have suffered a 30 percent production loss are determined eligible for emergency loans.

Description of Respondents: Farms.

Number of Respondents: 3,100.

Frequency of Responses: Reporting: On occasion.

Total Burden Hours: 4,960.

Agricultural Marketing Service

Title: Regulations Governing the Voluntary Grading of Shell Eggs.

OMB Control Number: 0581–0128.

Summary of Collection: The Agricultural Marketing Act of 1946 (60 Stat. 1087–1091, as amended; 7 U.S.C. 1621–1627) (AMA) directs and authorizes the Department to develop standards of quality, grades, grading programs, and services to enable a more orderly marketing of agricultural products so trading may be facilitated and so consumers may be able to obtain products graded and identified under USDA programs with the confidence of receiving quality in accordance with the standards, grades, and regulations. The regulations provide a voluntary program for grading shell eggs on the basis of U.S. standards, grades, and weight classes. In addition, the shell egg industry and users of the products have requested that other types of voluntary services be developed and provided under these regulations; e.g., contract and specification acceptance services and certification of quantity. This voluntary grading service is available on a resident basis or a lot-fee bases. The Agricultural Marketing Service (AMS) will collect information using forms PY–100, PY–157, and PY–240.

Need and Use of the Information: AMS will collect information on the name, address, and the kind of services or benefits the respondents wish. The

information is used to administer and to conduct and carry out the grading services requested by the respondents. If the information is not collected, the Agency would not be able to provide the voluntary grading service authorized and requested by Congress under the AMA, to provide the types of services requested by industry, to administer the program, to ensure properly grade-labeled products, to calculate the cost of the service, and to collect for the cost furnishing service as required by section 203(h) of the AMA.

Description of Respondents: Business or other for-profit; Federal Government; State, Local or Tribal Government.

Number of Respondents: 643.

Frequency of Responses: Reporting: On occasion; Semi-annually; Monthly; Annually; Other.

Total Burden Hours: 5,602.

Foreign Agricultural Service

Title: List of Commodities by Firm Available for Exporting.

OMB Control Number: 0551–0031.

Summary of Collection: The AgExport Connections Office of USDA's Foreign Agricultural Service (FAS) facilitates trade contracts between U.S. exporters and foreign buyers seeking U.S. food and agricultural products. Authority for this program falls under 7 U.S.C. Part 1761. The U.S. Supplier List (USL) and Foreign Buyer List (FBL) services are designed to help U.S. firms make contact with export agents, trading companies, importers and foreign buyers and create an opportunity to sell their products in overseas markets. This service provides the U.S. firm an opportunity to have a data record providing basic information about the company and the products it exports put into a USDA maintained database. FAS will collect information using a combination of forms and telephone interviews.

Need and Use of the Information: FAS will collect information on contact names, mailing addresses, telephone, fax, email, and websites. The main purposes of the USL and FBL services is to foster trade contacts in an effort to facilitate greater export of U.S. agriculture food, forestry, and fishery products. The databases are used to recruit U.S. exporters, importers, and buyers to participate in market development activities sponsored by USDA. These databases must be updated periodically to maintain the integrity and usefulness to the trade community.

Description of Respondents: Business or other for-profit.

Number of Respondents: 29,000.

Frequency of Responses: Reporting: On occasion; Semi-annually.

Total Burden Hours: 3,730.

Nancy B. Sternberg,

Department Clearance Officer.

[FR Doc. 99–7800 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–01–M

DEPARTMENT OF AGRICULTURE

Agricultural Research Service

Notice of Federal Invention Available for Licensing and Intent to Grant Exclusive License

AGENCY: Agricultural Research Service, USDA.

ACTION: Notice of availability and intent.

SUMMARY: Notice is hereby given that a Federally owned invention U.S. Patent No. 5,074,902 issued on December 24, 1991, entitled ''Granular Products Containing Fungi Encapsulated in a Wheat Gluten Matrix for Biological Control of Weeds'' is available for licensing and the U.S. Department of Agriculture, Agricultural Research Service, intends to grant to United Agri Products, Inc., of Greeley, Colorado, an exclusive license to S.N. 07/560,791.

DATES: Comments must be received on or before June 29, 1999.

ADDRESSES: Send comments to: USDA, ARS, Office of Technology Transfer, 5601 Sunnyside Avenue, Beltsville, Maryland 20705–5131.

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 United Agri Products, Inc., has submitted a complete and sufficient application for a license. The prospective exclusive license will be royalty-bearing and will comply with the terms and conditions of 35 U.S.C. 209 and 37 CFR 404.7. The prospective exclusive license may be granted unless, within ninety (90) 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. 99–7801 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–03–P

DEPARTMENT OF AGRICULTURE

Animal and Plant Health Inspection Service

[Docket No. 98–114–2]

AgrEvo USA Co.; Availability of Determination of Nonregulated Status for Canola Genetically Engineered for Male Sterility, Fertility Restoration, and Glufosinate Herbicide Tolerance

AGENCY: Animal and Plant Health Inspection Service, USDA.

ACTION: Notice.

SUMMARY: We are advising the public of our determination that certain canola transformation events developed by AgrEvo USA Company, which have been genetically engineered for male sterility, fertility restoration, and tolerance to the herbicide glufosinate, are no longer considered regulated articles under our regulations governing the introduction of certain genetically engineered organisms. Our determination is based on our evaluation of data submitted by AgrEvo USA Company in its petition for a determination of nonregulated status and on our analysis of other scientific data. This notice also announces the availability of our written determination document and its associated environmental assessment and finding of no significant impact.

EFFECTIVE DATE: March 22, 1999.

ADDRESSES: The determination, an environmental assessment and finding of no significant impact, and the petition may be inspected at USDA, room 1141, South Building, 14th Street and Independence Avenue SW., Washington, DC, between 8 a.m. and 4:30 p.m., Monday through Friday, except holidays. Persons wishing to inspect those documents are asked to call in advance of visiting at (202) 690–2817 to facilitate entry into the reading room.

FOR FURTHER INFORMATION CONTACT: Dr. Susan Koehler, Biotechnology and Biological Analysis, PPQ, APHIS, Suite 5B05, 4700 River Road Unit 147, Riverdale, MD 20737–1236; (301) 734–4886. To obtain a copy of the determination or the environmental assessment and finding of no significant impact, contact Ms. Kay Peterson at

(301) 734–4885; e-mail: kay.peterson@usda.gov.

SUPPLEMENTARY INFORMATION:

Background

On October 5, 1998, the Animal and Plant Health Inspection Service (APHIS) received a petition (APHIS Petition No. 98–278–01p) from AgrEvo USA Company (AgrEvo) of Wilmington, DE, seeking a determination that canola (*Brassica napus* L.) designated as In Vigor® Hybrid Canola Transformation Events MS8 and RF3 (transformation events), which have been genetically engineered for male sterility (MS8), fertility restoration (RF3), and tolerance to the herbicide glufosinate (both MS8 and RF3), do not present a plant pest risk and, therefore, are not regulated articles under APHIS' regulations in 7 CFR part 340.

On December 8, 1998, APHIS published a notice in the **Federal Register** (63 FR 67643–67644, Docket No. 98–114–1) announcing that the AgrEvo petition had been received and was available for public review. The notice also discussed the role of APHIS, the Environmental Protection Agency, and the Food and Drug Administration in regulating the subject canola transformation events and food products derived from them. In the notice, APHIS solicited written comments from the public as to whether these canola transformation events posed a plant pest risk. The comments were to have been received by APHIS on or before February 8, 1999. APHIS received no comments on the subject petition during the designated 60-day comment period.

Analysis

The subject transformation events have been genetically engineered to contain a *barnase* gene (MS8) for male sterility or a *barstar* gene (RF3) for fertility restoration. The *barnase* gene expresses a ribonuclease that blocks pollen development and results in a male sterile plant, and the *barstar* gene encodes a specific inhibitor of this ribonuclease and restores fertility. The *barnase* and *barstar* genes were derived from *Bacillus amyloliquefaciens*, and are linked in the subject transformation events to the *bar* gene derived from *Streptomyces hygroscopicus*. The *bar* gene encodes the enzyme phosphinothricin-N-acetyltransferase (PAT), which confers tolerance to the herbicide glufosinate. The herbicide tolerance trait allows for selection of plants carrying the linked genes for pollination control during breeding and for tolerance to the herbicide during commercial cultivation. Expression of the added genes is controlled in part by gene sequences derived from *Arabidopsis thaliana, Nicotiana tabacum*, and the plant pathogen *Agrobacterium tumefaciens*. The *A. tumefaciens* method was used to transfer the added genes into the parental canola variety, Drakkar.

Canola transformation events MS8, RF3, and their hybrid combination MS8/RF3 have been considered regulated articles under APHIS' regulations in 7 CFR part 340 because they contain gene sequences derived from a plant pathogen. However, evaluation of field data reports from field tests of these canola transformation events conducted under APHIS permits and notifications since 1997 indicates that there were no deleterious effects on plants, nontarget organisms, or the environment as a result of the environmental release of the subject canola transformation events.

Determination

Based on its analysis of the data submitted by AgrEvo and a review of other scientific data and field tests of the subject canola, APHIS has determined that canola transformation events MS8, RF3, and their hybrid combination MS8/RF3: (1) Exhibit no plant pathogenic properties; (2) are no more likely to become weeds than canola developed by traditional breeding techniques and are unlikely to increase the weediness potential for any other cultivated or wild species with which they can interbreed; (3) will not cause damage to raw or processed agricultural commodities; (4) will not harm threatened or endangered species or other organisms, such as bees, that are beneficial to agriculture; and (5) are unlikely to have any significant adverse impact on agricultural practices. Therefore, APHIS has concluded that the subject canola transformation events and any progeny derived from hybrid crosses with other canola varieties will be as safe to grow as canola in breeding programs that are not subject to regulation under 7 CFR part 340.

The effect of this determination is that AgrEvo's canola transformation events MS8, RF3, and their hybrid combination MS8/RF3 are no longer considered regulated articles under APHIS' regulations in 7 CFR part 340. Therefore, the requirements pertaining to regulated articles under those regulations no longer apply to the subject canola transformation events or their progeny. However, importation of these canola transformation events or seeds capable of propagation are still subject to the restrictions found in APHIS' foreign quarantine notices in 7 CFR part 319.

National Environmental Policy Act

An environmental assessment (EA) has been prepared to examine the potential environmental impacts associated with this determination. The EA was prepared in accordance with: (1) The National Environmental Policy Act of 1969 (NEPA), as amended (42 U.S.C. 4321 *et seq.*), (2) regulations of the Council on Environmental Quality for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), (3) USDA regulations implementing NEPA (7 CFR part 1b), and (4) APHIS' NEPA Implementing Procedures (7 CFR part 372). Based on that EA, APHIS has reached a finding of no significant impact (FONSI) with regard to its determination that AgrEvo's canola transformation events MS8, RF3, and their hybrid combination MS8/RF3 and lines developed from them are no longer regulated articles under its regulations in 7 CFR part 340. Copies of the EA and the FONSI are available upon request from the individual listed under **FOR FURTHER INFORMATION CONTACT.**

Done in Washington, DC, this 24th day of March 1999.

Craig A. Reed,

Administrator, Animal and Plant Health Inspection Service.

[FR Doc. 99–7803 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–34–P

DEPARTMENT OF AGRICULTURE

Cooperative State Research, Education, and Extension Service, Notice of Intent To Request an Extension of a Currently Approved Information Collection

AGENCY: Cooperative State Research, Education, and Extension Service, USDA.

ACTION: Notice and request for comments.

SUMMARY: In accordance with the Paperwork Reduction Act of 1995 (Pub. L. 104–13) and Office of Management and Budget (OMB) regulations at 5 CFR Part 1320 (60 FR 44978, August 29, 1995), this notice announces the Cooperative State Research, Education, and Extension Service's (CSREES) intention to request an extension of a currently approved information collection in support of Authorizations to use the 4–H Club Name and/or Emblem that expires May 31, 1999.

DATES: Comments on this notice must be received on or before June 4, 1999 to be assured for consideration.

FOR FURTHER INFORMATION CONTACT: Contact Dr. Alma C. Hobbs; Deputy

Administrator; Families, 4–H, and Nutrition; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; 1400 Independence Avenue, SW; Washington, DC 20250–2225; Telephone: (202) 720–2908; E-mail: ahobbs@reeusda.gov.

SUPPLEMENTARY INFORMATION:

Title: Application for Authorization to Use the 4–H Name and/or Emblem.

OMB Number: 0524–0034.

Expiration Date of Approval: May 31, 1999.

Type of Request: Intent to extend a currently approved information collection.

Abstract: Use of the 4–H Name and/or Emblem is authorized by an Act of Congress, (Pub. L. 772, 80th Congress, Chapter 654, 2nd Session). Use of the 4–H Name and/or Emblem by anyone other than the 4–H Clubs and those duly authorized by them, representatives of the Department of Agriculture, the Land-Grant colleges and universities, and persons authorized by the Secretary of Agriculture is prohibited by the provisions of 18 U.S.C. 707. The Secretary of Agriculture has delegated authority to the Administrator of the Cooperative State Research, Education, and Extension Service to authorize others to use the 4–H Name and Emblem. The Administrator has promulgated regulations at 7 CFR Part 8 that govern such use. The regulatory requirements for use of the 4–H Name and/or Emblem reflect the high standards of 4–H and its educational goals and objectives. Anyone requesting authorization from the Administrator to use the 4–H Name and Emblem is asked to describe the proposed use in a formal application. The collection of this information is used to determine whether the applicant's proposed use will meet the regulatory requirements and whether an authorization for use should be granted.

Estimate of Burden: Public reporting burden for this collection of information is estimated to average .50 hours per response.

Respondents: Individuals or households, business or other for profit, not-for-profit institutions.

Estimated Number of Respondents: 40.

Estimated Number of Responses per Respondent: 2.

Estimated Total Annual Burden on Respondents: 20 hours.

Copies of this information collection can be obtained from Dr. Nancy Valentine, National 4–H Program Leader, 202–720–2908, nvalentine@reeusda.gov.

Comments

Comments are invited on: (a) whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information 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 collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology. Comments may be sent to: Dr. Alma C. Hobbs; Deputy Administrator; Families, 4–H, and Nutrition; Cooperative State Research, Education, and Extension Service; U.S. Department of Agriculture; 1400 Independence Avenue, SW; Washington, DC 20250–2225; Telephone: (202) 720–2908; Email: ahobbs@reeusda.gov.

All responses to this notice will be summarized and included in the request to OMB approval. All comments will become a matter of public record.

Done at Washington, DC, on this 25th day of March, 1999.

Colien Hefferan,

Acting Administrator, Cooperative State Research, Education, and Extension Service.

[FR Doc. 99–7819 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–22–P

DEPARTMENT OF AGRICULTURE

Forest Service

Texas Blowdown Reforestation Project, National Forests and Grasslands in Texas, Angelina, Montgomery, Sabine, San Augustine, San Jucinto, and Walker Counties, Texas

AGENCY: Forest Service, USDA.

ACTION: Notice of intent to prepare an Environmental Impact Statement

SUMMARY: The U.S. Department of Agriculture, Forest Service, National Forests and Grasslands in Texas (NFGT) will prepare an Environmental Impact Statement (EIS) to assess and disclose the environmental effects of site preparation and reforestation on windstorm-damaged areas in the Angelina, Sabine, and Sam Houston National Forests. The proposed actions include site preparation using mechanical methods and prescribed fire, alone or in combination, followed by natural regeneration and/or planting on about 32,750 acres of windstorm-damaged forests. The project will be implemented in accordance with the direction in the 1996 Revised Land and Resource Management Plan (the Plan) for the National Forests and Grasslands in Texas. Project activities will take place within Management Area 1—Upland Forest Ecosystems and Management Area 2—Red-cockaded Woodpecker (RCW) Emphasis.

In addition to the management activities proposed for reforestation, the EIS will assess and disclose the effects of amending the forest plan to allocate an additional 7,300 acres to Management Area 2 on the Sabine National Forest due to the changed conditions caused by the windstorm.

DATES: Written comments and suggestions concerning the scope of the analysis must be postmarked or received by April 30, 1999. The estimated date for filing the draft EIS is June 1999, followed by the final decision in September 1999.

ADDRESSES: The Responsible Official is Ronnie Raum, Forest Supervisor; National Forests and Grasslands in Texas; 701 North First Street; Lufkin, TX 75901. Written comments and suggestions concerning the scope of analysis may be sent to him at that address.

FOR FURTHER INFORMATION CONTACT: Keith Baker, Project Environmental Coordinator. Phone: 409–344–6205 (New Waverly, TX).

SUPPLEMENTARY INFORMATION: On the afternoon of February 10, 1998, a storm with hurricane-force winds struck the forests of deep east Texas. Approximately 103,000 acres of national forest land on the Angelina, Sabine, and Sam Houston National Forests were damaged by the windstorm. The Forest Service categorized the storm damage severity and extent on the three affected national forests as follows:

- Extensive damage—loss of greater than 60 percent of the existing trees (11,600 acres),
- Moderate damage—loss of 30 to 60 percent of the existing trees (65,400 acres), and
- Light damage—loss of 10 to 30 percent of the existing trees (26,000 acres).

The majority of lands affected by the storm are allocated under the Plan to Management Area 1 (upland forest ecosystems) and Management Area 2 (red-cockaded woodpecker emphasis). Other Management Areas (MAs) were also affected, including MA–4

(streamside management zones), MA–8 (special area management), MA–9 (recreation area management), and MA–10 (administrative and special use sites).

The Forest Service determined that an emergency response was needed to meet three objectives: (1) Reduce the potential for high intensity wildfires spreading into the intermingled private ownerships that include individual homes, subdivisions, and rural communities; (2) minimize further damage to RCW and bald eagle habitat; and (3) reduce the risk of anticipated bark beetle attack to living trees that could kill additional federal and private timber, RCW habitat, and bald eagle habitat. The Forest Service requested approval for alternative arrangements for compliance with the National Environmental Policy Act (NEPA) from the Council on Environmental Quality (CEQ) to expedite the removal of the blown down and damaged timber. On March 10, 1998, CEQ approved the Forest Service's request for alternative arrangements and the NFGT undertook actions to remove blown down and damaged trees to meet the three objectives. As part of these alternative arrangements, the Forest Service and CEQ agreed that the actions taken to reforest the damaged areas of the three affected national forests would be assessed in an Environmental Impact Statement.

On July 15, 1998, the Forest Service published a notice in the **Federal Register** about plans to develop a Changed Condition Analysis (CCA) covering the areas affected by the storm (63 FR 38153, Jul. 15, 1998). The Forest Service identified two objectives for analysis: (1) To provide the basis for site preparation and reforestation proposals in the storm-damaged area of the NFGT and (2) to analyze the need to adjust land allocations to MA–2 on the Angelina and Sabine NFs to meet Plan objectives for RCW habitat. After completion of the CAA, the Interdisciplinary Team (IDT) used a systematic procedure to develop a proposed action to start the NEPA process.

Proposed Action

Site Preparation and Reforestation

The Forest Service proposes to initiate site preparation and reforestation actions on the Angelina and Sabine National Forests in MA–1 and MA–2. The actions proposed will provide for the development of forested conditions appropriate for the sites based on the recent developed Ecological Classification System (ECS). The ESC was prepared in cooperation with the Nature Conservancy of Texas and the Kisatchie National Forest to describe the public and private forest lands of the western Louisiana and eastern Texas portions of the Western Gulf Coastal Plain. The ECS classifies land into ecological types through the integration of multiple components of the forest ecosystem—soils, physiography (topography and landform), and vegetation. A land classification based on these components reflects the differences in the major environmental characteristics of a site, and it provides information about the inherent potential of a site in terms of the types of vegetative communities it will support. The reforestation actions where proposed to develop the appropriate vegetation considering the ECS, the existing vegetation conditions, and the objectives and management direction of the Plan.

Only those damaged areas where the post-storm residual basal area (BA) is less than 60 square feet will receive unique actions. Damaged areas that exceed 60 BA will not be treated specifically to manipulate the existing forest type or tree species, but will be subject to application of prescribed fire to reduce storm-generated fuel buildup and/or control of midstory vegetation adverse to Red-cockaded woodpecker habitat. The Forest Service proposes to allow damaged areas on the Sam Houston National Forest to reforest naturally without active management to prepare sites or manipulate the plant species.

Within the Angelina and Sabine NFs the following actions are proposed;

- In areas the ECS indicates should be dominated by beech-white oak, mixed oaks, and sweetbay-swamp tupelo forest types and the forest type is not directly correlated to slope or topographical position the following actions will be taken:

(a) Within MA–2 allow the areas to regenerate naturally without site preparation or artificial planting. Allow fire on a 3 to 5 year rotation since these areas still contain a residual pine component that provides for RCW foraging. About 5250 acres would be treated in this manner.

(b) Within MA–1 allow the areas to regenerate naturally without site preparation or artificial planting. Only allow prescribed fire to back into these areas when adjoining areas have been designated for use of prescribed fire. About 3750 acres would be treated in this manner.

- In areas the ECS indicates should be dominated by shortleaf pine-longleaf pine-oak mixtures and the forest type is not directly correlated to slope or topographical position the following actions will be taken:

(a) Within MA–2 where the residual overstory basal area ranges from 0–30 square feet, conduct mechanical site preparation, allowing up to 20 BA of oaks in clumps or along drainages, plant longleaf pine, and prescribe burn every 3 to 5 years. Approximately 1150 acres would receive these treatments.

(b) Within MA–2 in the areas where the residual overstory basal exceeds 30 square feet and is less than about 40 square feet conduct mechanical site preparation, leaving no more than 10 BA of hardwoods in clumps and along drainages, allow for natural regeneration of pines to develop a two age stand, and prescribe burn every 3 to 5 years. In areas where basal area ranges from about 40–60 square feet prescribe burn only and allow for natural regeneration. About 850 acres would receive these treatments.

(c) Within MA–1 where the residual overstory basal area ranges from 0–30 square feet, commercially remove residual loblolly pine that will impede shortleaf-longleaf regeneration, then mechanically site prepare the areas, plant shortleaf pine or longleaf pine seedlings depending on the site suitability, and prescribe burn the areas on a 3 to 5 year rotation. About 1550 acres would receive these treatments.

(d) Within MA–1 where the residual overstory basal area exceeds 30 square feet and is less than about 40 square feet conduct mechanical site preparation, leaving no more than 10 BA of hardwoods in clumps and along drainages, plant longleaf pine in openings on suitable soil types. Where shortleaf pine should dominate allow for natural regeneration to develop a two age stand, and prescribe burn every 3 to 5 years. In areas where basal area ranges from about 40–60 square feet prescribe burn only and allow for natural regeneration. About 400 acres would be treated with this prescription.

- In areas the ECS indicates should be dominated by shortleaf pine-loblolly pine forest mixtures and the forest type is not directly correlated to slope or topographical position the following actions will be taken:

(a) Inside MA–2 where the residual overstory basal area ranges from 0–30 square feet, the areas would be site prepared using mechanical methods, shortleaf pine would be planted in openings on ridgetops and upper slopes, and prescribed burning would be conducted on a 3 to 5 year cycle. In areas where basal area ranges from about 40–60 square feet prescribe burn only and allow for natural regeneration.

These treatments would be implemented on about 1450 acres.

(b) Inside MA–2 in the areas where the residual overstory basal exceeds 30 square feet and is less than about 40 square feet conduct mechanical site preparation, leaving no more than 20 BA of hardwoods in clumps and along drainages, plant shortleaf pine in openings on ridgetops and upper slopes, and conduct prescribed burning on a 3 to 5 year cycle. About 1550 acres would receive these treatments.

(c) Within MA–1 where the residual overstory basal area ranges from 0–30 square feet, the areas would be site prepared using mechanical methods, prescribe burned, and shortleaf pine would be planted on ridgetops and upper slopes where no shortleaf pine seed source exists or where adequate seed source exists would be allowed to regenerate naturally. These treatments would be implemented on about 1450 acres.

(d) Within MA–1 where the residual overstory basal area ranges from 30–60 square feet, prescribe burn the areas to allow for natural regeneration and the development of two-age stands. About 1050 acres would be treated with this prescription.

• In areas the ECS indicates should be dominated by white oak-loblolly pine-sweetbay or white oak-loblolly pine-willow oak forest types and the forest type is directly correlated to slope or topographical position the following actions will be taken:

(a) Within MA–2 allow the areas to regenerate naturally without site preparation or artificial planting. Allow fire on a 3 to 5 years rotation since these areas still contain a residual pine component that provides for RCW foraging. About 550 acres would be treated in this manner.

(b) Within MA–1 allow the areas to regenerate naturally without site preparation or artificial planting. Only allow prescribed fire to back into these areas when adjoining areas have been designated for use of prescribed fire. About 400 acres would be treated in this manner.

• In areas the ECS indicates should be dominated by shortleaf pine-longleaf pine-oak mixtures and the forest type is correlated to slope or topographical position the following actions will be taken:

(a) Within MA–2 where the residual overstory basal area ranges from 0–30 square feet, conduct mechanical site preparation, plant longleaf pine on the site prepared areas, prescribe burn every 3 to 5 years, and limit hardwoods to the lower slope positions. Approximately 950 acres would receive these treatments.

(b) Within MA–2 in the areas where the residual overstory basal exceeds 30 square feet and is less than about 40 square feet conduct mechanical site preparation, leaving no more than 10 BA of hardwoods in clumps and along drainages, allow for natural regeneration of pines to develop a two age stand, and prescribe burn every 3 to 5 years. In areas where basal area ranges from about 40–60 square feet prescribe burn only and allow for natural regeneration. About 1300 acres would receive these treatments.

(c) Within MA–1 where the residual overstory basal area ranges from 0–30 square feet, commercially remove residual loblolly pine on ridges and upper slopes that will impede shortleaf-longleaf regeneration, then mechanically site prepare the areas, plant shortleaf pine or longleaf pine seedlings depending on soil type and slope position, and prescribe burn the areas on a 3 to 5 year rotation. About 3450 acres would receive these treatments.

(d) Within MA–1 where the residual overstory basal area ranges from 30–60 square feet, prescribe burn the areas to allow for natural regeneration and the development of two-age stands. About 2650 acres would be treated with this prescription.

• In areas the ECS indicates should be dominated by shortleaf pine-loblolly pine forest mixtures and the forest type is correlated to slope or topographical position the following actions will be taken:

(a) Inside MA–2 where the residual overstory basal area ranges from 0–30 square feet, the areas would be site prepared using mechanical methods, shortleaf pine would be planted in openings on ridgetops and upper slopes, and prescribed burning would be conducted on a 3 to 5 year cycle. These treatments would be implemented on about 750 acres.

(b) Inside MA–2 where the residual overstory basal area ranges from 30–60 square feet, conduct site preparation using mechanical methods, plant shortleaf pine in openings on ridgetops and upper slopes and allow natural regeneration elsewhere, and prescribed burning would be conducted on a 3 to 5 years cycle. About 1300 acres would receive these treatments.

(c) Within MA–1 where the residual overstory basal area ranges from 0–30 square feet, loblolly pine would be commercially removed from ridgetops and upper slopes, the areas would be site prepared using mechanical methods, prescribe burned, and shortleaf pine would be planted on ridgetops and upper slopes where no shortleaf pine seed source exists or where adequate seed source exists would be allowed to regenerate naturally. These treatments would be implemented on about 1450 acres.

(d) Within MA–1 where the residual overstory basal area ranges from 30–60 square feet, prescribe burn the areas to allow for natural regeneration and the development of two-age stands. About 1500 acres would be treated with this prescription.

These actions will result in different vegetation patterns in many areas than existed prior to the February, 1998, windstorm. Hardwoods will be more prevalent on sites where the FCS indicates this is appropriate, such as lower slopes and moister sites. On drier upland sites pines will dominate and hardwoods will be limited to clumps or in areas along minor drainages. Many areas will develop different stand structure because overstory trees will remain and the new trees will create two different ages of vegetation on the same site. Natural regeneration will be relied on where it is expected to result in the development of vegetation appropriate for the site. Planting of shortleaf pine and longleaf pine will be done where a seed source for these species does not exist and the ECS indicates they should exist.

Forest Plan Amendment (Non-Significant Amendment)

The Plan delineated approximately 18,360 acres of the Sabine National Forest as MA–2 in an area known as the Northern Sabine Habitat Management Area (HMA). The emphasis in MA–2 is the production of high quality habitat for the endangered redcockaded woodpecker; the size of the HMA was determined based on a population objective of 91 active RCW groups. The February 10 storm affected approximately 18,300 acres of the Northern Sabine HMA. Of this total, about 15,000 acres received moderate to extensive damage. Because of the habitat needs for the RCW, many of the acres that provided suitable habitat for the species prior to the storm may not provide such habitat now. the EIS will examine the consequences of adjusting the boundaries of MA–2 within the Northern Sabine HMA to include about 7,300 additional acres in Compartments 29, 35, 36, 45, 46, 47, and 54 to provide suitable habitat for the RCW to meet the population objective.

Public Involvement and Scoping

This environmental analysis and decision-making process will enable

interested and affected people to participate and contribute to the final decision. Public participation will begin with the publication of this NOI. Interested and affected individuals and organizations on each affected forest scoping list will be informed of the proposal and invited to submit comments. The Forest Service will also be seeking information, comments, and assistance from Federal, state, and local agencies. The information received will be used in the preparation of the draft and final EIS. At this time no scoping meetings are scheduled to be held to discuss the project. The scoping process includes:

1. Identifying potential issues.
2. Identifying issues to be analyzed in depth.
3. Eliminating non-significant issues or those which have been covered by a relevant previous environmental process.
4. Exploring additional alternatives.
5. Identifying potential environmental effects of the proposed action and alternatives (i.e. direct, indirect, and cumulative effects).

Preliminary Issues

Several preliminary issues have been identified by the Forest Service. The issues are briefly described below:

Red-cockaded woodpecker—the storm adversely affected RCW habitat. What effect will reforestation activities have on habitat suitable for RCW foraging and nesting and the potential for RCW population growth in the short and long term?

Hardwoods—many hardwoods remain in the damaged areas. What effect would project activities have on the current and future hardwood composition of the storm-damaged areas? Will any areas be managed for pine-hardwood mixtures or only for hardwoods within the storm-affected areas?

Soil productivity—mechanical equipment used in site preparation could compact soils and prescribed fire could affect nutrient availability. What effect will mechanical site preparation and prescribed burning have on long-term soil productivity?

Water quality—site preparation activities could expose soil to erosion. What effects will mechanical site preparation and prescribed burning have on soil erosion and sedimentation?

Potential Alternatives: based on the preliminary issues, the following potential alternative themes have been identified:

No Action—no site preparation or planting activities would occur, nor would acreage adjustments be made to the Northern Sabine HMA. Only natural regeneration would be allowed in the damaged areas.

Limited Budget Theme—maintain the existing Northern Sabine HMA and maximize the pine regeneration if damaged areas within the HMA regardless of ECS considerations. Mechanical site preparation would be minimized and natural regeneration would be emphasized.

Reviewers Obligations

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 EISs 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 EIS stage but that are not raised until after completion of the final EIS 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 draft EIS 45-day coment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them in the final EIS.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the draft EIS 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 EIS of the merits of the alternatives formulated and discussed in the statement. Reviewer 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.

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. Comments submitted anonymously will be accepted and considered; however, those who submit anonymous comments will not have standing to appeal the subsequent decision under 36 CFR parts 215 or 217. Additionally, pursuant to 7 CFR 1.27(d), 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. Persons requesting such confidentiality should be aware that, under the FOIA, confidentiality may be granted in only very limited circumstances, such as to protect trade secrets. The Forest Service will inform the requester of the agency's decision regarding the request for confidentiality, and where the request is denied, the agency will return the submission and notify the requester that the comments may be resubmitted with or without name and address within 10 days.

Responsible Official

Ronnie Raum, Forest Supervisor; National Forests and Grasslands in Texas; 701 North First Street, Lufkin, TX 75901 is the Responsible Official. As the Responsible Official, I will decide which, if any of the alternatives to be described in the draft Environmental Empact Statement will be implemented. I will document the decision and the reasons for my selection of the decision in the Record of Decision.

Dated: March 25, 1999.

Ronnie Raum,

Forest Supervisor.

[FR Doc. 99–7836 Filed 3–30–99; 8:45 am]

BILLING CODE 3410–11–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Order Denying Permission To Apply For or Use Export Licenses; Action Affecting Export Privileges; A.V.S. Armoured Vehicles' Systems, Inc., Now Known as S.P.O. Spare Parts Logistics, Inc.

In the matter of: A.V.S. ARMOURED VEHICLES' SYSTEMS, INC., now known as S.P.L. SPARE PARTS LOGISTICS, INC. 1117 Old Country Road, Plainview, New York 11803.

On April 10, 1995, following a plea of guilty to one count of an information, A.V.S. Armoured Vehicles' Systems, Inc.[1] was convicted in the United States District Court for the Eastern District of New York of violating Section 38 of the Arms Export Control Act (22 U.S.C.A.

[1] On September 27, 1993, A.V.S. Armoured Vehicles' Systems, Inc. filed with the State of Delaware, Secretary of State, Division of Corporations, a Certificate of Amendment of the Certificate of Incorporation to change A.V.S. Armoured Vehicles' Systems, Inc's name to S.P.L. Spare Parts Logistics, Inc.

§ 2778 (1990 & Supp. 1998)) (the AECA). A.V.S. Armoured Vehicles' Systems, Inc. was convicted of knowingly and willfully making an untrue statement of a material fact on an export control document to the U.S. Department of State, Office of Defense Trade Control. Specifically, A.V.S. Armoured Vehicles' Systems, Inc. stated that the foreign end-user of replacement parts for the ''Hawk'' anti-aircraft missile system was the Government of Israel, when the actual end-use was not the Government of Israel.

Section 11(h) of the Export Administration Act of 1979, as amended (50 U.S.C.A. app. §§ 2401–2420 (1991 & Supp. 1998)) (the Act,[2] provides that, at the discretion of the Secretary of Commerce,[3] no person convicted of violating Section 38 of the AECA, or certain other provisions of the United States Code, shall be eligible to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 C.F.R. Parts 730–774 (1998)), (the Regulations), for a period of up to 10 years from the date of the conviction. In addition, any license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 766.25 and 750.8(a) of the Regulations, upon notification that a person has been convicted of violating Section 38 of the AECA, 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 A.V.S. Armoured Vehicles' Systems, Inc.'s conviction for violating Section 38 of the AECA, and following consultations with the Director, Office of Export Enforcement, I have decided to deny A.V.S. Armoured Vehicles' Systems, Inc., now known as S.P.P. Spare Parts Logistics, Inc., 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 five years from the date of its conviction. The five-year period ends on April 10, 2000. I have also decided to revoke all licenses issued pursuant to the Act in which A.V.S. Armoured Vehicles' Systems, Inc., now known as S.P.L. Spare Parts Logistics, Inc., had an interest at the time of its conviction.

Accordingly, it is hereby

Ordered

I. Until April 10, 2000, A.V.S. Armoured Vehicles' Systems, Inc., now known as S.P.L. Spare Parts Logistics, Inc., 1117 Old Country Road, Plainview, New York 11803, 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 facilities that acquisition or attempted acquisition by a 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 a 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 of controlled by the denied person, or service any item, of whatever origin, that is owned, possessed or controlled by the denied person is 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 A.V.S. Armoured Vehicles's Systems, Inc., now known as S.P.L. Spare Parts Logistics, Inc., 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, 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 April 10, 2000.

VI. A copy of this Order shall be delivered to A.V.S. Armoured Vehicles' Systems, Inc., now known as S.P.L. Spare Parts Logistics, Inc. This Order shall be published in the **Federal Register**.

Dated: March 23, 1999.

Eileen M. Albanese,

Director, Office of Exporter Services.

[FR Doc. 99–7879 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DT–M

[2] 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., 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 FR 44121, August 17, 1998), continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991 & Supp. 1998)).

[3] Pursuant to appropriate delegations of authority, the Director, Office of Exporter Services, in consultation with the Director, Office of Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act.

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Action Affecting Export Privileges; Aldrich Hazen Ames, Also Known as ''Kolokol'' and as ''K''; Order Denying Permission To Apply for or Use Export Licenses

Aldrich Hazen Ames, also known as ''Kolokol'' and as ''K'' currently incarcerated at: Allenwood USP, Inmate Number 40087–083, P.O. Box 3500, White Deer, Pennsylvania 17887.

On April 24, 1994, Aldrich Hazen Ames, also known as ''Kolokol'' and as ''K'' (Ames), was convicted in the United States District Court for the Eastern District of Virginia on, *inter alia,* once count of violating Section 794(c) of the Espionage Act (18 U.S.C.A. §§ 792–799 (1976 & Supp. 1998)). Ames was convicted of unlawfully and knowingly combining, conspiring, confederating and agreeing with other persons, both known and unknown, including officers of the intelligence services of the Union of Soviet Socialist Republics (U.S.S.R.) and later Russia, to knowingly and unlawfully communicate, deliver, and transmit to a foreign government, that is to U.S.S.R. and Russia, and to representatives, officers, and agents thereof, documents, writings, and information relating to the national defense of the United States with the intent and reason to believe that the same would be used to the injury of the United States and to the advantage of the U.S.S.R. and Russia.

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),[1] provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating Sections 793, 794, or 798 of the Espionage Act, or certain other provisions of the United States Code, shall be eligible to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 CFR parts 730–774 (1998) (the Regulations), for a period of up to 10 years from the date of the conviction. In addition, any license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked

Pursuant to Sections 766.25 and 750.8(a) of the Regulations, upon notification that a person has been convicted of violating Sections 793, 794, or 798 of the Espionage Act, 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 Ames's conviction for violating Section 793(c) of the Espionage Act, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Ames 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 from the date of his conviction. The 10-year period ends on April 24, 2004. I have also decided to revoke all licenses issued pursuant to the Act in which Ames had an interest at the time of his conviction.

Accordingly, it is hereby

Ordered

I. Until April 24, 2004, Aldrich Hazen Ames, also known as ''Kolokol'' and as ''K,'' currently incarcerated at: Allenwood USP, Inmate Number 40087–083, P.O. Box 3500, White Deer, Pennsylvania 17887, 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 Ames 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.

[1] The Act expired on August 20, 1994. Executive Order 12924 (3 CFR, 1994 Comp. 917 (1995)), extended by Presidential Notices of August 15, 1995 (3 CFR, 1995 Comp. 501 (1996)), August 14, 1996 (3 CFR, 1996 Comp. 298 (1997)), August 13, 1997 (3 CFR 1997 Comp. 306 (1998)), and August 13, 1998 (63 FR. 44121, August 17, 1998), continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991 & Supp. 1998)).

[2] 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 Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act.

V. This Order is effective immediately and shall remain in effect until April 24, 2004.

VI. A copy of this Order shall be delivered to Ames. This Order shall be published in the **Federal Register**.

Dated: March 23, 1999.

Eileen M. Albanese,

Director, Office of Exporter Services.

[FR Doc. 99–7881 Filed 3–30–99; 8:45 am]

BILLING CODE 3570–DT–M

DEPARTMENT OF COMMERCE

Bureau of Export Administration

Order Denying Permission To Apply for or Use Export Licenses; Action Affecting Export Privileges; Harold J. Nicholson, Also Known as ''Nevil R. Strachey'' and as ''Batman''

In the Matter of: Harold J. Nicholson, also known as ''Nevil R. Strachey'' and as ''Batman'' currently incarcerated at: Sheridan Federal Correction Institute, Inmate Number 49535–083, 27072 Ballston Road, Sheridan, Oregon 97378, and with an address at: 1699 North Terry Sp 161, Eugene, Oregon 97492.

On June 5, 1997, Harold J. Nicholson, also known as ''Nevil R. Strachey'' and as ''Batman'' (Nicholson), was convicted in the United States District Court for the Eastern District of Virginia on one count of violating Sections 794(a) and (c) of the Espionage Act (18 U.S.C.A. §§ 792–799 (1976 & Supp. 1998)). Nicholson was convicted of unlawfully and knowingly combining, conspiring, confederating and agreeing with other persons, both known and unknown, including officers of the intelligence services of the Russian Federation, to knowingly and unlawfully communicate, deliver, and transmit, and attempt to communicate, deliver, and transmit, to representatives of a foreign government, specifically the Russian Federation, directly or indirectly, documents, photographic negatives and information relating to the national defense of the United States, with the intent and reason to believe that the same would be used to the injury of the United States and to the advantage of the Russian Federation.

Section 11(h) of the Export Administration of 1979, as amended (currently codified at 50 U.S.C.A. app. §§ 2401–2420 (1991 & Supp. 1998)) the Act),[1] provides that, at the discretion of the Secretary of Commerce,[2] no person convicted of violating Sections 793, 794, or 798 of the Espionage Act, or certain other provisions of the United States Code, shall be eligible to apply for or use any license, including any License Exception, issued pursuant to, or provided by, the Act or the Export Administration Regulations (currently codified at 15 C.F.R. Part 730–774 (1998)) (the Regulations), for a period of up to 10 years from the date of the conviction. In addition, any license issued pursuant to the Act in which such a person had any interest at the time of conviction may be revoked.

Pursuant to Sections 766.25 and 750.8(a) of the Regulations, upon notification that a person has been convicted of violating Sections 793, 794, or 798 of the Espionage Act, 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 Nicholson's conviction for violating Sections 794(a) and (c) of the Espionage Act, and following consultations with the Director, Office of Export Enforcement, I have decided to deny Nicholson 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 from the date of his conviction. The 10-year period ends on June 7, 2007. I have also decided to revoke all licenses pursuant to the Act in which Nicholson had an interest at the time of his conviction.

Accordingly, it is hereby

Ordered

I. Until June 7, 2007, Harold J. Nicholson, also known as ''Nevil R. Strachey'' and as ''Batman,'' currently incarcerated at: Sheridan Federal Correction Institute, Inmate Number 49535–083, 27072 Ballston Raod, Sheridan, Oregon 97378, and with an address at: 1699 North Terry Sp 161, Eugene, Oregon 97492, 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. Apply 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,

[1] 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 FR 44121, August 17, 1998), continued the Export Administration Regulations in effect under the International Emergency Economic Powers Act (50 U.S.C.A. §§ 1701–1706 (1991 & Supp. 1998)).

[2] 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 Export Enforcement, exercises the authority granted to the Secretary by Section 11(h) of the Act.

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 Nicholson 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 June 7, 2007.

VI. A copy of this Order shall be delivered to Nicholson. This Order shall be published in the **Federal Register.**

Dated: March 23, 1999.

Eileen M. Albanese,

Director, Office of Exporter Services.

[FR Doc. 99–7880 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DT–M

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[I.D. 032399B]

Taking and Importing of Marine Mammals; International Dolphin Conservation Program

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

ACTION: Notice of availability.

SUMMARY: NMFS announces the availability of initial research results from the International Dolphin Conservation Program survey of dolphins in the eastern tropical Pacific Ocean (ETP).

ADDRESSES: A copy of the research results may be found on the internet at http://swfsc.ucsd.edu/IDCPA/IDCPAfront.html. Copies may also be obtained from the Marine Mammal Division, Southwest Fisheries Science Center, 8604 La Jolla Shores Drive, P.O. Box 271, La Jolla, California 92038–0271 (fax 619–546–7003).

SUPPLEMENTARY INFORMATION: NMFS has conducted scientific research required by the Marine Mammal Protection Act, as amended by the International Dolphin Conservation Program Act ((IDCPA) 16 U.S.C 1414(a)). Under the IDCPA, NMFS is required to study the effects of intentional encirclement on dolphins incidentally taken in the tuna purse seine fishery in the ETP, and to conduct population abundance surveys and stress studies. The IDCPA requires the Secretary of Commerce to make an initial finding regarding whether intentional encirclement is having a significant adverse impact on any depleted dolphin stock in the ETP (16 U.S.C. 1385(g)). NMFS' report on the study has been delayed by 30 days while completing an additional independent peer review requested by Congress. NMFS expects to publish a notification of the Secretary's initial finding in early May.

Dated: March 24, 1999.

Linda A. Chaves,

Acting Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 99–7887 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–22–F

DEPARTMENT OF COMMERCE

Patent and Trademark Office

[Docket No. 990212048–9048–01]

Guidelines for Reexamination of Cases in View of In re Portola Packaging, Inc., 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997)

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice

SUMMARY: The Patent and Trademark Office (PTO) is publishing the final version of guidelines to be used by Office personnel in their review of requests for reexaminations and ongoing reexaminations for compliance with the decision in *In re Portola Packaging, Inc.,* 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). Because these guidelines govern internal practices, they are exempt from notice and comment under 5 U.S.C. 553(b)(A).

DATES: The guidelines are effective March 31, 1999.

FOR FURTHER INFORMATION CONTACT: John M. Whealan by telephone at (703) 305–9035; by facsimile at (703) 305–9373; by mail addressed to Box 8, Commissioner of Patents and Trademarks, Washington, D.C. 20231; or by electronic mail at ''john.whealan@uspto.gov''.

SUPPLEMENTARY INFORMATION:

I. Discussion of Public Comments

Comments were received by the PTO from eight individuals and one bar association in response to the Request for Comments on Interim Guidelines for Reexamination of Cases in View of *In re Portola Packaging, Inc.,* 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997), published June 15, 1998 (63 FR 32646). In general, six of the eight individual comments were critical of the guidelines; one individual comment was partially supportive of the guidelines and one suggested a legislative change; the comments from the bar association were in complete support of the guidelines. All of the comments have been carefully considered.

A. Below is a listing of comments along with a corresponding Office response explaining why each has not been adopted:

(1) Comment: Most of the critical comments suggest the Office is misinterpreting the ''holding'' of *Portola Packaging.* These comments believe *Portola Packaging* held that (i) the Office may not initiate a reexamination proceeding based solely on prior art previously cited during prosecution of the application which matured into the patent, regardless of whether that art was discussed, and (ii) no rejection can be made during a subsequent reexamination based solely on prior art cited during prosecution of the application which matured into the patent, even if that prior art was not previously discussed. Response: The Office views these positions as dicta and not the ''holding'' of *Portola Packaging.*

The Federal Circuit recently explained the difference between the holding of a case and dicta. See In re McGrew, 120 F.3d 1236, 1238–39, 43 USPQ2d 1632, 1635 (Fed. Cir. 1997). The Court explained that dicta consists of the statements in an opinion ''upon a point or points not necessary to the decision of the case.'' *Id.* at 1238, 43 USPQ2d at 1635. The Court further explained that since ''dictum is not authoritative,'' it need not be followed. *Id.*

The Office considers the portions of the *Portola Packaging* opinion relied on by the critical commenters as dicta and not the holding of the case. In *Portola Packaging*, the prior art relied upon in the reexamination (that was found by the Court to be improperly used) was not only cited, but it was also discussed and applied to reject claims during prosecution of the application which matured into the patent. Thus, *Portola Packaging* holds that a rejection in a reexamination proceeding may not be based solely on prior art that was previously applied to reject claims during prosecution of the application which matured into the patent. *Portola Packaging* does not, however, hold (as suggested by the commenters) that prior art in the record of the application that

matured into the patent, which was not discussed, may never form the sole basis for a rejection during a subsequent reexamination proceeding. Such a broad reading of *Portola Packaging* would encourage the practice of applicants citing numerous references during prosecution of an application to preclude subsequent reexamination based on those references. This practice of flooding the Office with references during prosecution of an application in order to prevent their subsequent use in reexamination could overwhelm the examination process and limit the effectiveness of reexamination.

(2) *Comment:* One comment went further and suggested that *Portola Packaging* precluded reexamination based on any reference which is not new art. Response: The Office disagrees with this comment in view of the interpretation of the holding of *Portola Packaging* set forth in the preceding paragraph.

(3) *Comment:* One comment suggested the elimination of the unusual fact pattern situations exemplified in Part E, since in their opinion, *Portola Packaging* holds that previously cited art may never be relied on in a reexamination. *Response:* Once again, the Office views this position as dictum and not the holding of the case.

(4) *Comment:* One comment suggested the Office should seek a legislative overruling of the ''holding'' of *Portola Packaging. Response:* As the Office is following the holding of the case (as set forth above), the case need not be overruled. However, changes regarding the type of prior art that may be considered in reexamination proceedings may be proposed in upcoming legislation.

(5) *Comment:* One comment suggested that the form notices set forth in Section F may prompt an applicant to file a reissue application to resolve any issues that are precluded from resolution during reexamination. *Response:* The form notices in Section F have been modified to indicate that no patentability determination has been made in the reexamination (over prior art precluded by *Portola Packaging*). The notices do not suggest the filing of a reissue application. This of course would be an option open to the patent owner as *Portola Packaging* does not apply to reissue applications.

(6) *Comment:* One comment suggested that the practice of an examiner placing his initials next to a reference on an information disclosure statement (IDS), citation form PTOL–1449, or its equivalent, is sufficient to indicate that an examiner has considered the reference. *Response:* Where the IDS citations are submitted but not described, the examiner is only responsible for cursorily reviewing the references. The initials of the examiner on the PTOL–1449 indicate only that degree of review unless the reference is either applied against the claims, or discussed by the examiner as pertinent art of interest, in a subsequent office action.

As noted in (1) above, the prior art relied upon in the reexamination in *Portola Packaging* was not merely cited and initialed, but it was discussed and applied to reject claims in the application that matured into the patent. *Portola Packaging* does not hold that prior art that was of record but not discussed may not form the sole basis of a rejection of the claims. Accordingly, under *Portola Packaging* the mere presence of the examiner's initials next to a reference on an IDS citation does not preclude consideration of the reference in a subsequent reexamination proceeding.

(7) *Comment:* One comment suggested that the guidelines were inconsistent with *In re Hiniker Co.,* 150 F.3d 1362, 47 USPQ2d 1523 (Fed. Cir. 1998). *Response:* In *Hiniker*, the Federal Circuit affirmed a rejection in a reexamination proceeding which was based, in part, on new prior art. See 150 F.3d at 1367, 47 USPQ2d at 1527. *Hiniker*, therefore, does not preclude a rejection in a reexamination proceeding based on prior art that was cited but never discussed during the prosecution of the application which matured into the patent, since such a situation was not presented to the Court.

In *Hiniker*, the Court did state that *Portola Packaging* ''held that prior art that was before the original examiner could not support a reexamination proceeding despite the fact that it was not the basis of a rejection in the original prosecution; as long as the art was before the original examiner, it would be considered 'old art.' '' 150 F.3d at 1365–66, 47 USPQ2d at 1526 (citing *Portola Packaging*) (emphasis added). It is undisputed, however, that the prior art relied on to reject the claims in the reexamination proceeding in *Portola Packaging* was the same prior art that was relied on to reject claims during the prosecution of the application which matured into the patent. See *Portola Packaging*, 110 F.3d at 787, 42 USPQ2d at 1296–97. Accordingly, the *Hiniker* panel was not addressing the issue of prior art that was not discussed when it characterized the holding of *Portola Packaging* since it is clear that an ''old art'' rejection was at issue in *Portola Packaging*, whereas a ''new art'' rejection was at issue in *Hiniker*.

(8) *Comment:* One comment suggested that reexaminations should be the same as all other examinations. *Response:* Reexamination is based on patents and printed publications. Thus the scope of reexamination is narrower than that involved in the examination of a patent application. Certain issues of patentability that may be considered during prosecution of the application may not be considered during reexamination of the patent. If the patent owner desires consideration of questions of patentability not appropriate for reexamination, those issues can only be addressed in a reissue application filed under 35 U.S.C. 251.

(9) *Comment:* One comment queried whether applicants will now be required to discuss all references listed on an IDS statement. *Response:* There is no such requirement in the current rules. Under the guidelines set forth herein, however, references that are not discussed during the prosecution of an application which matures into a patent will not be precluded from consideration in a subsequent reexamination proceeding.

B. The following comments have been adopted to the extent indicated in the corresponding Office response:

(1) *Comment:* Two comments suggested that the statements in Section F to be used in denying or terminating a reexamination were misleading and could cast a shadow on the validity of the patent. One comment further proposed changing the language to, ''No new patentability determination has been made in this reexamination proceeding.'' *Response:* The Office has considered these suggestions, and in an attempt to be more clear, has modified the language in Section F to be used in denying or terminating a reexamination proceeding.

C. The following comments supported the interim guidelines and suggested no changes:

(1) *Comment:* The comments from the bar association supported the guidelines as consistent with *Portola Packaging* and the legislative intent of the reexamination process to resolve validity questions efficiently and economically. In addition, the bar association felt the guidelines were consistent with the Federal Circuit decision in *In re Lonardo* 119 F.3d 960, 43 USPQ2d 1262 (Fed. Cir. 1997), *cert. denied,* 118 S. Ct. 1164 (1998).

(2) The bar association also commented that the guidelines (and in particular the unusual fact patterns set forth in Section E) are consistent with

the rebuttable presumption of administrative correctness relied on by the Court in *Portola Packaging*. Courts presume that Government officials have properly discharged their duties, absent clear evidence to the contrary. Thus, since the presumption of administrative correctness is rebuttable, the guidelines properly provide for reexamination based on a previously considered reference where the evidence clearly shows that the examiner did not appreciate the issue raised in the reexamination request during the prosecution of the application that matured into the patent.

II. Guidelines for Reexamination of Cases in View of In re Portola Packaging, Inc., 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997)

The following guidelines have been developed to assist Patent and Trademark Office (PTO) personnel in determining whether to order a reexamination or terminate an ongoing reexamination in view of the United States Court of Appeals for the Federal Circuit's decision in In re *Portola Packaging, Inc.*[1] These guidelines supersede and supplement any previous guidelines issued by the PTO with respect to reexamination. These guidelines apply to all reexaminations regardless of whether they are initiated by the Commissioner, requested by the patentee, or requested by a third party. These guidelines will be incorporated into Chapter 2200 of the Manual of Patent Examining Procedure (MPEP).

A. Explanation of Portola Packaging

In order for the PTO to conduct reexamination, prior art must raise a ''substantial new question of patentability.''[2] In *Portola Packaging*, the Federal Circuit held that a combination of two references that were relied upon individually to reject claims during the prosecution of the application which matured into the patent does not raise a substantial new question of patentability in a subsequent reexamination of the patent.[3] The Federal Circuit also held that an amendment of the claims during reexamination does not justify using old prior art to raise a substantial new question of patentability.[4] The Court explained that ''a rejection made during reexamination does not raise a substantial new question of patentability if it is supported only by prior art previously considered by the PTO.''[5]

B. General Principles Governing Compliance With Portola Packaging

If prior art was previously relied upon to reject a claim in a prior related PTO proceeding,[6] the PTO will not order or conduct reexamination based only on such prior art, regardless of whether that prior art is to be relied upon to reject the same or different claims in the reexamination.

If prior art was not relied upon to reject a claim, but was cited in the record of a prior related PTO proceeding, and its relevance to the patentability of any claim was actually discussed on the record,[7] the PTO will not order or conduct reexamination based only on such prior art.

In contrast, the PTO may order and conduct reexamination based on prior art that was cited but whose relevance to patentability of the claims was not discussed in any prior related PTO proceeding.

C. Procedures for Determining Whether a Reexamination May be Ordered in Compliance With Portola Packaging

PTO personnel must adhere to the following procedures when determining whether a reexamination may be ordered in compliance with the Federal Circuit's decision in *Portola Packaging*:

1. Read the reexamination request to identify the prior art on which the request is based.

2. Conduct any necessary search of the prior art relevant to the subject matter of the patent for which reexamination was requested.[8]

3. Read the prosecution histories of all prior related PTO proceedings.

4. Determine if the prior art in the reexamination request and the prior art found in any search was:

(a) relied upon to reject any claim in a prior related PTO proceeding; or

(b) cited and its relevance to patentability of any claim discussed in a prior related PTO proceeding.

5. Deny the reexamination request if the decision to order reexamination would be based only on prior art that was, in a prior related PTO proceeding, (a) relied upon to reject any claim, and/or (b) cited and its relevance to patentability of any claim discussed.[9]

6. Order reexamination if the decision to order reexamination would be based at least in part on prior art that was, in a prior related PTO proceeding, neither (a) relied upon to reject any claim, nor (b) cited and its relevance to patentability of any claim discussed and a substantial new question of patentability is raised with respect to any claim of the patent.[10]

D. Procedures for Determining Whether an Ongoing Reexamination Must Be Terminated in Compliance With Portola Packaging

PTO personnel must adhere to the following procedures when determining whether any current or future ongoing reexamination should be terminated in compliance with the Federal Circuit's decision in *Portola Packaging*:

1. Prior to making any rejection in an ongoing reexamination, determine for any prior related PTO proceeding what prior art was (a) relied upon to reject any claim or (b) cited and discussed.

2. Base any and all rejections of the patent claims under reexamination at least in part on prior art that was, in any prior related PTO proceeding, neither (a) relied upon to reject any claim, nor (b) cited and its relevance to patentability of any claim discussed.

3. Withdraw any rejections based only on prior art that was, in any prior related PTO proceeding, previously either (a) relied upon to reject any claim, or (b) cited and its relevance to patentability of any claim discussed.

4. Terminate reexaminations in which the only remaining rejections are entirely based on prior art that was, in any prior related PTO proceeding, previously (a) relied upon to reject any claim, and/or (b) cited and its relevance to patentability of a claim discussed.[11]

E. Application of Portola Packaging to Unusual Fact Patterns

The PTO recognizes that each case must be decided on its particular facts and that cases with unusual fact patterns will occur. In such a case, the reexamination should be brought to the attention of the Group Director who will then determine the appropriate action to be taken.

Unusual fact patterns may appear in cases in which prior art was relied upon to reject any claim or cited and discussed with respect to the patentability of a claim in a prior related PTO proceeding, but other evidence clearly shows that the examiner did not appreciate the issues raised in the reexamination request or the ongoing reexamination with respect to that art. Such other evidence may appear in the reexamination request, in the nature of the prior art, in the prosecution history of the prior examination, or in an admission by the patent owner, applicant, or inventor.[12]

For example, if a textbook was cited during prosecution of the application which matured into the patent, the record of that examination may show that only select information from the textbook was discussed with respect to

the patentability of the claims.[13] If a subsequent reexamination request relied upon other information in the textbook that actually teaches what is required by the claims, it may be appropriate to rely on this other information in the textbook to order and/or conduct reexamination.[14]

Another example involves the situation where an examiner discussed a reference in a prior PTO proceeding, but did not either reject a claim based upon the reference or maintain the rejection based on the mistaken belief that the reference did not qualify as prior art.[15] If the reexamination request were to explain how and why the reference actually does qualify as prior art, it may be appropriate to rely on the reference to order and/or conduct reexamination.[16]

Another example involves foreign language prior art references. If a foreign language prior art reference was cited and discussed in any prior PTO proceeding, *Portola Packaging* may not prohibit reexamination over a complete and accurate translation of that foreign language prior art reference. Specifically, if a reexamination request were to explain why a more complete and accurate translation of that same foreign language prior art reference actually teaches what is required by the patent claims, it may be appropriate to rely on the foreign language prior art reference to order and/or conduct reexamination.

Another example of an unusual fact pattern involves cumulative references. To the extent that a cumulative reference is repetitive of a prior art reference that was previously applied or discussed, *Portola Packaging* may prohibit reexamination of the patent claims based only on the repetitive reference. [17] However, it is expected that a repetitive reference which cannot be considered by the PTO during reexamination will be a rare occurrence since most references teach additional information or present information in a different way than other references, even though the references might address the same general subject matter.

F. Notices Regarding Compliance With Portola Packaging

1. If a request for reexamination is denied under C.5 above in order to comply with the Federal Circuit's decision in *Portola Packaging*, the notice of reexamination denial should state: ''This reexamination request is denied based on *In re Portola Packaging, Inc.,* 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). No patentability determination has been made in this reexamination proceeding.''

2. If an ongoing reexamination is terminated under D.4 above in order to comply with the Federal Circuit's decision in *Portola Packaging*, the Notice of Intent to Issue a Reexamination Certificate should state: ''This reexamination is terminated based on *In re Portola Packaging, Inc.,* 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). No patentability determination has been made in this reexamination proceeding.''

3. If a rejection in the reexamination has previously issued and that rejection is withdrawn under D.3 above in order to comply with the Federal Circuit's decision in *Portola Packaging*, the Office action withdrawing such rejection should state: ''The rejection is withdrawn in view of *In re Portola Packaging, Inc.,* 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir. 1997). No patentability determination of the claims of the patent in view of such prior art has been made in this reexamination proceeding.'' If multiple rejections have been made, the Office action should clarify which rejections are being withdrawn.

Dated: March 23, 1999.

Q. Todd Dickinson,

Acting Assistant Secretary of Commerce and Acting Commissioner of Patents and Trademarks.

Endnotes

1. 110 F.3d 786, 42 USPQ2d 1295 (Fed. Cir.), *reh'g in banc denied*, 122 F.3d 1473, 44 USPQ2d 1060 (1997).

2. 35 U.S.C. 304.

3. During the original prosecution of the application which led to the patent, the PTO had rejected the claims separately based upon the Hunter and Faulstich references. The PTO never applied the references in combination. During reexamination, Portola Packaging amended the patent claims, and for the first time the PTO rejected the amended patent claims based upon the Hunter and Faulstich references in combination. Despite these facts, the Federal Circuit determined that the PTO was precluded from conducting reexamination on those references. 110 F.3d at 790, 42 USPQ2d at 1299.

4. 110 F.3d at 791, 42 USPQ2d at 1299.

5. 110 F.3d at 791, 42 USPQ2d at 1300.

6. Prior related PTO proceedings include the application which matured into the patent that is being reexamined, any reissue application for the patent, and any reexamination proceeding for the patent.

7. The relevance of the prior art to patentability may be discussed by either the applicant, patentee, examiner, or any third party. However, 37 CFR 1.2 requires that all PTO business be transacted in writing. Thus, the PTO cannot presume that a prior art reference was previously relied upon to reject or discussed in a prior PTO proceeding if there is no basis in the written record to so conclude other than the examiner's initials or a check mark on a PTO 1449 form, or equivalent, submitted with an information disclosure statement. Thus, any discussion of prior art must appear on the record of a prior related PTO proceeding. Examples of generalized statements in a prior related PTO proceeding that would not preclude reexamination include statements that prior art is ''cited to show the state of the art,'' ''cited to show the background of the invention,'' or ''cited of interest.''

8. See 35 U.S.C. 303 (''On his own initiative, and any time, the Commissioner may determine whether a substantial new question of patentability is raised by patents and publication discovered by him. . . .''); see also MPEP § 2244 (''If the examiner believes that additional prior art patents and publications can be readily obtained by searching to supply any deficiencies in the prior art cited in the request, the examiner can perform such an additional search.'').

9. See Portola Packaging, Inc., 110 F.3d at 790, 42 USPQ2d at 1299 (examiner presumed to have done his job). There may be unusual fact patterns and evidence which suggest that the examiner did not consider the prior art that was discussed in the prior PTO proceeding. These cases should be brought to the attention of the Group Director. For a discussion of the treatment of such cases, see section E above.

10. If not specified, a reexamination generally includes all claims. However, reexamination may be limited to specific claims. See 35 U.S.C. 304 (authorizing the power to grant reexamination for determination of a ''substantial new question of patentability affecting any claim of a patent.'') (emphasis added). Thus, the Commissioner may order reexamination confined to specific claims. However, reexamination is not necessarily limited to those questions set forth in the reexamination order. See 37 CFR 1.104(a) (''The examination shall be complete with respect both to compliance of the application or patent under reexamination with the applicable statutes and rules and to the patentability of the invention as claimed. * * *'').

11. The Commissioner may conduct a search for new art to determine whether a substantial new question of patentability exists prior to terminating any ongoing reexamination proceeding. *See* 35 U.S.C. 303. See also 35 U.S.C. 305 (indicating that ''reexamination will be conducted according to the procedures established for initial examination,'' thereby suggesting that the Commissioner may conduct a search during an ongoing reexamination proceeding).

12. See 37 CFR 1.104(c)(3).

13. The file history of the prior PTO proceeding should indicate which portion of the textbook was previously considered. See 37 CFR 1.98(a)(2)(ii) (an information disclosure statement must include a copy of each ''publication or that portion which caused it to be listed'') (emphasis added).

14. However, a reexamination request that merely provides a new interpretation of a reference already previously relied upon or actually discussed by the PTO does not

create a substantial new question of patentability.

15. For example, the examiner may not have believed that the reference qualified as prior art because: (i) the reference was undated or was believed to have a bad date; (ii) the applicant submitted a declaration believed to be sufficient to antedate the reference under 37 CFR 1.131; or (iii) the examiner attributed an incorrect filing date to the claimed invention.

16. For example, the request could: (i) verify the date of the reference; (ii) undermine the sufficiency of the declaration filed under 37 CFR 1.131; or (iii) explain the correct filing date accorded a claim.

17. For purposes of reexamination, a cumulative reference that is repetitive is one that substantially reiterates verbatim the teachings of a reference that was either previously relied upon or discussed in a prior PTO proceeding even though the title or the citation of the reference may be different.

[FR Doc. 99–7786 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–16–P

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Adjustment of Import Limits for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the Dominican Republic

March 25, 1999.

AGENCY: Committee for the Implementation of Textile Agreements (CITA).

ACTION: Issuing a directive to the Commissioner of Customs adjusting limits.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Naomi Freeman, International Trade Specialist, Office of Textiles and Apparel, U.S. Department of Commerce, (202) 482–4212. For information on the quota status of these limits, refer to the Quota Status Reports posted on the bulletin boards of each Customs port, call (202) 927–5850, or refer to the U.S. Customs website at http://www.customs.ustreas.gov. For information on embargoes and quota re-openings, call (202) 482–3715.

SUPPLEMENTARY INFORMATION:

Authority: Section 204 of the Agricultural Act of 1956, as amended (7 U.S.C. 1854); Executive Order 11651 of March 3, 1972, as amended.

The current limit for Categories 339/639 is being increased for swing, reducing the limit for Categories 342/642 to account for the swing being applied.

A description of the textile and apparel categories in terms of HTS numbers is available in the CORRELATION: Textile and Apparel Categories with the Harmonized Tariff Schedule of the United States (see **Federal Register** notice 63 FR 71096, published on December 23, 1998). Also see 63 FR 63297, published on November 12, 1998.

D. Michael Hutchinson

Acting Chairman, Committee for the Implementation of Textile Agreements.

Committee for the Implementation of Textile Agreements

March 25, 1999.

Commissioner of Customs,

Department of the Treasury, Washington, DC 20229.

Dear Commissioner: This directive amends, but does not cancel, the directive issued to you on November 5, 1998, by the Chairman, Committee for the Implementation of Textile Agreements. That directive concerns imports of certain cotton, wool and man-made fiber textile products, produced or manufactured in the Dominican Republic and exported during the twelve-month period which began on January 1, 1999 and extends through December 31, 1999.

Effective on March 31, 1999, you are directed to adjust the current limits for the following categories, as provided for under the Uruguay Round Agreement on Textiles and Clothing:

Category	Adjusted twelve-month limit [1]
339/639	1,216,161 dozen.
342/642	639,146 dozen.

[1] The limits have not been adjusted to account for any imports exported after December 31, 1998.

The Committee for the Implementation of Textile Agreements has determined that these actions fall within the foreign affairs exception of the rulemaking provisions of 5 U.S.C. 553(a)(1).

Sincerely,

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements

[FR Doc. 99–7891 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DR–F

COMMITTEE FOR THE IMPLEMENTATION OF TEXTILE AGREEMENTS

Increase of a Guaranteed Access Level for Certain Cotton and Man-Made Fiber Textile Products Produced or Manufactured in the Dominican Republic; Correction

March 26, 1999.

In the notice published in the **Federal Register** on March 19, 1999 (64 FR 13548), 3rd column, 16th line down, correct ''EFFECTIVE DATE: March 23, 1999.'' to read ''EFFECTIVE DATE: March 26, 1999.''

In the letter to the Commissioner of Customs published in the **Federal Register** on March 19, 1999 (64 FR 13548), page 13549, 1st Column, 4th line down, correct ''Effective on March 23, 1999,'' to read ''Effective on March 26, 1999,.''

D. Michael Hutchinson,

Acting Chairman, Committee for the Implementation of Textile Agreements.

[FR Doc.99–7892 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DR–F

COMMODITY FUTURES TRADING COMMISSION

Sunshine Act Meeting

''FEDERAL REGISTER'' CITATION OF PREVIOUS ANNOUNCEMENT: 64 F.R. 14707.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 1:00 p.m., Tuesday, April 20, 1999.

CHANGES IN THE MEETING: The meeting to discuss proposed new rules concerning automated access to electronic boards of trade; otherwise, primarily operating outside the United States, and related proposed rule 1.71 was previously announced in error as closed. The meeting is an open meeting and will be held in the Lobby Level Hearing Room.

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, (202) 418–5100.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 99–8001 Filed 3–29–99; 11:54 am]

BILLING CODE 6351–01–M

CONSUMER PRODUCT SAFETY COMMISSION

All-Terrain Vehicles; Commission Resolution

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: The Consumer Product Safety Commission (''Commission'') hereby announces its issuance of a Resolution commending Bombardier Inc. (''Bombardier'') for the company's action plan regarding all-terrain vehicle (''ATV'') safety.[1]

[1] Chairman Ann Brown and Commissioner Thomas H. Moore voted to approve the Resolution. Commissioner Mary Sheila Gall abstained from voting and issued a statement explaining the basis for her abstention. The statement of Commissioner Gall is available to the public through the Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

Historical information regarding ATV safety-related actions by the Commission and other members of the ATV industry is included in the Commission's **Federal Register** notice of September 9, 1998 (63 FR 48199). That notice also requested public comment on whether the Commission should issue a Resolution commending certain members of the industry for their ATV action plans. After consideration of public comments, the Commission issued its Resolution commending such other industry members (63 FR 67861).

Bombardier's action plan is similar to action plans being carried out by other ATV manufacturers/distributors that the Commission commended. Therefore, the Commission views the public comments received in response to its **Federal Register** notice of September 9, 1998 as applicable to the question of whether the Commission should also commend Bombardier, and has considered those comments in deciding to issue this commendation. Accordingly, the Commission has determined that it is not necessary to solicit comment on whether it should issue its Resolution regarding Bombardier.

FOR FURTHER INFORMATION CONTACT: For information about the Resolution, call or write Leonard H. Goldstein, Office of the General Counsel, Consumer Product Safety Commission, Washington, DC 20207; (301) 504–0980, Ext. 2202.

Dated: March 26, 1999.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

Resolution of the United States Consumer Product Safety Commission Commending Bombardier Inc.

The United States Consumer Product Safety Commission (the ''Commission''), by vote on March 19, 1999, *Resolves that:*

Whereas, Bombardier Inc. has announced its intention to sell ATVs in the United States; and

Whereas, Bombardier has agreed to undertake voluntary actions (''Bombardier's ATV Action Plan'') that are comparable to those being undertaken by the current manufacturers and/or distributors of ATVs that the Commission has commended (See 63 FR 67861), including actions to (i) promote training, including through the offer of a cash incentive to first-time ATV purchasers, (ii) implement a multi-year information and education safety campaign emphasizing, among other things, the risks created when children younger than 16 operate or ride on adult-sized ATVs, (iii) not market, sell or offer to sell adult-size ATVs to or for use by children younger than 16, (iv) not market or sell three-wheel ATVs, (v) provide safety information on and with ATVs, including giving an ATV Safety Alert to each purchaser, (vi) retain the services of an independent organization to conduct the undercover monitoring of an agreed-upon minimum number of randomly selected dealers to monitor compliance with minimum age requirements, (vii) undertake various other safety measures, and (viii) notify the Commission at least 60 days in advance of any material changes to Bombardier's ATV Action Plan; and

Whereas, a copy of Bombardier's ATV Action Plan is available to the public upon request to the Commission's Office of the Secretary; and

Whereas, notwithstanding implementation of Bombardier's ATV Action Plan, the Commission reserves all its statutory enforcement, regulatory and oversight powers with respect to ATVs.

Now, therefore:

1. The Commission commends Bombardier for its ATV Action Plan, which the Commission believes will provide safety benefits to consumers.

2. The Commission will actively monitor the voluntary actions of Bombardier as well as those of the current manufacturers and/or distributors of ATVs by, among other things, increasing the undercover inspections it conducts of ATV dealerships to ensure compliance with age recommendations; increasing its inspections to ensure proper use of labels and hangtags; and collecting and assessing information regarding the effectiveness of training incentives. Other activities are set forth in the **Federal Register** notice of September 9, 1998 (63 FR 48199), which notified the public of the voluntary actions of the current manufacturers/distributors of ATVs. The Commission will take appropriate action based on the results of its monitoring activity. The Commission also will continue to track the death and injury rate associated with ATVs and reserves its authority to take action based on this data.

[FR Doc. 99–7903 Filed 3–30–99; 8:45 am]

BILLING CODE 6355–01–P

CONSUMER PRODUCT SAFETY COMMISSION

Commission Agenda and Priorities; Public Hearing

AGENCY: Consumer Product Safety Commission.

ACTION: Notice of public hearing.

SUMMARY: The Commission will conduct a public hearing to receive views form all interested parties about its agenda and priorities for Commission attention during fiscal year 2001, which begins October 1, 2000. Participation by members of the public is invited. Written comments and oral presentations concerning the Commission's agenda and priorities for fiscal year 2001 will become part of the public record.

DATES: The hearing will begin at 10 a.m. on April 29, 1999. Written comments and requests from members of the public desiring to make oral presentations must be received by the Office of the Secretary no later than April 15, 1999. Persons desiring to make oral presentations at this hearing must submit a written text of their presentations no later than April 22, 1999.

ADDRESSES: The hearing will be in room 420 of the East-West Towers Building, 4330 East-West Highway, Bethesda, Maryland 20814. Written comments, requests to make oral presentations, and texts of oral presentations should be captioned ''Agenda and Priorities'' and mailed to the Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, or delivered to that office, room 502, 4330 East-West Highway, Bethesda, Maryland 20814. Comments, requests, and texts of oral presentations may also be filed by telefacsimile to (301) 504–0127 or by e-mail to cpsc-os@cpsc.gov.

FOR FURTHER INFORMATION CONTACT: For information about the hearing or to request an opportunity to make an oral presentation, call or write Rockelle Hammond, Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207; telephone (301) 504–0800, extension 1232; telefax (301) 504–0127.

SUPPLEMENTARY INFORMATION: Section 4(j) of the Consumer Product Safety Act (CPSA) (15 U.S.C. 2053(j)) requires the Commission to establish an agenda for action under the laws it administers, and, to the extent feasible, to select priorities for action at least 30 days before the beginning of each fiscal year. Section 4(j) of the CPSA provides further that before establishing its agenda and priorities, the Commission shall conduct a public hearing and provide an opportunity for the submission of comments.

The Office of Management and Budget requires all Federal agencies to submit their budget requests 13 months before the beginning of each fiscal year. The

Commission is formulating its budget request for fiscal year 2001, which begins on October 1, 2000.

Accordingly, the Commission will conduct a public hearing on April 29, 1999 to receive comments from the public concerning its agenda and priorities for fiscal year 2001. The Commissioners desire to obtain the views of a wide range of interested persons including consumers; manufacturers, importers, distributors, and retailers of consumer products; members of the academic community; consumer advocates; and health and safety officers of state and local governments.

The Commission is charged by Congress with protecting the public from unreasonable risks of injury associated with consumer products. The Commission enforces and administers the Consumer Product Safety Act (15 U.S.C. 2051 *et seq.*); the Federal Hazardous Substances Act (15 U.S.C. 1261 *et seq.*); the Flammable Fabric Act (15 U.S.C. 1191 *et seq.*); the Poison Prevention Packaging Act (15 U.S.C. 1471 *et seq.*); and the Refrigerator Safety Act (15 U.S.C. 1211 *et seq.*). Standards and regulations issued under provisions of those statutes are codified in the Code of Federal Regulations, title 16, chapter II.

While the Commission has broad jurisdiction over products used by consumers, its staff and budget are limited. Section 4(j) of the CPSA expresses Congressional direction to the Commission to establish an agenda for action each fiscal year and, if feasible, to select from that agenda some of those projects for priority attention.

Persons who desire to take oral presentations at the hearing on April 29, 1999, should call or write Rockelle Hammon, Office of the Secretary, Consumer Product Safety Commission, Washington, D.C. 20207, telephone (301) 504–0800, telefax (301) 504–0127, or e-mail, cpsc-cpsc-os@copsc.gov, no later than April 15, 1999.

Presentations should be limited to approximately ten minutes. Persons desiring to make oral presentations must submit the written text of their presentations to the Office of the Secretary not later than April 22, 1999. The Commission reserves the right to impose further time limitations on all presentations and further restrictions to avoid duplication of presentations. The hearing will begin at 10 a.m. on April 29, 1999 and will conclude the same day.

Dated: March 26, 1999.

Sadye E. Dunn,

Secretary, Consumer Product Safety Commission.

[FR Doc. 99–7904 Filed 3–30–99; 8:45 am]

BILLING CODE 6355–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Associated Form, and OMB Number: Medical Treatment Facility Incident Statement; AF Form 765; OMB Number 0701–0135.

Type of Request: Reinstatement.

Number of Respondents: 1.

Annual Responses: 13,200.

Annual Burden Per Response: 5 minutes.

Annual Burden Hours: 1,056.

Needs and Uses: The form is used by respondents (hospital employees, including non-governmental personnel and contractors) to report specific incidents that may have resulted in injury. It is not filed in a patient's record, but is kept by the medical treatment facility (MTF) Quality Service/Risk Manager until appropriate actions are completed to analyze the incident and determine whether corrective action is necessary to avoid repeat incidents. After completion and corrective action, if required, the form is retained for one year and then destroyed. Information recorded on the form is concise statements of facts. If the information is not collected as needed, MTFs will lose the opportunity to identify potential risks in the facilities.

Affected Public: Individuals or households.

Frequency: On Occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments on recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 2202–4302.

Dated: March 24, 1998.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 99–7846 Filed 3–30–99; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Associated Form, and OMB Number: Food/Exercise Diary, AF Form 3529; OMB Number 0701–0126.

Type of Request: Reinstatement.

Number of Respondents: 3,000.

Responses Per Respondent: 1.

Annual Responses: 3,000.

Average Burden Per Response: 15 minutes.

Annual Burden Hours: 750.

Needs and Uses: The information collection requirement is necessary to teach individuals on the USAF Weight Management Program and those on calorie-controlled diets to make an accurate objective self-analysis of their own food and exercise habits in order to take control of their own behavior and identify areas for lifestyle change. Respondents are medical beneficiaries referred to Nutritional Medicine for weight management counseling.

Affected Public: Individuals or households.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10236, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: March 24, 1999.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 99–7847 Filed 3–30–99; 8:45 am]

BILLING CODE 5001–01–M

DEPARTMENT OF DEFENSE

Office of the Secretary

Submission for OMB Review; Comment Request

ACTION: Notice.

The Department of Defense has submitted to OMB for clearance, the following proposal for collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35).

Title, Associated Form, and OMB Number: Nutritional Medicine Service Patient Evaluation; AF Forms 2503 and 2504; OMB Number 0701–0125.

Type of Request: Reinstatement.

Number of Respondents: 35,000.

Responses per Respondents: 1.

Annual Responses: 35,000.

Average Burden per Response: 5 minutes.

Annual Burden Hours: 2,900.

Needs and Uses: The information collection requirement is necessary to gather information from inpatients concerning the quality of food served and the level of service provided by Nutritional Medicine Service on the AF Form 2503. The AF Form 2504 is used to gather information from dining room patrons on quality of food and service provided. This information is required by the Joint Commission on Accreditation of Healthcare Organizations for assessment of quality assurance in the hospital accreditation process. The information is used within individual military hospital settings only. Respondents are medical beneficiaries admitted to the hospital, or patrons consuming meals in the dining hall.

Affected Public: Individuals or households.

Frequency: On occasion.

Respondent's Obligation: Voluntary.

OMB Desk Officer: Mr. Edward C. Springer.

Written comments and recommendations on the proposed information collection should be sent to Mr. Springer at the Office of Management and Budget, Desk Officer for DoD, Room 10235, New Executive Office Building, Washington, DC 20503.

DOD Clearance Officer: Mr. Robert Cushing.

Written requests for copies of the information collection proposal should be sent to Mr. Cushing, WHS/DIOR, 1215 Jefferson Davis Highway, Suite 1204, Arlington, VA 22202–4302.

Dated: March 24, 1999.

Patricia L. Toppings,

Alternate OSD Federal Register Liaison Officer, Department of Defense.

[FR Doc. 99–7848 Filed 3–30–99; 8:45 am]

BILLING CODE 5001–10–M

DEPARTMENT OF DEFENSE

Department of the Army

Final Environmental Assessment (EA) on the Disposal and Reuse of Fort Totten, NY

AGENCY: Department of the Army, DOD.

ACTION: Notice of Availability.

SUMMARY: The proposed action evaluated by this EA is the disposal and reuse of Fort Totten, New York, in accordance with the Defense Base Closure and Realignment Act of 1990, Public Law 101–510. The EA addresses the environmental consequences of the disposal and subsequent reuse of the 120 acres.

DATES: Interested parties are invited to review and submit comments on the Finding of No Significant Impact (FNSI) on or before April 30, 1999.

ADDRESSES: Copies of the Environmental Assessment can be obtained by writing to the U.S. Army Corps of Engineers, ATTN: Mr. Carl Burgamy, Jr., U.S. Army Engineer District, Mobile (CESAM–PD), 109 St. Joseph Street, Mobile, AL 36602.

FOR FURTHER INFORMATION CONTACT: Mr. Carl Burgamy, Jr., by facsimile at (344) 690–2727.

SUPPLEMENTARY INFORMATION: The EA addresses the environmental consequences of the disposal and subsequent reuse of the 120 acres comprising Fort Totten, New York. The Army disposal action is analyzed in this EA with respect to three disposal alternatives: (1) The No Action Alternative, which entails maintaining the property in caretaker status after closure; (2) The Unencumbered Disposal Alternative, which entails transferring the property without the Army having created any encumbrances or with the Army's having removed encumbrances that could be removed; and (3) The Encumbered Disposal Alternative, which entails transferring the property to future owners with Army-imposed limitations, or encumbrances, on the future use of the property.

Additionally, this EA analyzes the potential environmental and socioeconomic consequences of three reuse alternatives, developed by the Fort Totten Local Redevelopment Authority: (1) Low Intensity Reuse Alternative; (2) Low-Medium Intensity Reuse Alternative; and (3) Medium Intensity Reuse Alternative. The resource areas evaluated for potential impacts by the proposed action (disposal) and the secondary action (reuse) include: Land Use; Climate; Air Quality; Noise; Geology, Soils, and Topography; Water Resources; Infrastructure; Hazardous and Toxic Substances; Biological Resources and Ecosystems; Cultural Resources; Sociological Environment; Economic Development; Quality of Life; Installation Agreements, and Permits and Regulatory Authorizations.

The Notice of Intent declaring the Army's intent to prepare an environmental assessment for the disposal of Fort Totten was published in the **Federal Register** on September 22, 1995.

Copies of the EA will be available for review at the following locations: Queens Borough Public Library, Long Island Division, 89–11 Merrick Boulevard, Jamaica, NY 11432; Bayside Branch of the Queens Borough Public Library, 214–20 Northern Boulevard, Bayside, NY 11361; Bay Terrace Branch of the Queens Borough Public Library, 18–36 Bell Boulevard, Bayside, NY 11360; Whitestone Branch of the Queens Borough Public Library, 151–10 14th Road, Whitestone, NY 11357.

Dated: March 25, 1999.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health) OASA(I&E).

[FR Doc. 99–7864 Filed 3–30–99; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Army

Release of the Notice of Availability on the Draft Environmental Impact Statement (DEIS) on the Disposal and Reuse of the Military Ocean Terminal, Bayonne, NJ

AGENCY: Department of the Army, DOD.

ACTION: Notice of availability.

SUMMARY: This DEIS was prepared by the Army in compliance with the National Environmental Policy Act (NEPA) of 1969 and the President's Council on Environmental Quality. The closure of the Military Ocean Terminal, Bayonne, New Jersey (MOTBY) was

mandated in accordance with the recommendations of the Defense Base Closure and Realignment Act of 1990, Public Law 101–510, as amended (the ''BRAC law'').

DATES: The review period for the DEIS will end 45 days after publication of the NOA in the **Federal Register** by the U.S. Environmental Protection Agency (EPA).

ADDRESSES: Questions and/or written comments regarding the DEIS, or a request for a copy of the document may be directed to: U.S. Army Corps of Engineers, ATTN: Dr. Susan Ivester Rees, U.S. Army Engineer District, Modile (CESAM–PD), 109 St. Joseph Street, Mobile, AL 36602.

FOR FURTHER INFORMATION CONTACT: Dr. Susan Ivester Rees at 334–694–4141 or by facsimile at 334–690–2727.

SUPPLEMENTARY INFORMATION: The DEIS analyzes three alternative courses of action with respect to the disposal and subsequent reuse of the 676 acres (440 land acres and 236 submerged land acres) comprising the Military Ocean Terminal, Bayonne (MOTBY): (1) The no action alternative, under which the property would be maintained in a caretaker status after closure; (2) the unencumbered alternative, under which the Army would transfer the property without encumbrances, such as environmental restrictions and easements; and (3) the encumbered disposal alternative, under which the Army would transfer the property with various environmental restrictions and easement, limiting the future use of the property. Additionally, this DEIS analyzes the potential environmental and socioeconomic consequences of three community reuse alternatives: (1) low intensity reuse alternative; (2) Low-medium intensity reuse alternative; and (3) medium intensity reuse alternative.

The DEIS concludes the no action alternative is not reasonable since the closure of MOTBY is mandated by BRAC law, and the Army has no requirement to retain the property. The DEIS also concludes that the unencumbered disposal alternative is not feasible given environmental conditions and legal requirements.

The Army's preferred alternative course of action is the encumbered disposal of excess property. Possible encumbrances include: covenants and restrictions pertaining to asbestos-containing material; lead-based paint; floodplains; future remedial activities after transfer; wetlands and easements; and rights-of-way.

Community reuse of the MOTBY property is analyzed in the DEIS as a secondary action resulting from closure and disposal by the Army. While the Army does not control the community's reuse of the property, under NEPA, the Army is required to analyze the reasonably foreseeable impacts of its disposal action. The local community has established the Bayonne Local Redevelopment Authority (BLRA) to develop and implement a reuse plan for the installation. Approval and implementation of the reuse plan are within the discretion of the BLRA.

A public meeting will be held during the 45-day DEIS comment period to afford the public the opportunity to provide oral and written comments on the DEIS. The location and time of the meeting will be announced in local newspapers at least 15 days prior to the meeting. Verbal comments made at the public meeting and written comments received during the comment period will be used in the preparation of the Final EIS and Record of Decision.

Copies of the DEIS have been forwarded to the EPA, other Federal, state, and local agencies; public officials; and organizations and individuals who previously provided substantive comments in the EIS scoping process. Copies of the DEIS are available for review at the following libraries: The Bayonne Free Public Library, 697 Avenue C, Bayonne, NJ 07002–2806; the Jersey City Public Library, 472 Jersey Avenue, Jersey City, NJ 07302; and the Newark Public Library, 5 Washington Street, Newark, NJ 07102.

Dated: March 25, 1999.

Raymond J. Fatz,

Deputy Assistant Secretary of the Army, (Environment, Safety and Occupational Health), OASA(I&E).

[FR Doc. 99–7865 Filed 3–30–99; 8:45 am]

BILLING CODE 3710–08–M

DEPARTMENT OF DEFENSE

Department of the Navy

Termination of Environmental Impact Statement for Management of Aircraft Operations at Naval Air Station (NAS) Whidbey Island, Washington

AGENCY: Department of the Navy, DOD.

ACTION: Notice.

SUMMARY: Pursuant to Section 102(2)(c) of the National Environmental Policy Act of 1969, as implemented by the Council on Environmental Quality regulations (40 CFR Parts 1500–1508), the Department of the Navy, announced its intent to prepare an Environmental Impact Statement (EIS) for the management of air operations at NAS Whidbey Island. The Notice of Intent was published in the **Federal Register** on February 7, 1989. The EIS was to cover proposed air operations associated with increased training activity at Ault Field and Outlying Field (OLF) Coupeville. The Notice of Availability for the Draft EIS (DEIS) was published in the **Federal Register** on August 27, 1993. The DEIS was distributed to various federal, state, and local agencies, elected officials, special interest groups, interested individuals, and the media. Public hearings were held on September 29, 1993 and November 10, 1993.

At the time of the preparation of the DEIS, all Navy EA–6B Prowler electronic warfare squadrons and all west coast A–6E Intruder squadrons were stationed at NAS Whidbey Island. Ault Field and Outlying Field (OLF) Coupeville were used for aircraft training exercises on Whidbey Island.

Since the publication of the DEIS, the conditions at NAS Whidbey Island have changed significantly. All A–6E aircraft have been decommissioned and are no longer based at NAS Whidbey Island. Accordingly air operations at NAS Whidbey Island have been reduced 40–50% from 1988 levels.

The significant reduction in air operation activities has eliminated the need for proposed modifications to NAS Whidbey Island air operations. Therefore, the preparation of an EIS for Management of Aircraft Operations at NAS Whidbey Island is no longer required and the process is hereby terminated.

ADDRESSES: Questions regarding this notice may be directed to: Ms. Kathryn Souders, Environmental Affairs Director, NAS Whidbey Island at (360) 257–1009.

Dated: 25 March 1999.

Pamela A. Holden,

Lieutenant Commander, Judge Advocate General's Corps, U.S. Navy, Federal Register Liaison Officer.

[FR Doc. 99–7895 Filed 3–30–99; 8:45 am]

BILLING CODE 3810–FF–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

ACTION: Notice of Proposed Information Collection Requests.

SUMMARY: The Acting Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information

collection requests as required by the Paperwork Reduction Act of 1995.

DATES: An emergency review has been requested in accordance with the Act (44 U.S.C. Chapter 3507 (j)), since public harm is reasonably likely to result if normal clearance procedures are followed. Approval by the Office of Management and Budget (OMB) has been requested by April 2, 1999. A regular clearance process is also beginning. Interested persons are invited to submit comments on or before June 1, 1999.

ADDRESSES: Written comments regarding the emergency review 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. Comments regarding the regular clearance and requests for copies of the proposed information collection request 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 Director of OMB provide interested Federal agencies and the public an early opportunity to comment on information collection requests. The Office of Management and Budget (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 this notice containing proposed information collection requests at the beginning of the Departmental review of the information collection. 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. ED invites public comment at the address specified above. Copies of the requests are available from Patrick J. Sherrill at the address specified above.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner, (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected, and (5) how might the Department minimize the burden of this collection on respondents, including through the use of information technology.

Dated: March 25, 1999.

William E. Burrow,

Acting Leader, Information Management Group, Office of the Chief Information Officer.

Office of the Chief Information Officer

Type of Review: New.

Title: Year 2000 Assessment Survey of Postsecondary Educational Institutions.

Abstract: The Department of Education (ED) is actively participating on the President's Council on Year 2000 Conversion and this Year 2000 Assessment Survey is a Departmental, as well as a Council, initiative. ED is taking a proactive approach in requesting postsecondary educational institutions report on their Year 2000 readiness. ED needs to survey the progress of domestic (50 States, Guam, Puerto Rico, U.S. Virgin Islands, five U.S. Outlying Areas and the District of Columbia) postsecondary educational institutions and foreign postsecondary educational institutions attended by our students receiving federal financial aid. This will be done in order to ensure the successful operation of ED's programs and to report to the Office of Management and Budget, The President's Council on Year 2000 Conversion and other Year 2000 oversight authorities.

Additional Information: This survey is being submitted for emergency clearance, as it is a Year 2000 related data collection assessment effort. The year 2000 is only nine months away. Due to the short time period left before the Year 2000 and the urgency of achieving Year 2000 compliance of postsecondary educational institutions; we are requesting the 60-day and 30-day waiver for **Federal Register** Notices. This waiver is requested per emergency clearance of Year 2000 surveys under the Paperwork Reduction Act.

Frequency: As required by OMB, The President's Council on Year 2000 conversion and other Year 2000 oversight authorities.

Affected Public: Business or other for-profit; Not-for-profit institutions; State, local or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Burden:

Responses: 4,631.

Burden Hours: 30,102.

[FR Doc. 99–7820 Filed 3–30–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF EDUCATION

Notice of Proposed Information Collection Requests

AGENCY: Department of Education.

SUMMARY: The Acting Leader, Information Management Group, Office of the Chief Information Officer, invites comments on the proposed information collection requests as required by the Paperwork Reduction Act of 1995.

DATES: Interested persons are invited to submit comments on or before June 1, 1999.

ADDRESSES: Written comments and 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.

The Department of Education is especially interested in public comment addressing the following issues: (1) is this collection necessary to the proper functions of the Department; (2) will this information be processed and used in a timely manner; (3) is the estimate of burden accurate; (4) how might the Department enhance the quality, utility, and clarity of the information to be collected; and (5) how might the Department minimize the burden of this collection on the respondents, including through the use of information technology.

Dated: March 25, 1999.

William E. Burrow,

Acting Leader, Information Management Group, Office of the Chief Information Officer.

Office of Educational Research and Improvement

Type of Review: Reinstatement.

Title: 1999–2000 Private School Survey.

Frequency: On occasion.

Affected Public: Business or other for-profit; Not-for-profit institutions

Reporting and Recordkeeping Hour Burden:

Responses: 45,000.

Burden Hours: 16,667.

Abstract: The National Center for Education Statistics (NCES) collects information on private schools, both religious-affiliated and independent, every two years in order to maintain a universe frame of private schools that is of sufficient accuracy and completeness to serve as a sampling frame for NCES surveys of private schools and to generate biennial data on the total number of private schools, teachers, and students. Since 1980, this Elementary/Secondary data collection has formed the basis for national statistical data on private schools.

[FR Doc. 99–7821 Filed 3–30–99; 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 April 30, 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: March 25, 1999.

William E. Burrow,

Acting Leader, Information Management Group, Office of the Chief Information Officer.

Office of the Under Secretary.

Type of Review: Revision.

Title: Third National Even Start Evaluation: Performance Information Reporting System and Experimental Study.

Frequency: Annually.

Affected Public: Individuals or households; State, local or Tribal Gov't, SEAs or LEAs.

Reporting and Recordkeeping Hour Burden:

Responses: 1,350.

Burden Hours: 63,503.

Abstract: The third national Even Start evaluation calls for two data collection activities: (1) The Even Start Performance Information Reporting System involves the refinement and maintenance of a data collection system, collection and analysis of descriptive and outcome data from all Even Start grantees, and training of local Even Start project directors in data collection and technical assistance to them. (2) the Even Start Experimental Study involves recruiting 20 projects to participate in an experimental evaluation of the effectiveness of Even Start, random assignment of new families to Even Start or control groups, and measurement of child, adult, and family outcomes in fall 1999 and spring 2000.

[FR Doc. 99–7822 Filed 3–30–99; 8:45 am]

BILLING CODE 4000–01–P

DEPARTMENT OF ENERGY

Office of Fossil Energy

[FE Docket No. 99–19–NG]

Enron Capital & Trade Resources Corp.; Order Granting Long-Term Authorization To Import Natural Gas From Canada

AGENCY: Office of Fossil Energy, DOE.

ACTION: Notice of order.

SUMMARY: The Office of Fossil Energy of the Department of Energy gives notice that it issued DOE/FE Order No. 1470 (Order 1470) on March 18, 1999, granting Enron Capitol & Trade Resources Corp. (ECT) long-term authorization to import up to 20,000 Mcf of natural gas per day (up to approximately 7.3 Bcf annually) from Canada. ECT is one of the largest buyers and sellers of natural gas in North America. The term of the authorization begins November 1, 1999, or when deliveries commence, whichever occurs later, and terminates 10 years following the commencement date. The natural gas will be imported under a supply arrangement with Enron Capital & Trade Resources Canada Corp. This natural gas may be imported at any point on the border of the United States and Canada.

Order 1470 may be found on the FE web site at http://www.fe.doe.gov, or on our electronic bulletin board at (202) 586–7853. It is also available for inspection and copying in the Office of Natural Gas & Petroleum Import & Export Activities docket room, 3E–033, Forrestal Building, 1000 Independence Avenue, S.W., Washington, D.C. 20585–0334, (202) 586–9478. The docket room is open between the hours of 8:00 a.m. and 4:30 p.m., Monday through Friday, except Federal holidays.

Issued in Washington, D.C., March 24, 1999.

John W. Glynn,

Manager, Natural Gas Regulation, Office of Natural Gas & Petroleum, Import and Export Activities, Office of Fossil Energy.

[FR Doc. 99–7919 Filed 3–30–99; 8:45 am]

BILLING CODE 6450–01–P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket Nos. OA97–105–003; OA97–287–003; OA97–458–003; OA97–462–004; OA97–440–004; and OA97–446–003]

Carolina Power & Light Company; Central Power and Light Company; Public Service Company of Oklahoma; Southwestern Electric Power Company; West Texas Utilities Company; Entergy Services, Inc.; Entergy Arkansas, Inc.; Entergy Gulf States, Inc.; Entergy Louisiana, Inc.; Entergy Mississippi, Inc.; Entergy New Orleans, Inc.; Maine Electric Power Company; PECO Energy Company and UtiliCorp United, Inc; Notice of Filings

March 25, 1999.

Take notice that between March 12 to March 22, 1999, the companies listed in the above-captioned dockets filed revised standards of conduct under Order Nos. 889 *et seq.**

Any person desiring to be heard or to protest one or more of the filings should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C., 20426, in accordance with Rules 211 or 214 of the Commission's Rules of Practice and Procedure (18 CFR 285.211 or 385.214). All such motions to intervene or protest should be filed on or before 15 days from issuance. Protests will be considered by the Commission in determining the appropriate action to be taken but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of these filings are on file with the Commission and are available for public inspection.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7860 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

* Open Access Same-Time Information System (Formerly Real-Time Information Network) and Standards of Conduct, 61 FR 21737 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles January 1991–June 1996 ¶ 31,035 (April 24, 1996); Order No. 889–A, *order on rehearing,* 62 FR 12484 (March 14, 1997), III FERC Stats. & Regs. ¶ 31,049 (March 4, 1997) (Order No. 889–A); Order No. 889–B, *rehearing denied,* 62 FR 64715 (December 9, 1997), 81 FERC ¶ 61,253 (November 25, 1997).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–264–000]

Columbia Gas Transmission Corporation; Notice of Application

March 25, 1999.

Take notice that on March 19, 1999, Columbia Gas Transmission Corporation (Columbia), 12801 Fairfax, Virginia 22030–1046, filed in Docket CP99–264–000, an application pursuant to Section 7(b) of the Natural Gas Act (NGA) for permission and approval to abandon in place approximately 9.1 miles of 2-, 4-, 12-, and 18-inch pipelines and appurtenances located in Jackson County, West Virginia, all as more fully set forth in the application on file with the Federal Energy Regulatory Commission (Commission) and open to public inspection.

Columbia proposes to abandon in place approximately 9.1 miles of Line E which consists of 20-foot long joints with compression coupled pipeline. Columbia reports the pipeline was constructed prior to 1910 by one of Columbia's predecessors and is uncoated and lacks corrosion protection. Columbia continues that Line E was originally constructed to transport locally produced and purchased gas in the area of Roane County, West Virginia, to markets situated in the Jackson County, West Virginia, as well as certain Ohio Area Markets. Columbia further continues that due to declining supplies of gas in the original production area, as well as operational changes on Columbia's system which have occurred over time, the subject portion of Line E no longer serves the function for which it was originally constructed. Columbia further states that the pipeline is now inactive and the tap consumers once served from Line E now receive service from alternate fuels or other Local Distribution Companies. Columbia reports that as a result of these changes, there are no customers or consumers receiving service via the facilities.

Any person desiring to be heard or to make any protest with reference to said application should on or before April 15, 1999, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the NGA (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 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 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 Columbia to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7859 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. UL96–18–005]

Hubbardston Hydro Company; Notice of Rejecting Request for Hearing

March 25, 1999.

On January 15, 1999, the Commission issued an order denying reconsideration of an order issued by the Acting Director, Office of Hydropower Licensing which found that the existing, unlicensed Hubbardston Project, located at Fish Creek in Ionia County, Michigan, is required to be licensed pursuant to Section 23(b)(1) of the Federal Power Act (FPA).[1] On February 23, 1999, Hubbardston Hydro Company (Hubbardston) filed a request for rehearing of the order denying reconsideration.

Section 313(a) of the EPA [2] required an aggrieved party to file a request for rehearing within 30 days after the issuance of the Commission's order, in this case by February 16, 1999. Because the 30-day deadline for requesting rehearing is statutorily based, it cannot be extended and Hubbardston's request for rehearing must be rejected as untimely.

This notice constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this notice pursuant to 18 CFR 385.713.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7862 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

[1] 16 U.S.C. 817(1).

[2] 16 U.S.C. 8251(a).

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP96–52–003]

Pine Needle LNG Company, LLC; Notice of Initial Gas Tariff

March 25, 1999.

Take notice that on March 17, 1999, Pine Needle LNG Company, LLC (Pine Needle) filed to place into effect its FERC Gas Tariff, Original Volume No. 1, Original Sheet Nos 1 through 118 (Tariff). Pine Needle requests that its Tariff be made effective on May 1, 1999, which is the expected in service date for the Pine Needle facilities. The Tariff will allow Pine Needle to provide interstate service in compliance with the Commission orders issued on April 30, 1996 and November 27, 1996 in this proceeding.

Pine Needle states that the Tariff incorporates the revisions described in the April 30 order and is in compliance with the requirements of the Gas Institute Standards Board (GISB). The Tariff also includes a tariff sheet reflecting the initial rates based upon the actual cost of debt as required by Ordering Paragraph (L) of the April 30 order.

Pine Needle notes that Ordering Paragraph (D) of the April 30 order required Pine Needle to file its initial tariff 60 days prior to its projected in-service date. Pine Needle states that it was unable to meet this date and, after discussions with Commission staff, was granted permission to make the filing 45 days prior to the in-service date.

Pine Needle states that copies of this filing have been served on customers and interested state Commissions.

Any person desiring to be heard or to protest this filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, in accordance with Sections 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests must be filed as provided in Section 154.210 of the Commission's Regulations. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the Public Reference Room. This filing may be viewed on the Internet at http//www.ferc.fed.us/online/rims.htm (call 202–208–222 for assistance).

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7856 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–268–000]

Southern Natural Gas Company; Notice of Application

March 25, 1999.

Take notice that on March 22, 1999, Southern Natural Gas Company (Southern), AmSouth-Sonat Tower, Birmingham, Alabama 35203, filed in Docket No. CP99–268–000, an application pursuant to Section 7(b) of the Natural Gas Act (NGA), and Part 157 of the Federal Energy Regulatory Commission's (Commission) Regulations seeking authorization to abandon by sale to J.R. Pounds, Inc. (Pounds), certain natural gas transmission facilities including pipelines, receiving stations, compressors, and appurtenant facilities located in or near the Dexter Field, Hub Field, and Sandy Hook Field in Marion and Walthall Counties, Mississippi, as more fully set forth in the application which is on file with the Commission and open to public inspection. This filing may be viewed on the web at http:///www.ferc.fed.us/online/rims.htm (call 202–208–2222 for assistance).

Southern maintains that the proposed abandonment by sale to Pounds will not affect the capacity of Southern's pipeline system. Southern states that this abandonment is in the public interest because the sale of the facilities will reduce Southern's operation and maintenance costs, fuel and gas loss, and capital expenditures for upgrading of line and receiving stations through

the elimation of approximately 64.966 miles from Southern's pipeline system.

Any person desiring to be heard or make any protest with reference to said application should on or before April 15, 1999, file with the Federal Energy Regulatory Commission, Washington, D.C. 20426, a motion to intervene or 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 of 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 abandonment of the facilities 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 so such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for Southern to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7858 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

[Docket No. CP99–266–000]

Tennessee Gas Pipeline Company; Notice of Application To Abandon

March 25, 1999.

Take notice that on March 22, 1998, Tennessee Gas Pipeline Company (Tennessee), P.O. Box 2511, Houston, Texas 77252, filed under Section 7(b) of the Natural Gas Act, for authority to abandon by removal, certain facilities connected to its 30-inch mainline pipeline No. 100–3. The facilities are located in Wharton County, Texas, near milepost 16 – 3=4.62 on the mainline and are designated by Tennessee as the West Bernard facilities. They consist of a side valve, a riser, a ball valve, a check valve, a 4-inch meter and 16 feet of 2-inch station piping and appurtenances. Tennessee states that these facilities are no longer needed. This information is more fully set forth in the application which is on file with the Commission and open to public inspection. The application may also be viewed on the web at http//www.ferc.fed.us/online/rims.htm. Call (202) 208–2222 for assistance.

Any person desiring to be heard or make any protest with reference to said application should on or before April 15, 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 Protesters 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, or if the Commission on its own review of the matter of the matter finds that permission and approval of 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 Tennessee to appear or be represented at the hearing.

Linwood A. Watson, Jr.,

Acting Secretary.

[FR Doc. 99–7857 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Surrender of License and Soliciting Comments, Motions to Intervene, and Protests

March 26, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Surrender of License.

b. *Project No:* 2596–004.

c. *Date Filed:* March 31, 1998.

d. *Applicant:* Rochester Gas and Electric Corporation.

e. *Name of Project:* Station No. 160.

f. *Location:* On the Genesee River, in Livingston County, New York. The project does not utilize federal or tribal lands.

g. *Filed Pursuant to:* 18 CFR 4.200.

h. *Applicant Contact:* Mr. Hal F. Waggoner, Rochester Gas and, Electric, Corporation, 89 East Avenue, Rochester, NY 14649–0001, (716) 724–8105.

i. *FERC Contact:* Any questions on this notice should be addressed to Tom Papsidero, e-mail address: Thomas.Papsidero@ferc.fed.us, or telephone: (202) 219–2715.

j. *Deadline for filing comments and/or motions:* April 28, 1999.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, Mail Code: DLC, HL–11.1, 888 First Street, N.E., Washington, DC 20426.

Please include the project number (2596–004) on any comments or motions filed.

k. *Description of Surrender:* Rochester Gas and Electric Corporation, a corporation, requests to surrender the license for economic reasons.

l. *Locations of the application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, located at 888 First Street, NE, Room 2A, Washington, D.C. 20426, or by calling (202) 208–1371. This filing may be viewed on http://www.ferc.fed.us/on;ine/rims.htm (call (202) 208–2222 for assistance). A copy is also available for inspection and reproduction at the address in item h above.

m. Individuals desiring to be included on the Commission's mailing list should so indicated by writing to the Secretary of the Commission.

n. *This notice also consists of the following standard paragraphs:* B, C1, 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 Responsible Documents—Any filings must bear in all capital letters the title "COMMENTS" "RECOMMENDATIONS FOR TERMS AND CONDITIONS", "PROTESTS", 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 with 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. 99–7855 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

Notice of Application To Amend Schedule for Annual Winter Drawdowns and Soliciting Comments, Motions to Intervene, and Protests

March 25, 1999.

Take notice that the following hydroelectric application has been filed with the Commission and is available for public inspection:

a. *Application Type:* Amendment of Exemption.

b. *Project No.:* 6299–013.

c. *Date Filed:* March 9, 1999.

d. *Applicant:* Dakota County Electric Cooperative and Goodhue County.

e. *Name of Project:* Lake Byllesby Project.

f. *Location:* The project is located on the Cannon River, Dakota and Goodhue Counties, Minnesota. The project does not utilize federal or tribal lands.

g. *Filed Pursuant to:* 18 CFR 4.104.

h. *Applicant Contact:* Mr. Stephen Sullivan, Dakota County Parks and Recreation, 8500 127th Street, East Hastings, MN 55033, (651) 438–4662.

i. *FERC Contact:* Any questions on this notice should be addressed to Diana Shannon at (202) 208–7774, or e-mail address diana.shannon@ferc.fed.us.

j. *Deadline for filing comments and or motions:* April 29, 1999.

All documents (original and eight copies) should be filed with: David P. Boergers, Secretary, Federal Energy Regulatory Commission, Mail Code: DLC, HL–11.1, 888 First Street, NE, Washington, DC 20426.

Please include the Project Number (6299–013) on any comments or motions filed.

k. *Description of Amendment:* The exemptee currently conducts annual winter drawdowns to 853.7 feet NGVD at the project. These drawdowns begin on November 1 at a rate of approximately 0.1 foot per day, and continue for 30 days. The reservoir is maintained at 853.7 feet NGVD until such time that increasing flow exceeds the project's capacity and raises the reservoir elevation to 856.7 feet NGVD. The exemptee requests to begin drawdowns on October 1, at a rate of approximately 0.05 foot per day, for approximately 60 days, and maintain the reservoir at 853.7 feet NGVD until May 15.

l. *Locations of the Application:* A copy of the application is available for inspection and reproduction at the Commission's Public Reference Room, at 888 First Street NE, Room 2A, Washington, DC, 20426, or by calling (202) 208–1371. The application may be viewed on the website at http://www.ferc.fed.us/online/rims.htm. Call (202) 208–2222 for assistance. A copy is also available for inspection and reproduction at the address in item h above.

m. *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"; "PROTESTS", 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. 99–7861 Filed 3–30–99; 8:45 am]

BILLING CODE 6717–01–M

DEPARTMENT OF ENERGY

Office of Hearings and Appeals

Notice of Issuance of Decisions and Orders During the Week of October 19 Through October 23, 1998

During the week of October 19 through October 23, 1998, the decisions and orders summarized below were issued with respect to appeals, applications, petitions, or other requests filed with the Office of Hearings and Appeals of the Department of Energy. The following summary also contains a list of submissions that were dismissed by the Office of Hearings and Appeals.

Copies of the full text of these decisions and orders are available in the Public Reference Room of the Office of Hearings and Appeals, 950 L'Enfant Plaza, SW, Washington, D.C. 20585–0107, Monday through Friday, except federal holidays. They are also available in *Energy Management: Federal Energy Guidelines,* a commercially published loose leaf reporter system. Some decisions and orders are available on the Office of Hearings and Appeals World Wide Web site at http://www.oha.doe.gov.

George B. Breznay,
Director, Office of Hearings and Appeals.

Decision List No. 108

Week of October 19 through October 23, 1998

AMERICAN ELECTRIC POWER COMPANY, INC., 10/20/98, VEA–0009

DOE denied an Appeal filed by American Electric Power Company, Inc. (AEP) under provisions of 10 C.F.R. Part 490 (Alternative Fuel Transportation Program). In its Appeal, AEP challenged a determination by the Office of Energy Efficiency and Renewable Energy (EE) which substantially denied a request for an exemption from the firm's 1998 Model Year (MY) alternative fuel vehicle (AFV) purchase requirement. In considering AEP's Appeal, DOE determined that EE was correct that AEP was required to attempt acquisition of non-electric AFVs after the firm determined that electric vehicles were unavailable, although the firm had elected the electric vehicle option under section 490.307. DOE further determined that AEP's constructive knowledge of this requirement coupled with the firm's failure to show ''good faith efforts'' to acquire non-electric AFVs disqualified the firm from receiving equitable exemption relief.

Refund Applications

The Office of Hearings and Appeals issued the following Decisions and Orders concerning refund applications, which are not summarized. Copies of the full texts of the Decisions and Orders are available in the Public Reference Room of the Office of Hearings and Appeals.

Atlantic Richfield Co./Lou's Arco Service	RF304–15517	10/22/98
Enron Corp./W. Jayson Tusing	RR340–00003	10/22/98
Macmillard Oil Co./Parker Oil Co. et al	RF355–00004	10/19/98
Shell Oil Co./Plaquemine Oil Sales Corp	RF315–09975	10/21/98

Dismissals

The following submissions were dismissed.

Name	Case No.
City of Federal Way	VFA–0445
Cliff Sieling	VFA–0446
Coney Island Hospital	RG272–00165
Elview Construction, Inc	RF355–00027
Jacobson Warehouse Co., Inc	RF355–00034
Kuzzens, Inc	RF272–95307
Personnel Security Hearing	VSO–0224
322 Central Park West	RF272–95322

[FR Doc. 99–7918 Filed 3–30–99; 8:45 am]

BILLING CODE 6450–01–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6318–1]

Notice of Proposed Administrative Settlement Pursuant to the Resource Conservation and Recovery Act

AGENCY: Environmental Protection Agency.

ACTION: Notice; Request for public comment.

SUMMARY: In accordance with Section 7003(d) of the Resource Conservation and Recovery Act, 42 U.S.C. 9673(d), notice is hereby given of a proposed administrative settlement (''Consent Agreement'') concerning the Gila Tire Pile on the Gila River Indian Community Land located within the State of Arizona with the following parties: Maricopa County, Pinal County, and Blackwater Industrial Development Corporation. The settlement requires the respondents to remove the unburned tires from the site to an approved landfill facility no later than ten (10) days from the effective date of the Consent Agreement and to form a Working Committee with the Gila River Indian Community to establish a plan to remove and dispose of the burned tires no later than 160 days from the effective date of the Consent Agreement. In addition, the Consent Agreement requires Respondents to sample and characterize the burned tires within six (6) months from the date the Working Committee is formed, and provide to EPA, within twelve (12) months from the date that the Working Committee characterizes the burned tires, a work plan that identifies the preferred corrective measure and a schedule for implementation of the corrective measure. The corrective measure proposed for the burned tires shall be subject to EPA approval. Prior to approval, EPA will make the proposal available to the public for review and comment for thirty (30) days. After the close of the public comment period, EPA shall approve or modify the corrective measure. EPA shall then provide the respondents a sixty (60) day period to negotiate a modification of the agreement to include the implementation of the corrective measure. If agreement is not reached during this period, EPA reserves all rights it has to implement the corrective measure, including the issuance of a

unilateral administrative order directing respondents to implement the corrective measure. This settlement includes an EPA covenant not to sue the settling parties pursuant to Section 7003 of the Resource Conservation and Recovery Act, 42 U.S.C. 6973. For thirty (30) days following the date of publication of this notice, the Agency will receive written comment on the settlement. The Agency will consider all comments received and may modify or withdraw its consent to the settlement if comments received disclose facts or consideration which indicate that the proposed settlement is inappropriate, improper or inadequate. The Agency's response to any comments received will be available for public inspection at the Chandler Public Library located at 22 South Delaware Street, Chandler, AZ 85244 and at the U.S. Environmental Protection Agency Region 9 located at 75 Hawthorne Street, San Francisco, CA 94105 (in the library on the 13th floor). Commenters may request an opportunity for a public meeting in the affected area in accordance with Section 7003(d) of RCRA, 42 U.S.C. Section 6973(d).

DATES: Comments must be submitted on or before April 30, 1999.

ADDRESSES: The proposed settlement and additional background information relating to the settlement are available for public inspection at 75 Hawthorne Street, San Francisco, CA 94105. A copy of the proposed settlement may be obtained from Jean Killpack, Project Coordinator, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–2033. Comments should reference the Gila Tire Pile, located on the Gila River Indian Community Land within the State of Arizona and EPA docket number #7003–09–99–003. Comments should be addressed to Rich Vaille, Chief, State Programs and Compliance Branch, Waste Management Division, 75 Hawthorne Street, San Francisco, CA 94105.

FOR FURTHER INFORMATION CONTACT: Jean Killpack, Project Coordinator, 75 Hawthorne Street, San Francisco, CA 94105, (415) 744–2033.

SUPPLEMENTARY INFORMATION: On July 15, 1994, a user agreement was signed by Colinas Tire Recovery, Inc., and Blackwater Industrial Development Corporation, allowing for temporary storage of shredded tires by Colinas Tire Recovery on 10 acres of land located on the Gila River Indian Community reservation. The site is located two miles north of the City of Coolidge. During the year that followed the signing of the lease, approximately three million shredded tires (32,362 tons) collected from 14 Arizona Counties (excluding Pima County) were placed in 25 piles on the land by Colinas and its subcontractors.

On August 1, 1997, approximately two million tires caught on fire at the site. Thick black smoke, intense heat, high winds and dust created extreme conditions that hampered fire fighting efforts. The Gila River Indian Community, Pinal County, and the State of Arizona declared a State of Emergency. Air quality concerns and thick smoke required the evacuation of more than 300 people from the vicinity. To date, the burned tires still smolder.

EPA notified several Arizona Counties, two transporters, and Blackwater Industrial Development Corporation on June 1, 1998 that they were potentially responsible parties in the cleanup of the Gila Tire Pile, and requested a good faith offer to cleanup the site. On September 25, 1998, the Arizona counties, through Pinal County, submitted an offer to EPA which addressed the removal of the unburned tires and the cleanup of the burned tires. EPA accepted this offer and met with the Arizona Counties on December 8, 1998. EPA established a 60 day negotiation period to negotiate the terms of a Consent Agreement which reflected the September 25th good faith offer by the Counties. At the close of the 60 day period (February 8, 1999), EPA had not reached settlement with the Arizona Counties or transporters by the negotiation period deadline. EPA did reach a settlement with Respondent Blackwater Industrial Development Corporation.

On February 18, 1999, EPA issued a unilateral enforcement order to seven (7) Arizona Counties (Cochise, Coconino, Pinal, Maricopa, Mohave, Yavapai, Yuma) and two transporters (Colinas Tire Recovery, Inc., and REPCO Waste Recovery, Inc.) to remove the unburned tires and to submit a burned tire plan within certain time frames. The effective date of this order is March 19, 1999. However, prior to the unilateral enforcement order becoming effective, several respondents joined Blackwater Industrial Development Corporation and entered into the Consent Agreement with EPA. EPA has rescinded the unilateral enforcement order on March 18, 1999, and the Consent Agreement supersedes the enforcement order. EPA will issue a revised unilateral enforcement order to non-settling Respondents, as necessary.

Dated: March 22, 1999.

Alexis Strauss,

Acting Regional Administrator.

[FR Doc. 99–7909 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6318–2]

Chesapeake Bay Program

This notice is to request interested parties to submit their name and address to the U.S. Environmental Protection Agency's Chesapeake Bay Program (CBP) for the purpose of establishing a database for those interested in receiving Request for Proposals (RFPs) in order to apply for grants/cooperative agreements or interagency agreements. RFPs will be announced for several different themes in support for the Chesapeake Bay Program's goals.

Background

The Chesapeake Bay Program is the unique regional partnership which has been directing and conducting the restoration of the Chesapeake Bay. The Chesapeake Bay Program partners include the states of Maryland, Pennsylvania, and Virginia; the District of Columbia; the Chesapeake Bay Commission, a tri-state legislative body; the U.S. Environmental Protection Agency, representing the federal government; and participating advisory groups. The Chesapeake Bay Program's highest priority is to restore and protect the Bay's living resources and their habitats.

Eligibility

Only applicants/organizations that are colleges; universities; nonprofit organizations; or local, and state agencies are eligible to receive grants/cooperative agreements. Proposed work must be in support of Chesapeake Bay Program goals and commitments.

Goals of the Chesapeake Bay Program

The Chesapeake Bay Program has developed many goals and is implementing Bay-wide efforts to meet those goals. Some of the program's goals include: (1) Reduce nutrient loads (nitrogen and phosphorus to the Bay by 40% by 2000; (2) restore underwater grasses; (3) remove impediments to upstream fish migration; (4) manage the harvest of fish and shellfish to assure sustainability; (5) restore 2010 miles of riparian forest buffers along the Bay and its tributaries by 2010; (6) protect existing forest buffers; (7) encourage farmers to use nutrient management and other BMPs; (8) work with local governments to better manage the location and density of new development; (9) eliminate chemical toxicity in the Bay; (10) encourage businesses, communities and local

governments to practice pollution prevention; (11) encourage community-based activities; (12) develop and implement tributary strategies tailored to local needs; (13) provide for increased public access to Bay and its tributaries; and (14) educate the public about actions needed to protect and restore the Bay.

Themes

(1) Toxics: Implement critical elements of the Chesapeake Bay Basinwide Toxics Reduction and Prevention Strategy in order to ensure a Bay free of toxics; (2) nutrients: Sustain and accelerate efforts to meet the nutrient reduction goals in order to attain water quality conditions necessary to support the living resources of the Chesapeake Bay; (3) living resource/habitate restoration: Restore and protect living resources, their habits and ecological relationships; (4) land growth and stewardship: Encourage sustainable development patterns that integrate economic health, resource protection, and community participation; (5) monitoring: Integrate monitoring programs across the Chesapeake basin through the implementation of the Basin-wide Monitoring Strategy; (6) air: Link atmospheric deposition and loading of nutrients and chemical contaminants to effects on living resources and water quality in the Chesapeake Bay, its tributaries and watershed; (7) communication/outreach: Provide communication, outreach and education components of the Bay Program partnership; (8) modeling: Continue to develop, calibrate, and manage the application of linked airshed-watershed-estuarine hydrodynamic-water quality-living resources models to support the Bay Program's nutrient cap and for understanding the nutrient and sediment affects in the Chesapeake Bay system; and (9) data management: Implement distributed data and information servers networked to provide direct public access to synthesized Bay restoration and protection related data and information.

Submission

Clearly print or type your name, email address, organization, mailing address and what ''Theme(s)'' RFP you would be interested in receiving. Mail this information to: Environmental Protection Agency, Chesapeake Bay Program, (RFP Database), 410 Severn Ave, Suite 109, Annapolis, MD 21403 or access our website—www.chesapeakebay.net/rfp.htm. EPA will only accept addresses provided in writing, no phone calls.

William Matuszeski,

Director, Chesapeake Bay Program.

[FR Doc. 99–7913 Filed 3–30–99; 8:45 am]

BILLING CODE 6500–50–M

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30474; FRL–6070–9]

BioSafe Systems; Application to Register a Pesticide Product

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces receipt of an application to register the pesticide product Oxidate Broad Spectrum Bactericide/Fungicide, containing an active ingredient involving a changed pattern pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

DATES: Written comments must be submitted by April 30, 1999.

ADDRESSES: By mail, submit written comments identified by the document control number [OPP–30474] File Symbol (70299–E) to: Public Information and Records Intregrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. In person, bring comments to: Environmental Protection Agency, Rm. 119, Crystal Mall #2, 1921 Jefferson Davis Hwy., Arlington, VA.

Comments and data may also be submitted electronically to: opp-docket@epamail.epa.gov. Follow the instructions under ''SUPPLEMENTARY INFORMATION.'' No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this notice may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential may be disclosed publicly by EPA without prior notice. The public docket is available for public inspection in Rm. 119 at the Virginia address given above, from 8:30 a.m. to 4 p.m., Monday through Friday, excluding holidays.

FOR FURTHER INFORMATION CONTACT: By mail: Anne Ball, Biopesticides and Pollution Prevention Division (7511C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location/telephone number and e-mail address: Rm. 910W44, CM #2, 1921 Jefferson Davis Hwy, Arlington, VA, 703–308–8717; e-mail: ball.anne@epamail.epa.gov.

SUPPLEMENTARY INFORMATION: EPA received an application from BioSafe Systems, 80 Commerce St., Glastonbury, CT 06033, to register the pesticide product Oxidate Broad Spectrum Bactericide/Fungicide (EPA File Symbol 70299–E), containing the active ingredient hydrogen peroxide (hydrogen dioxide) at 27%. This application involves a changed use pattern for the active ingredient pursuant to the provisions of section 3(c)(4) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended. In addition to the currently registered uses, Oxidate will be used as a fungicide and bactericide on growing crops such as (beans, broccoli, cauliflower, cabbage, citrus, curcurbits, onions, peppers, potatoes, tomatoes, apples, filberts, bananas, grapes, stonefruits, and postharvest potatoes). Notice of receipt of this application does not imply a decision by the Agency on the application.

Notice of approval or denial of an application to register a pesticide product will be announced in the **Federal Register**. The procedure for requesting data will be given in the **Federal Register** if an application is approved.

Comments received within the specified time period will be considered before a final decision is made; comments received after the time specified will be considered only to the extent possible without delaying processing of the application.

Public Record and Electronic Submissions

The official record for this notice, as well as the public version, has been established for this notice under docket number [OPP–30474] (including comments and data submitted electronically as described below). A public version of this record, including printed, paper versions of electronic comments, which does not include any information claimed as CBI, is available for inspection from 8:30 a.m. to 4 p.m., Monday through Friday, excluding legal holidays. The official notice record is located at the address in ''ADDRESSES'' at the beginning of this document.

Electronic comments can be sent directly to EPA at:

opp-docket@epamail.epa.gov

Electronic comments must be submitted as an ASCII file avoiding the use of special characters and any form of encryption. Comment and data will also be accepted on disks in Wordperfect 5.1/6.1 or ASCII file format. All comments and data in electronic form must be identified by the docket number [OPP–30474] Electronic comments on this notice may be filed online at many Federal Depository Libraries.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pest, Product registration.

Dated: March 17, 1999.

Janet L. Andersen,

Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 99–7914 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–30459A/30417A/30443B; FRL–6059–5]

Certain Companies; Approval of Pesticide Product Registrations

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: This notice announces Agency approval of applications to register the pesticide products Flight Control, For-Mite Formic Acid, and NewLeaf Plus Potatoes, containing new active ingredients not included in any previously registered products pursuant to the provisions of section 3(c)(5) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended.

FOR FURTHER INFORMATION CONTACT: The Regulatory Action Leader, Biopesticides and Pollution Prevention Division (7511C), listed in the table below:

Regulatory Action Leader	Office location/telephone number	Address
Driss Benmhend	Rm. 902W37, CM #2, 703–308–9525, e-mail: benmhend.driss@epamail.epa.gov.	1921 Jefferson Davis Hwy, Arlington, VA
Linda Hollis	Rm. 9th fl., CM #2, 703–308–8733, e-mail: hollis.linda@epamail.epa.gov.	Do.
Diana Horne	Rm. 902, CM #2, 703–308–8367, e-mail: horne.diana@epamail.epa.gov.	Do.

SUPPLEMENTARY INFORMATION:

Electronic Availability: Electronic copies of this document and the Fact Sheet are available from the EPA home page at the **Federal Register** Environmental Sub-Set entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/).

The following notices of application were published in the **Federal Register** containing active ingredients not included in any previously registered pesticide products:

1. EPA issued a notice, published the **Federal Register** of August 28, 1998 (63 FR 46016)(FRL–6024–6), which announced that Environmental Biocontrol International, 3521 Silverside Road, Suite 1-L, Wilmington, DE 19810, had submitted an application to register the pesticide product Flight Control (EPA File Symbol 69969–R) containing the active ingredient (9,10-anthraquinone at 50%.

The application was approved on December 16, 1998, as Flight Control for use to repel geese in terrestrial areas at airports, commercial, industrial, and municipal sites, dumpsites, landfills, golf courses, ornamental, and conifer nurseries (EPA Registration Number 69969–1). (Driss Benmhend)

2. EPA published a notice in the **Federal Register** of August 6, 1996 (61 FR 40840)(FRL–5389–2), announcing that Mann Lake Ltd., County Road and First St., Hackensack, MN 56452, had submitted an application to register the pesticide product Formite Formic Acid (EPA File Symbol 61671–G) containing the active ingredient formic acid at 65%.

The application was approved on January 28, 1999 following reformulation, as For-Mite Formic Acid for the control of tracheal mites and the suppression of varroa mites in honeybees (EPA Registration Number 61671–3). (Diana Horne)

3. EPA published a notice in the **Federal Register** of December 9, 1997 (62 FR 64831)(FRL–5756–3), announcing that Monsanto Company 700 14th St., NW., Suite 1100, Washington, DC 20005, had submitted an application to register the plant pesticide product Potato Leafroll Virus Replicase Protein (EPA File Symbol 524-UOI) containing the active ingredient Potato Leafroll Virus Replicase Protein and the genetic material necessary for its production at 0.03%.

The application was approved on November 18, 1998, as NewLeaf Plus Potatoes containing the active ingredient Potato Leafroll Virus Resistance Gene (also known as orf1/orf2 gene) and the genetic material necessary for its production. The name of the active ingredient was changed to more accurately reflect that part of the plant pesticide responsible for providing the product with its pesticidal properties. This pure form of the plant-pesticide, resistance gene as expressed in potato cells is for use on potatoes (EPA Registration Number 524–498). (Linda Hollis)

The Agency has considered all required data on risks associated with the proposed use of 9,10-anthraquinone, formic acid, and Potato Leafroll Virus Resistance Gene and the genetic material necessary for its production, and information on social, economic, and environmental benefits to be derived from use. Specifically, the Agency has considered the nature of the pesticide and its pattern of use, application methods and rates, and level and extent of potential exposure. Based on these reviews, the Agency was able to make basic health safety determinations which show that use of 9,10-anthraquinone, formic acid, and Potato Leafroll Virus Resistance Gene and the genetic material necessary for its production when used in accordance with widespread and commonly recognized practice, will not generally cause unreasonable adverse effects to the environment.

More detailed information on these registrations is contained in EPA Pesticide Fact Sheets on 9,10-anthraquinone, formic acid, and Potato Leafroll Virus Resistance Gene and the genetic material necessary for its production.

A copy of the fact sheets for each of the active ingredients, which provides a summary description of the pesticides, use patterns and formulations, science findings, and the Agency's regulatory position and rationale, may be obtained from the National Technical Information Service (NTIS), 5285 Port Royal Road, Springfield, VA 22161.

In accordance with section 3(c)(2) of FIFRA, a copy of the approved labels, the lists of data references, the data and other scientific information used to support registration, except for material specifically protected by section 10 of FIFRA, are available for public inspection in the Public Information and Records Integrity Branch, Information Resources and Services Division (7502C), Office of Pesticide Programs, Environmental Protection Agency, Rm. 119, CM #2, Arlington, VA 22202 (703–305–5805). Requests for data must be made in accordance with the provisions of the Freedom of Information Act and must be addressed to the Freedom of Information Office (A-101), 401 M St., SW., Washington, DC 20460. Such requests should: (1) Identify the product name and registration number and (2) specify the data or information desired.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Pesticides and pests, Product registration.

Dated: March 9, 1999.

Kathleen D. Knox,

Acting Director, Biopesticides and Pollution Prevention Division, Office of Pesticide Programs.

[FR Doc. 99–7337 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50855; FRL–6069–9]

Issuance of an Experimental Use Permit

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted an experimental use permit to the following applicant. The permit is in accordance with, and subject to, the provisions of 40 CFR part 172, which defines EPA procedures with respect to the use of pesticides for experimental use purposes.

FOR FURTHER INFORMATION CONTACT: By mail: Joanne Miller, Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location, telephone number, and e-mail address: 1921 Jefferson Davis Highway, Rm. 241, CM #2, Arlington, VA, 703–305–6224, e-mail: miller.joanne@epa.gov.

SUPPLEMENTARY INFORMATION: EPA has issued the following experimental use permit:

264–EUP–123. Issuance. Rhone-Poulenc AG Company, P.O. Box 12014, 2 T.W. Alexander Drive, Research Triangle Park, NC 27709. This experimental use permit allows the use of 280 pounds of the herbicide isoxaflutole [5-cyclopropyl-4-(2-methylsulfonyl-4-trifluoromethylbenzoyl) isoxazole] on 2,000 acres of field corn to evaluate the control of various weeds. The program is authorized only in the States of Alabama, Delaware, Georgia, Idaho, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Oregon, Pennsylvania, Utah, Virginia, Washington, and Wisconsin. The experimental use permit is effective from March 1, 1999 to March 1, 2000.

Persons wishing to review this experimental use permit are referred to the designated contact person. Inquires concerning this permit should be directed to the person cited above. It is suggested that interested persons call before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Experimental use permits.

Dated: March 23, 1999.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 99–7769 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[OPP–50856; FRL–6070–8]

Issuance of Experimental Use Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: EPA has granted experimental use permits to the following applicants. These permits are in accordance with, and subject to, the provisions of 40 CFR part 172, which defines EPA procedures with respect to the use of pesticides for experimental use purposes.

FOR FURTHER INFORMATION CONTACT: By mail: Registration Division (7505C), Office of Pesticide Programs, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

In person or by telephone: Contact the designated person at the following address at the office location, telephone number, or e-mail address cited in each experimental use permit: 1921 Jefferson Davis Highway, Arlington, VA.

SUPPLEMENTARY INFORMATION: EPA has issued the following experimental use permits:

45639–EUP–60. Extension. AgrEvo USA Company, Little Falls Centre One, 2711 Centerville Road, Wilmington, DE 19808. This experimental use permit allows the use of 3,797 pounds of the herbicide glufosinate-ammonium on 2,543 acres of canola, rice, and sugar beet to evaluate the control of weed in glufosinate-ammonium tolerant canola, rice, and sugar beet and to eliminate non-glufosinate-ammonium tolerant canola and rice in seed production. The program is authorized only in the States of Arkansas, California, Colorado, Florida, Idaho, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Dakota, Oregon, Texas, Washington, and Wyoming. The experimental use permit is effective from March 10, 1999 to November 30, 1999. This permit is being issued with the condition that all canola, rice, and sugar beet commodities will be destroyed, except glufosinate-ammonium tolerant canola, rice, and sugar beet seed propagated for planting. (Eugene Wilson, Rm. 235, CM #2, 703–305–6103, e-mail: wilson.eugene@epa.gov)

352–EUP–166. Issuance. E.I. du Pont de Nemours and Company, Dupont Agricultural Products, Walker's Mill, Barley Mill Plaza, P.O. Box 80038, Wilmington, DE 19880–0038. This experimental use permit allows the use of 82.5 pounds of the insecticide indoxacarb on 150 acres of cotton on a crop destruct basis to evaluate the control of various insect pests. The program is authorized only in the States of Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, Oklahoma, South Carolina, Tennessee, and Texas. The experimental use permit is effective from March 9, 1999 to March 9, 2000. This permit is issued with the limitation that all treated crops will be destroyed or used for research purposes only. (Ann Sibold, Rm. 212, CM #2, 703–305–6502, e-mail: sibold.ann@epa.gov)

Persons wishing to review these experimental use permits are referred to the designated contact person. Inquires concerning these permits should be directed to the persons cited above. It is suggested that interested persons call

before visiting the EPA office, so that the appropriate file may be made available for inspection purposes from 8 a.m. to 4 p.m., Monday through Friday, excluding legal holidays.

Authority: 7 U.S.C. 136.

List of Subjects

Environmental protection, Experimental use permits.

Dated: March 17, 1999.

James Jones,

Director, Registration Division, Office of Pesticide Programs.

[FR Doc. 99–7433 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–F

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6317–8]

Cherokee Resources Superfund Sites Notice of Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of Proposed Settlement.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to settle claims for response costs under Section 122(g) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. 9622(g), in a *de minimis* settlement with the following party: Textile Printing. These claims relate to removal and response actions undertaken by EPA at the Cherokee Resources Sites on Berryhill Road and Summit Avenue in Charlotte, Mecklenburg County, North Carolina. Previous notices have been given for phase one and phase two of the *de minimis* settlement. This is an addendum to the second and final phase of the *de minimis* settlement for these Sites.

EPA will consider public comments on the proposed settlement relating to this party which are received by EPA within thirty (30) days of the date of publication of this notice. EPA may withdraw or withhold consent to the proposed settlement if such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. Environmental Protection Agency, Region 4, Waste Management Division, Atlanta Federal Center, 61 Forsyth Street, S.W., Atlanta, Georgia 30303–3104, 404–562–8887.

Written comments may be submitted to Ms. Batchelor at the above address within thirty (30) days of the date of publication.

Dated: March 12, 1999.

Anita L. Davis,

Acting Chief, Program Services Branch, Waste Management Division.

[FR Doc. 99–7911 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6317–9]

Transport One Acid Spill Superfund Site; Mt. Vernon, Rockcastle County, KY; Notice of Proposed Settlement

AGENCY: Environmental Protection Agency.

ACTION: Notice of proposed settlement.

SUMMARY: Under Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Environmental Protection Agency (EPA) has proposed to settle claims for response costs at the Transport One Acid Spill Superfund Site (the ''Site'') located in Mt. Vernon, Rockcastle County, Kentucky with Transport One. EPA will consider public comments on the proposed settlement for thirty days. EPA may withdraw from or modify the proposed settlement should such comments disclose facts or considerations which indicate the proposed settlement is inappropriate, improper, or inadequate. Copies of the proposed settlement are available from: Ms. Paula V. Batchelor, U.S. Environmental Protection Agency, Region 4, Program Services Branch, Waste Management Division, 61 Forsyth Street, S.W., Atlanta, Georgia 30303, (404) 526–8887.

Written comments may be submitted to Ms. Batchelor at the above address within 30 days of the date of publication.

Dated: March 16, 1999.

James L. Miller,

Acting Chief, Program Services Branch, Waste Management Division.

[FR Doc. 99–7912 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–M

ENVIRONMENTAL PROTECTION AGENCY

[FRL–6317–7]

Sun Laboratories Superfund Site/Atlanta, Georgia; Notice to Rescind Federal Register Notice Dated March 2, 1999

AGENCY: Environmental Protection Agency.

ACTION: Notice to Rescind Previous **Federal Register** Notice.

SUMMARY: On March 2, 1999 (64 FR 10145), the Environmental Protection Agency (EPA) published a Notice of Proposed Settlement for response costs incurred by EPA at the Sun Laboratories Site (Site) located in Atlanta, Georgia, with Nasaro Incorporated and Yoram Fishman. That notice was published prematurely. The purpose of this notice is to rescind EPA's March 2, 1999 **Federal Register** Notice regarding the settlement of response costs at the Site. The Notice of Proposed Settlement for the Site may be republished in the future following final approval of the settlement.

Dated: March 24, 1999.

Anita L. Davis,

Acting Chief, Program Services Branch, Waste Management Division.

[FR Doc. 99–7910 Filed 3–30–99; 8:45 am]

BILLING CODE 6560–50–M

FEDERAL MARITIME COMMISSION

Ocean Freight Forwarder License Applicants

Notice is hereby given that the following applicants have filed with the Federal Maritime Commission applications for licenses as ocean freight forwarders pursuant to section 19 of the Shipping Act of 1984 (46 U.S.C. app. 1718 and 46 CFR 510).

Persons knowing of any reason why any of the following applicants should not receive a license are requested to contact the Office of Freight Forwarders, Federal Maritime Commission, Washington, D.C. 20573.

De La Vega Group Services, Inc., 2237 S.W. 11 Street, Miami, FL 33135, Officer: Manuel Enrique De La Vega, President.

Dated: March 26 1999.

Bryant L. VanBrakle,

Secretary.

[FR Doc. 99–7893 Filed 3–30–99; 8:45 am]

BILLING CODE 6730–01–M

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 April 23, 1999.

A. Federal Reserve Bank of Cleveland (Paul Kaboth, Banking Supervisor) 1455 East Sixth Street, Cleveland, Ohio 44101-2566:

1. Fifth Third Bancorp, Cincinnati, Ohio; to acquire up to 13 percent of the voting shares of Michigan Community Bancorp, Limited, Sterling Heights, Michigan, and thereby indirectly acquire North Oakland Community Bank, Rochester Hills, Michigan, and Lakeside Community Bank, Sterling Heights, Michigan.

Board of Governors of the Federal Reserve System, March 25, 1999.

Barbara R. Lowrey,

Associate Secretary of the Board.

[FR Doc. 99–7817 Filed 3–30–99; 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 United States.

Each notice is available for inspection at the Federal Reserve Bank indicated. The notice also will be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether the proposal complies with the standards of section 4 of the BHC Act.

Unless otherwise noted, comments regarding the applications must be received at the Reserve Bank indicated or the offices of the Board of Governors not later than April 23, 1999.

A. Federal Reserve Bank of Richmond (A. Linwood Gill III, Assistant Vice President) 701 East Byrd Street, Richmond, Virginia 23261-4528:

1. Sandy Spring Bancorp, Inc., Olney, Maryland; to acquire Equitable Federal Savings Bank, Wheaton, Maryland, and thereby engage in operating a savings association, pursuant to § 225.28(b)(4)(ii) of Regulation Y.

Board of Governors of the Federal Reserve System, March 25, 1999.

Barbara R. Lowrey,

Associate Secretary of the Board.

[FR Doc. 99–7818 Filed 3–30–99; 8:45 am]

BILLING CODE 6210–01–F

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Proposed Data Collection Available for Public Comment and Recommendations

Section 3506(c)(2)(A) of the Paperwork Reduction Act of 1995 requires that Federal agencies provide a 60-day notice in the **Federal Register** concerning each proposed collection of information. The National Institute of Dental and Craniofacial Research (NIDCR) of the National Institutes of Health is publishing this notice to solicit public comment on a proposed revised data collection: The Impact and Costs of Sealants in Young Child Populations.

Comments are invited on: (a) The need for the information, (b) its practical utility, (c) the accuracy of the agency's burden estimate, and (d) ways to minimize burden on respondents. Send comments to Dr. Robert Selwitz, Office of Science Policy and Analysis, NIDCR, NIH, Natcher Building, Room 3AN–44J, 9000 Rockville Pike, Bethesda, MD 20892. Written comments must be received by June 1, 1999. To request a copy of the data collection plan and instrument, call Dr. Selwitaz on (301) 594-3977 (not a toll-free number).

Prposed Project

The Impact and Costs of Sealants in Young Child Populations—Revision—This study will assess the value (costs and effects) of providing dental sealants to the child populations with erupted permanent posterior teeth (approximaelty ages 6-12) under alternative financial support programs in existing oral health care delivery systems and across two socioeconomic groups. The primary objectives of the study are to determine if various levels of dental insurance influence the use of dental sealants, if costs affributable to sealants in a payment program provide value in teams of reduced caries, and if providing dental sealants to specific tooth surfaces of children merits the investment of limited resources within a larger oral health care program. The findings will provide valuable information concerning: 1. Real disease reductions possible using dental sealants for age-appropriate child populations within the existing oral health delivery system, 2. the costs of, and estimated savings from, providing sealants rather than restorative care, and 3. the marginal benefits and cost benefits of adding sealants to ''normative'' caries prevention efforts in age-appropriate child populations.

The number of required respondents has been reduced significantly due to the proposed modification of the approach to meeting the objectives of the study. Data gathered from approximately 400 children enrolled to date under the study's insurance coverage will be supplemented by administrative data already collected from large numbers of children who are receiving dental care through private

insurance, the Children's Health Insurance Program, and Medicaid. No contact with these children is required, and there will be no identifying information in the data obtained. The result of the proposed modification is that the respondent burden for the component of this study that involves direct contact with subjects is reduced to a small proportion of the original estimate. The burden estimates are as follows:

	No. of respondents	No. of responses per respondent	Avg/burden/ response (hours)
Parents	500	4	.125
Children	400	4	.129
Dentists	300	1	.033

Dated: March 18, 1999.

Yvonne H. du Buy,

Executive Officer, NIDCR.

[FR Doc. 99–7816 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Center for Scientific Review; Notice of Closed Meetings

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meetings.

The meetings will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: March 29, 1999.
Time: 11:00 AM to 12:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Garrett V. Keefer, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4190, MSC 7808, Bethesda, MD 20892, (301) 435–1152.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 1, 1999.
Time: 1:00 PM to 2:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Gopa Rakhit, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4154, MSC 7806, Bethesda, MD 20892, (301) 435–1721.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 2, 1999.
Time: 1:00 PM to 2:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Gopal C. Sharma, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7816, Bethesda, MD 20892, (301) 435–1783.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 ET1 (4M).
Date: April 2, 1999.
Time: 3:00 PM to 5:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Philip Perkins, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4148, MSC 7804, Bethesda, MD 20892, (301) 435–1718.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 5, 1999.
Time: 11:00 AM to 1:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Sami A. Mayyasi, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5112, MSC 7852, Bethesda, MD 20892, (301) 435–1169.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 5, 1999.
Time: 1:00 PM to 2:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Gopal C. Sharma, DVM, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7816, Bethesda, MD 20892, (301) 435–1783.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG–1 AARR–4 (02).
Date: April 5, 1999.
Time: 2:00 PM to 5:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Mohindar Poonian, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, MSC 7852, Bethesda, MD 20892, (301) 435–1168, poonianm@csr.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1–SSS5–09.
Date: April 6, 1999.
Time: 8:00 AM to 5:30 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: Nancy Schinowara, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4208, MSC 7814, Bethesda, MD 20892–7814 (301) 435–1173, shinowan@drg.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 6, 1999.

Time: 8:00 AM to 5:00 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.
Contact Person: Gertrude K. McFarland, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4110, MSC 7816, Bethesda, MD 20892, (301) 435–1784.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 6, 1999.
Time: 1:00 PM to 2:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Gopal C. Sharma, DVM, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4112, MSC 7816, Bethesda, MD 20892, (301) 435–1783.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG–1 AARR–3 (03).
Date: April 6, 1999.
Time: 1:00 PM to 3:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Mohindar Poonian, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5110, Bethesda, MD 20892, (301) 435–1168, poonianm@drg.nih.gov.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel.
Date: April 6, 1999.
Time: 2:00 PM to 3:30 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Jay Cinque, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5186, MSC 7846, Bethesda, MD 20892, (301) 435–1252.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1 BM–2 03.
Date: April 7, 1999.
Time: 8:30 AM to 5:30 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: William C. Branche, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 4182, MSC 7808, Bethesda, MD 20892, (301) 435–1148.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

Name of Committee: Center for Scientific Review Special Emphasis Panel, ZRG1–SB (2).
Date: April 7, 1999.
Time: 1:00 PM to 2:00 PM.
Agenda: To review and evaluate grant applications.
Place: NIH, Rockledge 2, Bethesda, MD 20892, (Telephone Conference Call).
Contact Person: Teresa Nesbitt, DVM, Scientific Review Administrator, Center for Scientific Review, National Institutes of Health, 6701 Rockledge Drive, Room 5118, MSC 7854, Bethesda, MD 20892, (301) 435–1172.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.306, Comparative Medicine, 93.306; 93.333, Clinical Research, 93.333, 93.337, 93.393–93.396, 93.837–93.844, 93.846–93.878, 93.892, 93.893, National Institutes of Health, HHS)

Dated: March 24, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7812 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The contract proposals and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the contract proposals, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel Refinement of New Assays for Direct Detection of Viral Nucleic Acids in Donated Organs.
Date: April 13, 1999.
Time: 8:30 AM to 11:30 AM.
Agenda: To review and evaluate contract proposals.
Place: Holiday Inn Chevy Chase, 5520 Wisconsin Avenue, Chevy Chase, MD 20815.
Contact Person: David T. George, NIH, NHLBI, DEA, Review Branch, Rockledge Building II, Room 7188, 6701 Rockledge Drive, Bethesda, MD 20892–7924, 301/435–0288.

This notice is being published less than 15 days prior to the meeting due to the timing limitations imposed by the review and funding cycle.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 23, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7813 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Heart, Lung, and Blood Institute; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Heart, Lung, and Blood Institute Special Emphasis Panel The Sleep Heart Health Study.
Date: April 22, 1999.
Time: 8:00 AM to 1:00 PM.
Agenda: To review and evaluate grant applications.
Place: Holiday Inn—Silver Spring, 8777 Georgia Avenue, Silver Spring, MD 20910.
Contact Person: Valerie L. Prenger, Health Science Administrator, NIH, NHLBI, DEA, Review Branch, Rockledge Center II, 6701

Rockledge Drive, Suite 7198, Bethesda, MD 20892–7924, (301) 435–0297.

(Catalogue of Federal Domestic Assistance Program Nos. 93.233, National Center for Sleep Disorders Research; 93.837, Heart and Vascular Diseases Research; 93.838, Lung Diseases Research; 93.839, Blood Diseases and Resources Research, National Institutes of Health, HHS)

Dated: March 23, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7814 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, RFA ES99–002 Xenobiotics & Neurodevelopmental Abnormalities.

Date: April 22–23, 1999.

Time: April 22, 1999, 7 p.m. to 10 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Institute of Environmental Health Sciences, Building 101, Main Conference Room, South Campus, Research Triangle Park, NC 27709.

Time: April 23, 1999, 8 a.m. to 5 p.m.

Agenda: To review and evaluate grant applications.

Place: Nat. Institute of Environmental Health Sciences, Building 101, Main Conference Room, South Campus, Research Triangle Park, NC 27709.

Contact Person: Linda K. Bass, Scientific Review Administrator, NIEHS, P.O. Box 12233 EC–24, Research Triangle Park, NC 27709, (919) 541–1307.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: March 23, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7809 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Environmental Health Sciences; Notice of Closed Meeting

Pursuant to section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2), notice is hereby given of the following meeting.

The meeting will be closed to the public in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), Title 5 U.S.C., as amended. The grant applications and the discussions could disclose confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the grant applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

Name of Committee: National Institute of Environmental Health Sciences Special Emphasis Panel, SBIR Phase 1 Contract Review.

Date: April 21, 1999.

Time: 1:00 PM to 5:00 PM.

Agenda: To review and evaluate contract proposals.

Place: Nat. Institute of Environmental Health Sciences, South Campus, Building 101 Conference Room, Research Triangle Park, NC 27709.

Contact Person: David Brown, Scientific Review Administrator, Nat'l Institute of Environmental Health Sciences, P.O. Box 12233, Research Triangle Park, NC 27709, (919) 541–4964.

(Catalogue of Federal Domestic Assistance Program Nos. 93.113, Biological Response to Environmental Health Hazards; 93.114, Applied Toxicological Research and Testing; 93.115, Biometry and Risk Estimation—Health Risks from Environmental Exposures; 93.142, NIEHS Hazardous Waste Worker Health and Safety Training; 93.143, NIEHS Superfund Hazardous Substances—Basic Research and Education; 93.894, Resources and Manpower Development in the Environmental Health Sciences, National Institutes of Health, HHS)

Dated: March 23, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7810 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

National Institute of Nursing Research; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Institute of Nursing Research Special Emphasis Panel, March 4, 1999, 1:00 PM to March 4, 1999, 5:00 PM, Building 45, Room 3AN–18B, MD, 20892 which was published in the **Federal Register** on February 19, 1999, 64 FR 8393.

The meeting will be held on March 30 instead of March 4 as previously published. The meeting is closed to the public.

Dated: March 24, 1999.

LaVerne Y. Stringfield,

Committee Management Officer, NIH.

[FR Doc. 99–7811 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Statement of Organization, Functions, and Delegations of Authority

Part N, National Institutes of Health, of the Statement of Organization, Functions, and Delegations of Authority for the Department of Health and Human Services (40 FR 22859, May 27, 1975, as amended most recently at 64 FR 7205, February 12, 1999, and redesignated from Part HN as Part N at 60 FR 56605, November 9, 1995), is amended as set forth below to reflect the reorganization of the Center for Information Technology (CIT). (1) Revise CIT's functional statement. (2) In the Office of the Director, CIT, revise the functional statement for the Office of the Director (NU1, formerly HNU1); retitle the Office of Administrative Management (NU14, formerly HNU14) as the Office of the Deputy Director; establish the Office of the Chief Technology Officer (NU1–2, formerly HNU1–2) and the Office of the Deputy Chief Information Officer (NU13, formerly HNU13); and abolish the Office of Information Technology and Planning (NU18, formerly HNU18). (3) Retitle the Office of Computational Bioscience (NU2, formerly HNU2) as the Division

of Computational Bioscience and revise the functional statement. (4) Retitle the Office of Telecommunications Management (NU4, formerly HNU4) as the Division of Network Systems and Telecommunications and revise the functional statement. (5) Establish the Division of Customer Support (NU6, formerly HNU6), the Division of Computer System Services (NU7, formerly HNU7), and the Division of Enterprise and Custom Applications (NU8, formerly HNU8). (6) Abolish the Office of Computing Resources and Services (NU3, formerly HNU3) and the Office of Information Resources Management (NU5, formerly HNU5).

Section N–B, Organization and Functions, is amended as follows:

Under the heading Center for Information Technology (NU, formerly HNU), delete the organizations and functional statements in their entirety and replace with the following:

Center for Information Technology (NU, formerly HNU). (1) Provides leadership for the determination of NIH computational and telecommunications needs at all levels and oversees the development of appropriate infrastructure support to meet identified needs; (2) develops, operates, and maintains a state-of-the-art regional computer facility and provides overall guidance based on legislation and policy that is responsive to the NIH mission; (3) develops and provides NIH information technology (IT) policy to implement legislative mandates, such as those under the Clinger-Cohen Act; Presidential and other Administration initiatives; and DHHS, OMB, and other policy and administrative requirements; (4) provides leadership and focus within NIH for the development and implementation of policy and standards in the area of information technology by identifying, documenting, and communicating information technology issues, problems, and solutions to the NIH community in a comprehensive and meaningful way; (5) establishes and operates the necessary organization and infrastructure to assure appropriate security, connectivity, and inter-operability across the NIH Institutes and Centers; off-campus locations, and remote access; (6) collaborates on, and provides for, research activities in the computational biosciences and statistics; (7) develops, administers, and manages NIH systems, and provides consulting services to the ICs, in support of administrative and business applications; and (8) serves as a Federal Data Processing Center for administrative, biomedical, and statistical computing, provides data processing and high performance computing facilities and integrated telecommunications data networks, and provides services to the DHHS and other Federal agencies.

Office of the Director (NU1, formerly HNU1). (1) Plans, directs, coordinates, and evaluates the Center's programs, policies, and procedures; and (2) provides analysis and guidance in the development of systems for the effective use of IT techniques and equipment in support of NIH programs.

Office of the Chief Technology Officer (NU1–2, formerly HNU1–2). (1) Advises the Center Director on NIH computational and telecommunications needs; (2) provides analysis and guidance in the development of systems in support of NIH-wide IT initiatives; (3) evaluates new technologies to provide planning guidance for Center programs and services; and (4) coordinates IT architectural management for the NIH.

Office of the Deputy Chief Information Officer (NU13, formerly HNU13). (1) Advises the Chief Information Officer on the direction and management of significant NIH IT program and policy activities under the relevant Federal statutes, regulations and policies; (2) develops, implements, manages, and oversees NIH IT activities related to IT legislation, regulations, and NIH and other Federal policies; (3) directs NIH's IT capital planning processes with regard to major IT investments, and provides leadership to ICs in enhancing and strengthening their IT program management to ensure compliance with legislative and policy requirements; (4) serves as the principal NIH liaison to the DHHS, its OPDIVs, and other Federal agencies on IT matters; (5) identifies critical IT issues and analyzes, plans, leads, and manges NIH's implementation of special DHHS or Federal initiatives related to management of IT resources; and (6) collaborates with NIH functional managers responsible for IT-related areas, such as acquisition, automated information systems security, information collection, the Freedom of Information Act, and the Privacy Act.

Office of the Deputy Director (NU14, formerly HNU14). (1) Provides guidance and support to the Center Director on the administrative and business management aspects of the Center's programs, policies, and procedures; (2) plans and manages the administrative services for the Center; (3) coordinates development and oversight of the CIT budget; (4) advises on the management and optimal use of human resources; (5) coordinates the Center's response to NIH-wide management programs; (6) provides advice on internal information technology activities, including strategic planning, budget planning, performance measurement, capacity management, and coordination of the acquisition of information processing resources, and oversees the Center's IT programs for compliance with regulatory IT requirements; (7) plans and carries out information dissemination activities for the Center; and (8) provides contract coordination services to the Center.

Division of Computational Bioscience (NU2, formerly HNU2). (1) Coordinates and manages all Center activities related to the conduct and support of NIH research in the computational biosciences and statistics; (2) applies computing technology to research involving molecular structure determination and modeling, protein and DNA sequence analysis, and biomedical imaging; (3) conducts and supports research in mathematical theory and biophysical instrumentation to explain biological phenomena in terms of chemistry and physics; (4) conducts research and development in computer science and computational engineering; (5) promotes the application of high performance computing to biomedical research, evaluates the overall performance of these programs, and represents the Center to the Federal Program in High Performance Computing and Communication (HPCC); (6) operates the CIT High Performance Computing Platforms and supports the NIH distributed scientific workstation efforts; and (7) communicates and collaborates with researchers, both within and outside NIH, to obtain and provide information concerning the Center's ongoing and future research, and support for research.

Division of Network Systems and Telecommunications (NU4, formerly HNU14). (1) Directs the engineering, design, implementation and support of network infrastructure and services for the NIH wide area network (NIHnet) to facilitate the use of scientific, administrative, and other business applications; (2) manages and directs NIH telecommunications systems; (3) develops technical requirements for the NIH ICs and implements telecommunications programs to meet the needs of the NIH community; (4) serves as the focal point for telecommunications service orders; (5) develops and disseminates recommended standards, policies and procedures for the nationwide implementation and management of NIH networking and telecommunications systems; (6) researches, develops, and tests next-generation networking/ telecommunications technologies; (7)

develops and supports applications using new network technologies, such as telemedicine and video conferencing; (8) provides consulting, guidance and support to the ICs to meet their network requirements; (9) serves as liaison to the NIH ICs and other DHHS components on networking/telecommunications activities to improve information infrastructure; (10) develops, implements, and supports remote access services to NIHnet; (11) provides technical support for wireless services; and (12) provides 24-hour telephone/network support service.

Division of Customer Support (NU6, formerly HNU6). (1) Provides centralized, integrated computer support services to the NIH computing community; (2) advocates customer needs to CIT management and represents services and policies to the Center's customers; (3) plays an active and participatory role in support of desktop computing to the end-user, including the seamless migration of desktop technologies in the areas of software, hardware, Internet, communications, and access; (4) coordinates and oversees the CIT Training Program for the benefit of the NIH computing community; (5) manages NIH-wide HelpDesk and implements problem tracking systems; and (6) provides central account establishment and management services for access to CIT systems.

Division of Computer System Services (NU7, formerly HNU7). (1) Plans, implements, operates, and supports centrally owned or administered computing resources for NIH enterprises use, ensuring interoperability among those resources and between them and other computing facilities owned by customer organizations; (2) promotes awareness and efficient and effective use of these computing resources by customer personnel through training, presentations, consultations, and documentation; (3) investigates new and emerging computing requirements of customer programs; (4) conducts research and development to identify, evaluate, and adapt new computer architectures and technologies to meet identified customer requirements and to enhance current service offerings; and (5) where appropriate, manages and operates departmental computing resources for IC, Office, or Center use.

Division of Enterprise and Custom Applications (NU8, formerly HNU8). (1) Supports the NIH enterprise business process through the development and management of both transaction and decision-support environments for administrative and business applications of the NIH, such as procurement, budget, accounting and human resource activities; (2) provides systems analysis, programming and application services to the NIH ICs and other Federal agencies; (3) provides databases administration and management services to the NIH; (4) provides World Wide Web development and support services to the NIH community; and (5) provides consulting services to the NIH ICs for applications development.

Delegations of Authority Statement: All delegations and redelegations of authority to offices and employees of NIH which were in effect immediately prior to the effective date of this reorganization and are consistent with this reorganization shall continue in effect, pending further redelegation.

Dated: March 17, 1999.

Harold Varmus,

Director, National Institutes of Health.

[FR Doc. 99–7815 Filed 3–30–99; 8:45 am]

BILLING CODE 4140–01–M

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR–4415–N–02]

Notice of Funding Availability for Mainstream Housing Opportunities for Persons With Disabilities (Mainstream Program) Fiscal Year 1999: Extension of Application Deadline

AGENCY: Office of the Assistant Secretary for Public and Indian Housing, HUD.

ACTION: Notice of funding availability (NOFA): extension of application deadline.

SUMMARY: On March 8, 1999, HUD published a NOFA that announced Fiscal Year 1999 funding of approximately $48.5 million in five-year budget authority for approximately 1,600 rental vouchers to enable persons with disabilities (elderly and non-elderly) to rent affordable private housing. The March 8, 1999 NOFA set an application deadline of May 7, 1999. This notice extends the deadline to June 30, 1999.

APPLICATION DUE DATE: June 30, 1999.

ADDITIONAL INFORMATION: The application deadline for submission is being extended because of changes made this year from previous NOFAs for the Mainstream program. New for Fiscal Year 1999 is HUD's opening of the Mainstream Program to the receipt of applications from non-profit disability organizations that provide services to disabled families. Also new is HUD's encouragement to PHAs and non-profit disability organizations to view each other as a possible contract administrator, or to be otherwise involved in the administration of the Section 8 vouchers that either party might receive under this NOFA.

If you are interested in applying for funding under the Mainstream Program, please read the NOFA published on March 8, 1999, at 64 FR 11301, which will provide you with detailed information regarding the submission of an application, Section 8 program requirements, the application selection process to be used by HUD in selecting applications for funding, and other valuable information relative to a PHA's or non-profit disability organization's application submission and participation in the Mainstream Program.

FOR FURTHER INFORMATION CONTACT: George C. Hendrickson, Housing Program Specialist, Office of Public and Assisted Housing Delivery, Department of Housing and Urban Development, Room 4216, 451 Seventh Street, SW, Washington, DC 20410–8000; telephone (202) 708–1872, ext. 4064. (The number listed above is not a toll-free number). Persons with hearing or speech impairments may access this number via TTY (text telephone) by calling the Federal Information Relay Service at 1–800–877–8339 (this is a toll-free number).

Dated: March 24, 1999.

Deborah Vincent,

General Deputy Assistant Secretary for Public and Indian Housing.

[FR Doc. 99–7824 Filed 3–30–99; 8:45 am]

BILLING CODE 4210–33–P

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

Notice of Availability (NOA) of a Final Environmental Impact Statement on the Proposed Expansion of the Big Muddy National Fish and Wildlife Refuge in Missouri

ACTION: Notice of Availability.

SUMMARY: This notice advises the public that a Final Environmental Impact Statement on the Proposed Expansion of the Big Muddy National Fish and Wildlife Refuge in Missouri will be available for public review beginning March 30, 1999. Comments and suggestions are invited.

DATES: Comments may be submitted until May 3, 1999, and will be considered during preparation of the Record of Decision.

ADDRESSES: Comments should be addressed to: Ms. Judy McClendon, U.S. Fish and Wildlife Service, 24385 State Highway 51, Puxico, Missouri 63960. Telephone: Toll-free 800/686–8339; or 573/222–6001. Individuals with speech or hearing impairments may call the Missouri Relay Services at 800/735–2966 (TTY). Fax: 573/222–6150. E-Mail: R3planning@fws.gov or judy__mcclendon@fws.mail.gov

FOR FURTHER INFORMATION CONTACT: Judy McClendon at the address, phone number, or E-Mail above. Individuals wishing copies of this Environmental Impact Statement (EIS) for review should immediately contact the above individual. Copies of the EIS or Summary have been sent to all agencies and individuals who participated in the scoping process and to all others who have already requested copies.

SUPPLEMENTARY INFORMATION: Ms. Judy McClendon, Wildlife Biologist, is the primary author of this document. The Fish and Wildlife Service (Service), Department of the Interior, has prepared a final EIS on the proposal to expand the Big Muddy National Fish and Wildlife Refuge in Missouri from its currently authorized 16,628 acres to a total of 60,000 acres.

The Big Muddy National Fish and Wildlife Refuge expansion would be accomplished by acquiring from willing sellers an additional 43,372 acres along the 20-county Missouri River floodplain from Kansas City, Missouri, to St. Louis, Missouri, and the lower 10 miles of major tributaries. Acquisition could include methods such as fee title purchase, easements or agreements with landowners, partnerships, or donations. Selection criteria, such as willing sellers, presence of remnant floodplain ecosystems, and potential ecosystem restoration capabilities, will be used to determine specific sites for acquisition. Management goals of the Big Muddy project are to restore acquired acreage to a natural floodplain condition which could include restoring bottomland forests, improve and restore wetland values, improve fishery and wildlife resources, and provide additional public use areas for fish and wildlife dependent recreation.

This action is designed to preserve and restore the natural river floodplain ecosystem, allow for management of viable and diverse fish and wildlife habitats, and provide for compatible fish and wildlife dependent recreation.

The major alternatives under consideration that were analyzed and evaluated during planning are: (A) No Action. The Big Muddy National Fish and Wildlife Refuge would not be expanded beyond the currently authorized 16,628 acres. This acreage figure amounts to 2.7 percent of the 800,000 acre floodplain in this reach of the Missouri River and is insufficient to protect the health of the Missouri River floodplain ecosystem; (B) Expand the Big Muddy National Fish and Wildlife Refuge to 60,000 acres by acquisition of 43,372 acres dispersed along the Missouri River corridor from its confluence with the Kansas River, near Kansas City, to its confluence with the Mississippi River, near St. Louis, Missouri. Expansion under Alternative B (Preferred) would allow approximately 8 percent of riverine habitat losses of the Missouri River and its floodplain from Kansas City to St. Louis, Missouri to be restored. This amount of floodplain ecosystem preservation, along with a combined 30,000 acres to be acquired by the U.S. Army Corps of Engineers and the Missouri Department of Conservation, will equal about 12 percent of the subject floodplain. Natural resource managers in the Midwest recommend preserving 10 to 20 percent of the floodplain.

Three other alternatives were considered but not analyzed. They include: (C) seek permanent protection of fish, wildlife, and habitats through cooperative agreements with landowners and other agencies with no acquisition of lands; (D) encourage private land programs to preserve or restore fish, wildlife, and their habitats without further acquisition; and (E) acquire the entire Missouri River floodplain from Kansas City to St. Louis, Missouri, about 800,000 acres.

Alternatives, C, D, And E were rejected because they did not have the capacity to address the Service's mandated responsibilities, did not provide permanent resource protection and restoration opportunities, failed to meet the purpose and need for which the Big Muddy National Fish and Wildlife Refuge was established, or were considered to be impractical and cost-prohibitive.

Other governmental agencies and members of the general public contributed to the planning and evaluation of the proposal and to the preparation of the EIS. The Notice of Intent to prepare the EIS was published in the **Federal Register** on November 28, 1995. Public open house meetings to receive comments on the Draft EIS were held in five locations in November 1997; a 90-day public comment period began in November 1997, and closed February 17, 1998. Over 500 comments were received and considered during preparation of the Final EIS. The Service gave presentations to county officials, conservation groups, other interested parties and the media, and informed the public through intermittent distribution of the *Big Muddy Update.* The Service's mailing list has over 1,800 names.

All comments received by May 3, 1999, will be considered in preparation of the Record of Decision for this proposed action.

Dated: March 22, 1999.

William F. Hartwig,

Regional Director.

[FR Doc. 99–7870 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–55–M

DEPARTMENT OF THE INTERIOR

Geological Survey

Biological Resources Division; Request for Public Comments on Information Collection To Be Submitted to OMB for Review Under the Paperwork Reduction Act

A request extending the information collection described below will be submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. Chapter 35). Copies of the proposed collection of information may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the proposal should be made within 60 days directly to the Bureau clearance officer, U.S. Geological Survey, 807 National Center, 12201 Sunrise Valley Drive., Reston, Virginia, 20192, telephone (703) 648–7313.

As required by OMB regulations at 5 CFR 1320.8(d)(1), the U.S. Geological Survey solicits specific public comments as to:

1. Whether the collection of information is necessary for the proper performance of the functions of the bureaus, including whether the information will have practical utility;

2. The accuracy of the bureau's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;

3. The quality, utility, and clarity of the information to be collected; and

4. How 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 forms of information technology.

Title: Frogwatch USA.

Current OMB Approval Number: 1028–0072.

Summary: The collection of information referred to herein applies to a World-Wide Web site that permits individuals to submit records of the number of calling amphibians at wetlands. The Web site is termed Frogwatch USA. Information will be used by scientists and federal, state, and local agencies to identify wetlands showing significant declines in populations of amphibians.

Estimated Annual Number of Respondents: 500.

Estimated Annual Burden Hours: 3,625 hours.

Affected Public: Primarily U.S. residents.

For Further Information Contact: To obtain copies of the survey, contact the Bureau clearance officer, U.S. Geological Survey, 807 National Center, 12201 Sunrise Valley Drive, Reston, Virginia, 20192, telephone (703) 648–7313, or see the website at www.mp2–pwrc.usgs.gov/frogwatch/.

Dated: March 23, 1999.

Susan Haseltine,

Assistant Chief Biologist for Science.

[FR Doc. 99–7795 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–Y7–M

DEPARTMENT OF THE INTERIOR

Bureau of Indian Affairs

Information Collection Submitted to the Office of Management and Budget for Review under the Paperwork Reduction Act

AGENCY: Bureau of Indian Affairs, Interior.

ACTION: Notice of reinstatement.

SUMMARY: This notice announces that the Bureau of Indian Affairs (BIA) has submitted the information collection request, OMB No. 1076–0017, for reinstatement under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). On June 5, 1998, the BIA published a Notice in the **Federal Register** (63 FR 30771) requesting comments on Application for Assistance/Services under the Financial Assistance and Social Services Program, the information collection proposed for reinstatement. One public comment was received during the 60-day comment period. The respondent recommended that the application form be divided into two separate forms, enlarging the print, and that Self-Governance Tribes be provided flexibility to develop their own forms. In response to the suggestions, the BIA stated that prior to 1992, there were two separate application forms. Based on the recommendations of a majority of tribes for brevity and ease of application, the forms were combined. The print is small because of the volume of information requested, but has been determined readable by users and caseworkers alike. Therefore, one comment was not sufficient to change the format. In response to the recommendation that the Self-Governance Tribes not be required to use the form, the BIA agrees that there is no statutory requirement for the Self-Governance Tribes to use the form. However, if the Tribes choose a different form, comparable data should be collected so that the information can be used for reporting and budget preparation purposes.

DATES: OMB is required to respond to this request within 60 days after publication of this notice in the **Federal Register**, but may respond after 30 days; therefore, your comments should be submitted to OMB by April 30, 1999 to assure maximum consideration.

ADDRESSES: Your comments and suggestions on the requirements should be made directly to the Attention: Desk Officer for the Department of the Interior, Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10102, 725 17th Street, NW, Washington, DC 20503. Please provide a copy to Mr. Larry Blair, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street NW, MS–4603-MIB, Washington, D.C. 20240.

FOR FURTHER INFORMATION CONTACT: Copies of the collection of information may be obtained by contacting Larry Blair, Office of Tribal Services, Bureau of Indian Affairs, Department of the Interior, 1849 C Street NW, MS–4603–MIB, Washington, D.C. 20240. Telephone: (202) 208–2479.

SUPPLEMENTARY INFORMATION:

I. Abstract

The information collection is in compliance with 25 CFR Part 20. The information is used to determine eligibility for services and funding of welfare assistance funds which includes general assistance, child welfare assistance, and miscellaneous assistance. In addition, the BIA uses this data to measure program performance and for gathering data to prepare the annual program budget justification.

II. Request for Comments

We specifically request your comments be submitted to OMB as directed in the addresses section. Please send a copy to the BIA. Comments should be submitted within 30 days concerning the following:

1. Is the collection of information necessary for the proper performance of the functions of the BIA; does the information have practical utility;
2. Is BIA's estimate of the burden of the information collection accurate; are the methodology and assumptions used valid;
3. Can the quality, utility and clarity of the information collected be improved, and,
4. Can the burden of the information collection be minimized for those who are to respond; is the use of appropriate automated electronic, mechanical or other forms of information technology considered.

III. Data

Title of the Collection of Information: Department of the Interior, Bureau of Indian Affairs, Application for Financial Assistance and Social Services Program.

OMB Number: 1076–0017.

Affected Entities: Members of Indian tribes and their members who are living on a reservation or near-reservation.

Frequency of Response: Annual.

Estimated Number of Annual Responses: 200,000 applicants.

Estimated Time per Application: 15 minutes.

Estimated Total Annual Burden Hours: 50,000 hours.

Dated: March 25, 1999.

Kevin Gover,

Assistant Secretary—Indian Affairs.

[FR Doc. 99–7854 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–02–P

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[CA–670–1430–00; CACA–40068]

Notice of Realty Action; Leasing of Public Lands for Compromise Settlement of Litigation

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: The Bureau of Land Management (BLM) proposes to offer a 20-year lease on a parcel of public land located in sections 10 and 15 of T. 17 S., R. 7 E., San Bernardino Meridian. This non-competitive lease is being offered as part of a court stipulation and order for compromise settlement of long standing litigation. The land has been examined and found suitable for leasing under the provision of Section 302 of the Federal Land Policy and Management Act (FLPMA) of 1976, and 43 CFR Part 2920.

FOR FURTHER INFORMATION CONTACT: Lynda Kastoll, Realty Specialist, El Centro Field Office, 1661 South 4th Street, El Centro, CA 92243, (760) 337–4421.

SUPPLEMENTARY INFORMATION: The lease is intended to authorize existing improvements. The lease granted under this provision would be assignable and renewable in the same manner as other Part 2920 leases, subject to BLM approval, and other relevant provisions of Part 2920. No new development or surface disturbing activities except maintenance of improvements now in place shall be allowed without prior written approval from the BLM authorized officer. The subject of the lease is a narrow strip of land approximately 24 feet wide and 1,386 feet long, containing .76 acre, generally described as follows:

T. 17 S., R. 7 E., San Bernardino Meridian
Sec. 10, SW¼SW¼SW¼;
Sec. 15, NW¼NW¼NW¼NW¼;

as shown on the dependent resurvey of February 23, 1990.

Dated: March 24, 1999.

Elayn Briggs,

Acting Field Manager.

[FR Doc. 99–7875 Filed 3–30–99; 8:45 am]

BILLING CODE 4310–40–P

INTERNATIONAL TRADE COMMISSION

[Investigations Nos. 701–TA–A (Review) and 731–TA–157 (Review)]

Carbon Steel Wire Rod From Argentina

AGENCY: United States International Trade Commission.

ACTION: Scheduling of full five-year reviews concerning the suspended countervailing duty investigation and the antidumping duty order on carbon steel wire rod from Argentina.

SUMMARY: The Commission hereby gives notice of the scheduling of full reviews pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether termination of the suspended countervailing duty investigation or revocation of the antidumping duty order on carbon steel wire rod from Argentina would be likely to lead to continuation or recurrence of material injury. For further information concerning the conduct of these reviews 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 FR 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: March 23, 1999.

FOR FURTHER INFORMATION CONTACT: Sioban Maguire (202–708–4721), 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 February 4, 1999, the Commission determined that responses to its notice of institution of the subject five-year reviews were such that full reviews pursuant to section 751(c)(5) of the Act should proceed (64 FR 8120, February 18, 1999). A record of the Commissioners' votes and the Commission's statement on adequacy are available from the Office of the Secretary and at the Commission's web site.

Participation in the Reviews and Public Service List

Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in these reviews as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the reviews need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the reviews.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in these reviews available to authorized applicants under the APO issued in the reviews, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the reviews. A party granted access to BPI following publication of the Commission's notice of institution of the reviews need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in the reviews will be placed in the nonpublic record on July 14, 1999, and a public version will be issued thereafter, pursuant to § 207.64 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with the reviews beginning at 9:30 a.m. on August 3, 1999, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before July 26, 1999. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on July 29, 1999, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing .

Written Submissions

Each party to the reviews may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.65 of the Commission's rules; the deadline for filing is July 23, 1999. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.67 of the Commission's rules. The deadline for filing posthearing briefs is August 12, 1999; witness testimony must be filed

no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the reviews may submit a written statement of information pertinent to the subject of the reviews on or before August 12, 1999. On September 24, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before September 29, 1999, but such final comments must not contain new factual information and must otherwise comply with § 207.68 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, 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 §§ 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the reviews must be served on all other parties to the reviews (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.

Authority: These reviews are 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: March 26, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99–7877 Filed 3–30–99; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 332–388]

Simplification of the Harmonized Tariff Schedule of the United States

AGENCY: United States International Trade Commission.

ACTION: Release of proposed schedule for public comment.

EFFECTIVE DATE: March 25, 1999.

FOR FURTHER INFORMATION CONTACT: Eugene A. Rosengarden, Director, Office of Tariff Affairs and Trade Agreements (O/TA&TA) (202–205–2592), or staff members listed below. The O/TA&TA fax number is 202–205–2616. Mr. Rosengarden may also be reached via Internet e-mail at *rosengarden@usitc.gov.* Hearing impaired individuals are advised that information on this matter can be obtained by contacting our TDD terminal on 202–205–1810. Media representatives should contact Margaret O'Laughlin, Public Affairs Officer (202–205–1819). This notice, and any subsequent notices published pursuant to section 332(g) of the Tariff Act of 1930, may be obtained from the ITC Internet web server: *http://www.usitc.gov.*

SUPPLEMENTARY INFORMATION: On November 5, 1997, the Commission instituted investigation No. 332–388, Simplification of the Harmonized Tariff Schedule of the United States (HTS); subsequently, on February 25, 1998, the Commission issued a revised schedule for the subject investigation. That revised schedule calls for the publication of draft HTS chapters for public comment on April 1, 1999, with the deadline for public comments being June 30, 1999.

The request letter directed the Commission to work to alleviate compliance and administrative burdens; to utilize concession duty-rate levels scheduled to be effective on January 1, 2004; to suggest simplification of the nomenclature structure without proposing duty-rate changes having a significant effect on U.S. industry and trade; to suggest appropriate ways to reflect column 2 (statutory) duty rates; to convert specific, compound and complex rates of duty to their ad valorem equivalents, where possible, using data for the three most recent calendar years; and to propose appropriate simplification of statistical reporting categories. However, for this initial draft, trade data for 1997 only have been used for such conversions; slight adjustments in the proposed rates should be expected when the complete data are employed.

Due to the length of the draft schedule and cross-reference table, they are being made available over the Internet only, and the electronic files in PDF format have been placed on the Commission's web site for inspection and/or downloading. A printed copy of the draft schedule has been placed in the Secretary's docket section, and a second copy is available in O/TA&TA. Questions may be directed to the following staff members:

General comments: Eugene A. Rosengarden, Director (202–205–2595) Office of Tariff Affairs and Trade Agreements

General legal notes: Janis L. Summers, Attorney-adviser (202–205–2605)

Chapters 1–24: Ronald H. Heller, Nomenclature Analyst (202–205–2596)

Chapters 25–26: Lawrence A. DiRicco, Nomenclature Analyst (202–205–2606)

Chapters 27–40: Frederick Schottman, Nomenclature Analyst (202–205–2077)

Chapters 41–49: Ronald H. Heller (202–205–2596)

Chapters 50–63: Janis L. Summers (202–205–2605)

Chapters 64–83: Lawrence A. DiRicco (202–205–2606)

Chapters 84–85: Craig M. Houser, Nomenclature Analyst (202–205–2597)

Chapters 86–89: Lawrence A. DiRicco (202–205–2606)

Chapters 90–91: Craig M. Houser (202–205–2597)

Chapters 92–97: Lawrence A. DiRicco (202–205–2606)

Statistical reporting: Gil Whitson (202–205–2602)

WRITTEN SUBMISSIONS: Interested persons or entities are invited to submit written statements on the draft simplified HTS. Written statements should be submitted as quickly as possible, and follow-up statements are permitted; but all statements must be received at the Commission by the close of business on June 30, 1999, in order to be considered and made part of the record. The Commission notes that it is particularly interested in receiving input from the private sector regarding the proposed treatment of particular goods, as well as general comments about the changes suggested by the draft simplified HTS. Commercial or financial information which a submitter desires the Commission to treat as confidential must be submitted on separate sheets of paper, each marked ''Confidential Business Information'' at the top. All submissions requesting confidential treatment must conform with the requirements of § 201.6 of the Commission's *Rules of Practice and Procedure* (19 CFR 201.6). All written submissions, except for confidential business information, will be available for inspection by interested persons. All submissions should be addressed to the Office of the Secretary, United States International Trade Commission, 500 E Street SW., Washington, DC 20436. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means.

Issued: March 26, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99–7878 Filed 3–30–99; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Investigation No. 701–TA–224 (Review)]

Live Swine From Canada

AGENCY: United States International Trade Commission.

ACTION: Scheduling of a full five-year review concerning the countervailing duty order on live swine from Canada.

SUMMARY: The Commission[1] hereby gives notice of the scheduling of a full review pursuant to section 751(c)(5) of the Tariff Act of 1930 (19 U.S.C. 1675(c)(5)) (the Act) to determine whether revocation of the countervailing duty order on live swine from Canada would be likely to lead to continuation or recurrence of material injury. 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 FR 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: March 23, 1999.

FOR FURTHER INFORMATION CONTACT: Karen Taylor (202–708–4101), 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 March 5, 1999, the Commission determined that responses to its notice of institution of the subject five-year review were such that a full review pursuant to section 751(c)(5) of the Act should proceed (64 FR 12352, March 12, 1999). A record of the Commissioners' votes and the Commission's statement on adequacy are available from the Office of the Secretary and at the Commission's web site.

Participation in the Review and Public Service List

Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in this review as parties must file an entry of appearance with the Secretary to the Commission, as provided in § 201.11 of the Commission's rules, by 45 days after publication of this notice. A party that filed a notice of appearance following publication of the Commission's notice of institution of the review need not file an additional notice of appearance. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the review.

Limited Disclosure of Business Proprietary Information (BPI) Under an Administrative Protective Order (APO) and BPI Service List

Pursuant to § 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in this review available to authorized applicants under the APO issued in the review, provided that the application is made by 45 days after publication of this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the review. A party granted access to BPI following publication of the Commission's notice of institution of the review need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff Report

The prehearing staff report in the review will be placed in the nonpublic record on August 26, 1999, and a public version will be issued thereafter, pursuant to section 207.64 of the Commission's rules.

Hearing

The Commission will hold a hearing in connection with the review beginning at 9:30 a.m. on September 16, 1999, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before September 8, 1999. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on September 13, 1999, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by §§ 201.6(b)(2), 201.13(f), 207.24, and 207.66 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written Submissions

Each party to the review may submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of § 207.65 of the Commission's rules; the deadline for filing is September 2, 1999. Parties may also file written testimony in connection with their presentation at the hearing, as provided in § 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of § 207.67 of the Commission's rules. The deadline for filing posthearing briefs is October 5, 1999; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the review may submit a written statement of information pertinent to the subject of the review on or before October 5, 1999. On October 29, 1999, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before November 2, 1999, but such final comments must not contain new factual information and must otherwise comply with § 207.68 of the Commission's rules. All written submissions must conform with the provisions of § 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of §§ 201.6, 207.3, 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 §§ 201.16(c) and 207.3 of the Commission's 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

[1] Commissioner Crawford is not participating in this review.

certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Authority: This review is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to § 207.62 of the Commission's rules.

Issued: March 24, 1999.

By order of the Commission.

Donna R. Koehnke,

Secretary.

[FR Doc. 99–7876 Filed 3–30–99; 8:45 am]

BILLING CODE 7020–02–P

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: number of full-time law enforcement employees as of October 31.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until June 1, 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: Reinstatement, without change, or a previously approved collection for which approval has expired.

(2) The title of the form/collection: Number of Full-Time Law Enforcement Employees as of October 31.

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form 1–711a/1–711b/1–711c. 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 to determine the number of Civilian and sworn full-time law enforcement employees throughout the United States. Data are tabulated and published in the annual *Crime in the United States.*

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to reply: 17,667 agencies with 17,667 responses (including zero reports); and with an average of 8 minutes a year per responding agency devoted to compilation of data for this information collection.

(6) An estimate of the total public burden (in hours) associated with this collection: 2,356 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, N.W., Washington, D.C. 20530.

Dated: March 26, 1999.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99–7850 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–02–M

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: law enforcement officers killed and assaulted (LEOKA).

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until June 1, 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: Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) The title of the form/collection: Law Enforcement Officers Killed and Assaulted (LEOKA).

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form: 1–705. 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 provide data regarding Law Enforcement Offices Killed and Assaulted throughout the United States. Data is tabulated and published in the comprehensive annual *Law Enforcement Officers Killed and Assaulted.*

(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: 17,667 agencies with 212,004 estimated annual responses (includes zero reports); and with an average completion time of 7 minutes a month per responding agency.

(7) An estimate of the total public burden (in hours) associated with this collection: 24,734 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, N.W., Washington, D.C. 20530.

Dated: March 26, 1999.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99–7851 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–02–M

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: Monthly return of arson offenses known to law enforcement.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until June 1, 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: Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) The title of the form/collection: Monthly Return of Arson Offenses Known to Law Enforcement.

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form: 1–725. 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 arson offenses committed throughout the United States. Data is tabulated and published in the annual *Crime in the United States.*

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to reply: 17,667 agencies with 212,004 estimated annual responses (includes zero reports); and with an average completion time of 9 minutes a month per report.

(6) An estimate of the total public burden (in hours) associated with this collection: 31,801 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, N.W., Washington, D.C. 20530.

Dated: March 6, 1999.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99–7852 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–02–M

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: Analysis of law enforcement officers killed and assaulted.

The proposed information collection is published to obtain comments from the public and affected agencies. Comments are encouraged and will be accepted until June 1, 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 information 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: Reinstatement, without change, of a previously approved collection for which approval has expired.

(2) The title of the form/collection: Analysis of Law Enforcement Officers Killed and Assaulted.

(3) The agency form number, if any, and applicable component of the department sponsoring the collection. Form: 1–728. 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. Collection will be printed in English and Spanish. This collection is needed to provide data regarding Law Enforcement Officers Killed and Assaulted throughout the United States. Date is analyzed, tabulated, and published in the comprehensive annual *Law Enforcement Officers Killed and Assaulted.*

(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: 17,667 agencies with 570 estimated annual responses (zero reports are not required); and with an average of 1 hour per report per responding agency.

(7) An estimate of the total public burden (in hours) associated with this collection: 570 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, N.W., Washington, D.C. 20530.

Dated: March 26, 1999.

Robert B. Briggs,

Department Clearance Officer, United States Department of Justice.

[FR Doc. 99–7853 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–02–M

DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

Agency Information Collection Activities: Proposed Collection; Comment Request

ACTION: Notice of Information Collection under Review: Application for Transmission of Citizenship Through a Grandparent.

The Department of Justice, Immigration and Naturalization Service (INS) has submitted the following information collection request to the Office of Management and Budget (OMB) for review and clearance in accordance with the Paperwork Reduction Act of 1995. The information collection was previously published in the **Federal Register** on January 6, 1999 at 64 FR 911, allowing for a 60-day public comment period. No comments were received by the INS on this proposed information collection.

The purpose of this notice is allow an additional 30 days for public comments. Comments are encouraged and will be accepted until April 30, 1999. This process is conducted in accordance with 5 CFR 1320.10.

Written comments and/or suggestions regarding the items contained in this notice, especially regarding the estimated public burden and associated response time should be directed to the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Stuart Shapiro, Department of Justice Desk Officer, Room 10235, Washington, DC 20530; 202–395–7316.

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 the proper performance of the functions of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, 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 collection:

Type of Information Collection: Reinstatement without change of a previously approved collection.

(2) *Title of the Form/Collection:* Application of Transmission of Citizenship Through a Grandparent.

(3) *Agency form number, if any, and the applicable component of the Department of Justice sponsoring the collection:* Form N–600/N–643, Adjudication Division, Immigration and Naturalization Service.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract:* Primary: Individuals or Households. The collection of this information is required by Section 322 of the Immigration and Nationality Technical Corrects Act of 1994 which allows for a United States citizen parent to use the citizen grandparents residence for transmission of citizenship onto his or her natural or adopted child.

(5) An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond: 9,641 responses at 30 minutes (.5 hours) per response.

(6) *An estimate of the total public burden (in hours) associated with the collection:* 4,820 annual burden hours.

If you have additional comments, suggestions, or need a copy of the proposed information collection instrument with instructions, or additional information, please contact Richard A. Sloan, 202–514–3291, Director, Policy Directives and Instructions Branch, Immigration and Naturalization Service, U.S. Department of Justice, Room 5307, 425 I Street, NW., Washington, DC 20536. Additionally, comments and/or suggestions regarding the item(s) contained in this notice, especially regarding the estimated public burden and associated response time may also be directed to Mr. Richard A. Sloan.

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: March 23, 1999.

Richard A. Sloan,

Department Clearance Officer, United States Department of Justice, Immigration and Naturalization Service.

[FR Doc. 99–7796 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–10–M

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; (Reinstatement, with change, of a previously approved collection for which approval has expired); Census of Jails, Form CJ–3, CJ–3 Addendum, CJ–3A, CJ–3B.

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. Office of Management and Budget approval is being sought for the information collection listed below. This proposed information collection was previously published in the **Federal Register** on January 22, 1999, allowing for a 60-day public comment period.

The purpose of this notice is to allow an additional 30 days for public comment until April 30, 1999. This process is conducted in accordance with 5 CFR 1320.10.

Written 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 the Office of Management and Budget, Office of Information and Regulatory Affairs, Attention: Department of Justice Desk Officer, Washington, DC 20530. Additionally, comments may be submitted to OMB via facsimile to (202) 395–7285. Comments may also be submitted to the Department of Justice (DOJ), Justice Management Division, Information Management and Security Staff, Attention: Department Clearance Officer, Suite 850, 1001 G Street, NW, Washington, DC 20530. Additionally, comments may be submitted to DOJ via facsimile to (202) 514–1590.

Written comments and/or 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 the proper performance of the function of the agency, including whether the information will have practical utility;

(2) Evaluate the accuracy of the agency's estimate of the burden of the proposed collection of information, 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:* Extension of previously approved collection.

(2) *The title of the form/collection:* 1999 Census of Jails (CJ–3, CJ–3 Addendum, CJ–3A, CJ–3B).

(3) *The agency form number, if any, and the applicable component of the Department sponsoring the collection:* Bureau of Justice Statistics, Office of Justice Programs, U.S. Department of Justice.

(4) *Affected public who will be asked or required to respond, as well as a brief abstract: Primary:* Federal, state, local, and tribal governments; multi-jurisdictional jail facilities; private jail facilities.

The Census of Jails is the foundation for all national statistics on local jails and inmates. Whether the statistics are based on data reported by jail administrators from official records or on data reported by jail inmates in personal interviews, the census provides the frame from which to generalize to the nation and to track changes over time. Without a periodic census, sample surveys would be unreliable, and statistics would be based on a group of jails of unknown representativeness, that were simply convenient to contact and willing to respond. Previous censuses were conducted in 1970, 1972, 1978, 1983, 1988, and 1993. The censuses include all locally administered confinement facilities that hold inmates beyond arraignment and are staffed by municipal or county employees. The censuses also include jails operated under contract for local governments (17 in 1993). Reporting units are typically jurisdictions (regional, county, parish, or municipal jails), which may contain one or more jail facilities (sites with separate administrators, staff, and budgets). Data are provided by a reporter in each jurisdiction, usually a jail administrator or county sheriff. 42 U.S.C. 3732 et seq. authorizes the Bureau of Justice Statistics, U.S. Department of Justice to collect this information.

(5) *An estimate of the total number of respondents and the amount of time estimated for an average respondent to respond/reply:* It is estimated that approximately 3,558 respondents will take an average of 1 hour to complete the census.

(6) *An estimate of the public burden (in hours) associated with the collection:* The total hour burden to complete the census is 3,289 public burden hours.

If additional information is required contact: Ms. 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: March 26, 1999.

Brenda E. Dyer,

Department Deputy Clearance Officer, Department of Justice.

[FR Doc. 99–7849 Filed 3–30–99; 8:45 am]

BILLING CODE 4410–18–M

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: 10 CFR Part 30—Rules of General Applicability to Domestic Licensing of Byproduct Material.

2. Current OMB Approval Number: 3150–0017.

3. How often the collection is required: Required reports are collected

and evaluated on a continuing basis as events occur. There is a one-time submittal of information to receive a license. Renewal applications are submitted every 10 years. Information submitted in previous applications may be referenced without being resubmitted. In addition, recordkeeping must be performed on an on-going basis.

4. Who is required or asked to report: All persons applying for or holding a license to manufacture, produce, transfer, receive, acquire, own, possess, or use radioactive byproduct material.

5. The number of annual respondents: 5,529 NRC licensees and 16,000 Agreement State licensees.

6. The number of hours needed annually to complete the requirement or request: 46,937 hours for the NRC licensees (19,364 reporting + 27,573 recordkeeping) and 111,753 hours for the Agreement State licensees (38,344 reporting + 73,409 recordkeeping).

7. Abstract: 10 CFR Part 30 establishes requirements that are applicable to all persons in the United States governing domestic licensing of radioactive byproduct material. The application, reporting and recordkeeping requirements are necessary to permit the NRC to make a determination whether the possession, use, and transfer of byproduct material is in conformance with the Commission's regulations for protection of the public health and safety.

Submit, by June 1, 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/NEWS/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 E6, Washington, DC 20555–0001, or by telephone at 301–415–7233, or by Internet electronic mail at BJS1@NRC.GOV.

Dated at Rockville, Maryland, this 25th day of March 1999.

For the U.S. Nuclear Regulatory Commission.

Brenda Jo. Shelton,

NRC Clearance Officer, Office of the Chief Information Officer.

[FR Doc. 99–7841 Filed 3–30–99; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF LABOR

Pension and Welfare Benefits Administration

Medical Child Support Working Group

AGENCY: Pension and Welfare Benefits Administration, Department of Labor.

ACTION: Notice of open meeting.

SUMMARY: Pursuant to section 10(d) of the Federal Advisory Committee Act (FACA), notice is given of the second meeting of the Medical Child Support Working Group (MCSWG). The Medical Child Support Working Group was jointly established by the Secretaries of the Department of Labor (DOL) and the Department of Health and Human Services (DHHS) under section 401(a) of the Child Support Performance and Incentive Act of 1998. The purpose of the MCSWG is to identify the impediments to the effective enforcement of medical support by State child support enforcement agencies, and to submit to the Secretaries of DOL and DHHS a report containing recommendations for appropriate measures to address those impediments.

DATES: The meeting of the MCSWG will be held on Tuesday, April 13, 1999, from 11 a.m. to approximately 5:00 p.m.

ADDRESSES: The meeting will be held in Room N–3437, Conference Room A/B/C, at the offices of the U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC. All interested parties are invited to attend this public meeting. Seating may be limited and will be available on a first-come, first-serve basis. Persons needing special assistance, such as sign language interpretation or other special accommodation, should contact the Executive Director of the Medical Child Support Working Group, Office of Child Support Enforcement at the address listed below.

FOR FURTHER INFORMATION CONTACT: Ms. Samara Weinstein, Executive Director, Medical Child Support Working Group, Office of Child Support Enforcement, Fourth Floor East, 370 L'Enfant Promenade, SW, Washington, DC 20447 (telephone (202) 401–6953; fax (202) 401–5559; e-mail: sweinstein@acf.dhhs.gov). These are not toll-free numbers. The date, location and time for subsequent MCSWG meetings will be announced in advance in the **Federal Register**.

SUPPLEMENTARY INFORMATION: Pursuant to Section 10(d) of the Federal Advisory Committee Act, as amended (5 U.S.C. Appendix 2) (FACA), notice is given of a meeting of the Medical Child Support Working Group (MCSWG). The Medical Child Support Working Group was jointly established by the Secretaries of the Department of Labor (DOL) and the Department of Health and Human Services (DHHS) under section 401(a) of the Child Support Performance and Incentive Act of 1998 (Pub.L. 105–200).

The purpose of the MCSWG is to identify the impediments to the effective enforcement of medical support by State child support enforcement agencies, and to submit to the Secretaries of DOL and DHHS a report containing recommendations for appropriate measures to address those impediments. This report will include: (1) Recommendations based on assessments of the form and content of the National Medical Support Notice, as issued under interim regulations; (2) appropriate measures that establish the priority of withholding of child support obligations, medical support obligations, arrearages in such obligations, and in the case of a medical support obligation, the employee's portion of any health care coverage premium, by such State agencies in light of the restrictions on garnishment provided under title III of the Consumer Credit Protection Act (15 U.S.C. 1671–1677); (3) appropriate procedures for coordinating the provision, enforcement, and transition of health care coverage under the State programs for child support, Medicaid and the Child Health Insurance Program; (4) appropriate measures to improve the availability of alternate types of medical support that are aside from health care coverage offered through the noncustodial parent's health plan, and unrelated to the noncustodial parent's employer, including measures that establish a noncustodial parent's responsibility to share the cost of premiums, co-payments, deductibles, or payments for services not covered under a child's existing health coverage; (5) recommendations on whether reasonable cost should remain a consideration under section 452(f) of the

Social Security Act; and (6) appropriate measures for eliminating any other impediments to the effective enforcement of medical support orders that the MCSWG deems necessary.

The membership of the MCSWG was jointly appointed by the Secretaries of DOL and DHHS, and includes representatives of: (1) DOL; (2) DHHS; (3) State Child Support Enforcement Directors; (4) State Medicaid Directors; (5) employers, including owners of small businesses and their trade and industry representatives and certified human resource and payroll professionals; (6) plan administrators and plan sponsors of group health plans (as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1167(1)); (7) children potentially eligible for medical support, such as child advocacy organizations; (8) State medical child support organizations; and (9) organizations representing State child support programs.

Agenda: The agenda for this meeting includes a discussion of the form and content of the National Medical Support Notice (Notice) mandated by section 401(b) of the Child Support Performance and Incentive Act. The Notice is to be jointly developed and promulgated by the Secretaries of DHHS and DOL as a means of enforcing the health care coverage provisions in a child support order. As time permits, the MCSWG may discuss the other items to be included in its report to the Secretaries as listed above.

Public Participation: Members of the public wishing to present oral statements to the MCSWG should forward their requests to Samara Weinstein, MCSWG Executive Director, as soon as possible and at least four days before the meeting. Such request should be made by telephone, fax machine, or mail, as shown above. Time permitting, the Chairs of the MCSWG will attempt to accommodate all such requests by reserving time for presentations. The order of persons making such presentations will be assigned in the order in which the requests are received. Members of the public are encouraged to limit oral statements to five minutes, but extended written statements may be submitted for the record. Members of the public also may submit written statements for distribution to the MCSWG membership and inclusion in the public record without presenting oral statements. Such written statements should be sent to the MCSWG Executive Director, as shown above, by mail or fax at least five business days before the meeting.

Minutes of all public meetings and other documents made available to the MCSWG will be available for public inspection and copying at both the DOL and DHHS. At DOL, these documents will be available at the Public Documents Room, Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N–5638, 200 Constitution Avenue, NW, Washington, DC from 8:30 a.m. to 5:30 p.m. Questions regarding the availability of documents from DOL should be directed to Ms. Ellen Goodwin, Plan Benefits Security Division, Office of the Solicitor, Department of Labor (telephone (202) 219–4600, ext. 119). This is not a toll-free number. Any written comments on the minutes should be directed to Ms. Samara Weinstein, Executive Director of the Working Group, as shown above.

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

Leslie Kramerich,

Deputy Assistant Secretary for Policy, Pension and Welfare Benefits Administration.

[FR Doc. 99–7832 Filed 3–30–99; 8:45 am]

BILLING CODE 4510–29–U

SECURITIES AND EXCHANGE COMMISSION

[Release No. 35–26994]

Filings Under the Public Utility Holding Company Act of 1935, as Amended (''Act'')

March 25, 1999.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the applications(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendments is/are available for public inspection through the Commission's Office of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by April 19, 1999, to the Secretary, Securities and Exchange Commission, Washington, D.C. 20549–0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of fact or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After April 19, 1999, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

New England Electric System (70–9441) Notice of Proposal To Amend Trust Agreement To Allow Proposed Merger and To Give Shareholders Certain Appraisal Rights; Order Authorizing Solicitation of Proxies

New England Electric System (''NEES''), a registered holding company, located at 25 Research Drive, Westborough, Massachusetts 01582, has filed a declaration under sections 6(a)(2), 7 and 12(e) of the Public Utility Holding Company Act of 1935, as amended (''Act''), and rules 62 and 65 under the Act.

NEES has entered into an Agreement and Plan of Merger, dated as of December 11, 1998 (''Merger Agreement'') with The National Grid Group plc, a public limited company incorporated under the laws of England and Wales (''National Grid'') and NGG Holdings LLC (''NGG Holdings''), a Massachusetts limited liability subsidiary of National Grid. On the closing date specified in the Merger Agreement, NGG Holdings intends to merge with and into NEES (''Merger''). NEES would be the surviving entity and a wholly owned subsidiary of National Grid. On December 14, 1998, NEES and National Grid publicly announced the proposed merger.[1]

NEES proposes to amend its Agreement and Declaration of Trust (''Trust Agreement'') and to solicit proxies from its common shareholders for the purpose of obtaining required shareholder approvals related to the Merger. Specifically, NEES will seek shareholder approval of the Merger and of an amendment to the Trust Agreement (''Amendment'') [2] The

[1] On February 1, 1999, NEES announced that it had entered into an agreement to merge with Eastern Utility Associates (''EUA''), under which NEES will acquire all outstanding shares of EUA for $31 per share subject to an upward adjustment. The NEES Agreement and Declaration of Trust does not require that NEES shareholders approve this type of merger and the merger between NEES and National Grid is not conditioned on the closing of the merger between NEES and EUA. However, the proxy statement for the approval of the NEES/National Grid merger will include a description of the proposed NEES/EUA merger.

[2] The Trust Agreement, which predates the Massachusetts statute permitting a Massachusetts limited liability company to merge with a Massachusetts business trust, currently does not give shareholders the ability to vote to merge with limited liability companies.

Amendment would allow a Massachusetts limited liability company, like NGG Holdings, to be merged into NEES, which is a Massachusetts business trust, upon consent of a majority of the shares outstanding and a two-thirds vote of the NEES board of directors. In addition, the Amendment would allow share holdings not consenting to a merger with a limited liability company to be given the same appraisal rights as stockholders of a Massachusetts business corporation. The Amendment, which would be effected regardless of whether the Merger is consummated, must be approved by an affirmative vote of a majority of the outstanding shares and by a two-thirds vote of the NEES board of directors.

The Merger must also be approved by an affirmative vote of a majority of the outstanding shares. The Merger is subject to a number of conditions, including the approval of the Commission under the Act and other regulatory approvals. NEES and National Grid will file an application-declaration with the Commission requesting authority to consummate the Merger and related transactions during the first quarter of 1999.

NEES requests that an order authorizing the solicitation of proxies be issued as soon as practicable under rule 62(d). It appears to the Commission that NEES' declaration regarding the proposed solicitation of proxies should be permitted to become effective immediately.

It is ordered, under rule 62 under the Act, that the declaration regarding the proposed solicitation of proxies can become effective immediately, subject to the terms and conditions contained in rule 24 under the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7839 Filed 3–30–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41200; File No. SR–BSE–99–3]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Boston Stock Exchange, Inc. Relating to Limitations on Trading During Significant Market Moves

March 22, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 22, 1999, the Boston Stock Exchange, Inc. (''BSE'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to approve the proposal on an accelerated basis.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange seeks to amend its market volatility rules to correspond with recent changes implemented by the New York Stock Exchange (''NYSE'').

The text of the proposed rule change is below. Proposed new language is italicized and proposed deletions are in brackets.

* * * * *

CHAPTER II

Dealings on the Exchange

Limitations on Trading During Significant Market Moves

[Sec. 34B. On any day when the DJIA has advanced by 50 points or more from its closing value on the previous trading day, all index arbitrage orders to buy any component stock of the S&P 500 Stock Price Index[2] must be entered with the instruction ''buy minus''. If, on that day, the DJIA subsequently reaches a value that is 25 points or less above the closing value on the previous trading day, this requirement shall not apply. This principal shall govern the imposition and removal of the buy minus requirement as to all subsequent movements in the DJIA on that day. On any day when the DJIA has declined by 50 points or more from its closing value on the previous trading day, all index arbitrage orders to sell must be entered with the instruction ''sell plus''. If, on that day, the DJIA subsequently reaches a value that is 25 points or less below the closing value on the previous, this requirement shall not apply. This principle shall govern the imposition and removal of the sell plus requirement as to all subsequent movements in the DJIA on that day. All orders containing the instruction buy minus or sell plus shall be executed as provided in Chapter I, Section 3.

[2] ''Standard & Poor's 500 Stock Price Index'' is a service mark of Standards & Poor's Corporation.]

[Supplemental Material

.01 ''Index arbitrage'' means an arbitrage trading strategy involving the purchase or sale of a group of stocks in conjunction with the purchase or sale, or intended purchase or sale, of one or more cash-settled options or futures contracts on index stock groups or options on any such futures contracts (collectively, ''derivative index products'') in an attempt to profit by the price difference between the group of stocks and the derivative index products. While the purchase or sale of the stocks must be in conjunction with the purchase or sale of the derivative index products, the transactions need not be executed contemporaneously to be considered index arbitrage.]

Sec. 34B. (a) All index arbitrage orders to sell any component stock of the S&P 500 Stock Price Index[2] must be entered with the instruction ''sell plus'' on any trading day when the Dow Jones Industrial Average declines below its closing value on the previous trading day by at least the ''two-percent value'' as calculated below. This index arbitrage order entry requirement shall remain in effect for the remainder of the trading day. However, the index arbitrage order entry requirement pursuant to this paragraph (a) shall be removed if the DJIA subsequently reaches a value below its closing value on the previous trading day that is a decline equal to the ''one-percent value'' or less as calculated below.

(b) All index arbitrage orders to buy any component stock of the S&P 500 Stock Price Index must be entered with the instruction ''buy minus'' on any trading day with the DJIA advances above its closing value on the previous trading day by at least the''two-percent value'' as calculated below. This index arbitrage order entry requirement shall remain in effect for the remainder of the trading day. however, the index arbitrage order entry requirement pursuant to this paragraph (b) shall be removed if the DJIA subsequently reaches a value above its closing value on the previous trading day that is an advance equal to the ''one-percent value'' or less as calculated below.

(c) The principles in paragraphs (a) and (b) shall govern the imposition and removal of the index arbitrage order requirements as to all subsequent movements in the DJIA on that day.

Supplementary material:

.10 The ''two-percent value'' shall be calculated at the beginning of each calendar quarter and shall be two-percent (2.0%), rounded down to the nearest ten points, of the average closing value of the DJIA for the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[2] ''Standard & Poor's 500 Stock Price Index'' is a service mark of Standards & Poor's Corporation.]

last month of the previous quarter. The ''one-percent value'' shall be one-half, rounded down to the nearest ten points, of the ''two-percent value.''

.20 The index arbitrage order entry restrictions shall not apply to index arbitrage market-at-the-close orders in liquidation of previously established stock positions against derivative index products entered on the last business day prior to the expiration or settlement of such derivative index products. Such orders shall be entered pursuant to each procedures as the Exchange may from time to time prescribe.

.30 All orders containing the instruction ''buy minus'' or ''sell plus'' shall be executed as provided in Chapter I, Section 3.

.40 Definitions. (a) For purpose of this Rule, ''index arbitrage'' means a trading strategy in which pricing is based on discrepancies between a ''basket'' or group of stocks and the derivative index product (i.e., a basis trade) involving the purchase or sale of a ''basket'' or group of stocks in conjunction with the purchase of sale, or intended purchase or sale, of one or more derivative index products in an attempt to profit by the price difference between the ''basket'' or group of stocks and the derivative index products. While the purchase of sale of the stocks must be in conjunction with the purchase or sale of derivative index products, the transactions need not be executed contemporaneously to be considered index arbitrage. The term ''derivative index products'' refers to cash-settled options or futures contracts on index stock groups, and options on any such futures contracts.

(b) ''Program trading means either (A) index arbitrage or (B) any trading strategy involving the related purchase or sale of a ''basket'' or group of 15 or more stocks having a total market value of $1 million or more. Program trading includes the purchases or sales of stocks that are part of a coordinated trading strategy, even if the purchases or sales are neither entered or executed contemporaneously, nor part of a trading strategy involving options or futures contracts on an index stock group, or options on any such futures contracts, or otherwise relating to a stock market index.

(c) ''Account on an individual investor'' means an account covered by Section 11(a)(1)(E) of the Securities Exchange Act of 1934.

Stop Order Bans

Sec. 35(a). Whenever the primary market for a stock admitted to dealings on the Boston Stock Exchange institutes a stop and stop limit order ban, the Exchange will also ban such orders in the stock until such time as the ban in the primary market is lifted.

[(b) Whenever the New York Stock Exchange (NYSE) institutes a stop and stop limit order ban pursuant to NYSE Rule 80A, the BASE will also ban stop and stop limit orders for the remainder of the trading day, except that a member or member organization may enter a stop or stop limit order of 2,099 shares or less for the account of an individual investor pursuant to instructions received directly from the individual investor.

(i) An ''account of the individual investor'' means an account covered by Section 11(a)(1)(E) of the Securities Exchange Act of 1934.]

Supplementary Material:

Stop Order Ban Procedures

[.01. Whenever the New York Stock Exchange (''NYSE'') implements a stop order ban pursuant to NYSE Rule 80A, the Boston Stock Exchange (''BSE'') will also ban such orders as follows:

(i) Upon notice from the NYSE by announcement over the ''hoot and holler system'' that all new stop and stop limit orders in all stocks are banned for the remainder of the day (except for orders up to 2099 shares for the account of an individual investor), the BSE will announce to its floor and BEACON subscribers that a stop order ban in all stocks is in effect for the remainder of the day, except for orders up to 2099 shares for the accounts of individual investors.

(ii) The entry of stop and stop limit orders (other than orders up to 2099 shares for the accounts of individual investors) will be banned on the BSE for the remainder of the day. Any stop or stop limit orders received in the BEACON system will be rejected and the message ''stop not accepted—ban in effect'' will be sent back to the entering firm.

(iii) Any stop and stop limit orders residing on the specialists' books at the time the ban goes into effect will remain eligible for execution.]

[.02] *.01.* Whenever the primary market implements a stop order ban in an individual stock due to an unusually large accumulation of stop and stop limit orders, the BSE will also ban such orders as follows:

(i) Upon notice from the primary market by indication over the consolidated tape that stop and stop limit orders are banned in an individual stock, the Boston Stock Exchange will announce to its floor and BEACON subscribers that a stop order ban is in effect in the individual stock.

(ii) The entry of stop and stop limit orders will be banned until such time as the ban is lifted in the primary market and that information is disseminated on the consolidated tape. Any orders received in the BEACON system will be rejected and the message ''stop not accepted—ban in effect'' will be sent back to the entering firm.

(iii) Any stop and stop limit orders residing on the specialist's book at the time the ban goes into effect will be canceled by the Exchange. The cancellation message ''U R Out'' will be sent back to the entering firm.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in Sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend two BSE rules that limit certain types of trading during significant market moves.

Chapter II, Section 34B of the BSE's rules states that on any day where the Dow Jones Industrial Average (''DJIA'') advances by more than 50 points from its closing value on the previous trading day, all index arbitrage orders to buy any component stock of the S&P 500 Stock Price Index must be entered with the instruction ''buy minus.'' Declines of 50 points from the previous trading day's closing value require that all index arbitrage orders to sell be entered with the instruction ''sell plus.'' The stabilizing requirements associated with that 50 point ''collar'' are removed if the DJIA moves back to or within 25 points of the previous day's close. Until recently, the NYSE similarly restricted index arbitrage using a 50 point collar.

Chapter II, Section 35(b) and Supplementary Material .01 of the BSE's rules states that whenever the NYSE implements a stop order ban pursuant to NYSE Rule 80A, the BSE will also ban stop and stop limit orders for the remainder of the day, except for orders of 2099 shares or less for the account of an individual investor pursuant to instructions from that investor. Until recently, NYSE Rule 80A contained ''sidecar'' provisions that would be triggered if the primary S&P 500 futures contract declined by 12 points from the previous close. When a market decline triggered those sidecar procedures, the NYSE would divert program trading orders to a separate file for five minutes and would restrict the entry of stop orders or stop limit orders.

The Commission recently approved a proposed NYSE rule change that widened the 50 point collars and eliminated the sidecar provisions.[3] In lieu of the 50 point collars methodology for advances or declines, collars will now be based on a percentage of the average closing value of the DJIA. In particular, the collars would be imposed when the DJIA declines or advances from the prior day's close by an amount equal to two percent (rounded down to the nearest ten points) of the average

[3] Securities Exchange Act Release No. 41041 (February 11, 1999), 64 FR 8424 (February 19, 1999).

closing value. The collars would be removed when the DJIA comes back or retreats to a value which represents a decline or advance from the prior day's close by an amount equal to one half of the ''two percent value'' (rounded down to the nearest ten points). The proposed collars are to be calculated quarterly based on the average closing value of the DJIA for the last month of the previous calendar quarter.

The BSE proposed to modify Section 34B to reflect the NYSE rule change, by replacing the 50 point collar with a level based on two percent of the DJIA. When the DJIA declines by the ''collar value,'' all index arbitrage orders to sell any component stock of the S&P 500 must be marked ''sell plus'' for the remainder of the day. If the DJIA advances by the ''collar value,'' all index arbitrage orders to buy any component stock of the S&P 500 must be marked ''buy minus'' for the remainder of the trading day.

In addition, the BSE is proposing to delete the stop and stop limit order restrictions found in Section 35(b) and Supplementary Material .01, in response to the NYSE's elimination of the sidecar provisions of NYSE Rule 80A.

2. Statutory Basis

The proposed rule change is consistent with Section 6(b) of the Act in general,[4] and furthers the objectives of Section 6(b)(5) in particular,[5] in that it is designed to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanisms of a free and open market and, in general, to protect investors and the public interest.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has neither solicited nor received written comments on the proposed rule change.

III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

After careful consideration, the Commission has concluded, for the reasons set forth below, that the proposed rule change is consistent with the requirements of the Act and the rules and regulations thereunder. Both BSE rules in question—the 50 point collar provision of Chapter II, Section 34B, and the ''sidecar'' stop and stop limit order restrictions of Chapter II, Section 35(b) and Supplementary Material .01—are substantially similar to recently changed NYSE rules. Modifying the BSE rules to conform to the counterpart NYSE rules will eliminate a needless disparity between the practices of the two exchanges. Moreover, the Commission noted in its order approving the proposed NYSE rule changes that the sidecar provisions appeared unnecessary and that eliminating them was in the public interest. The Commission also noted that widening the collar provisions represented an improvement over the earlier trading restrictions, and the Commission recommended that the NYSE periodically evaluate the continuing need for those restrictions on index arbitrage. The Commission believes that the same principles apply to the BSE.

The BSE has requested that the Commission grant accelerated approval of the proposed rule change to correspond with the NYSE's recent rule changes. The Commission finds good cause for approving the proposed rule change prior to the 30th day after the date of publication of notice of filing in the **Federal Register**. The Commission has already approved an equivalent rule change for the NYSE after careful analysis of public comments. Moreover, maintaining the existing trading restrictions on the BSE, even after they have been relaxed on the NYSE, may affect broker-dealer order routing decisions in a way that is contrary to the competitive intent behind the National Market System.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Exchange. All submissions should refer to File No. SR–BSE–98–3 and should be submitted by April 21, 1999.

V. Conclusion

It Is Therefore Ordered, pursuant to Section 19(b)(2) of the Act[6] that the proposed rule change (SR–BSE–99–3) is hereby approved on an accelerated basis.[7]

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[8]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7807 Filed 3–30–99; 8:45 am]

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[4] 15 U.S.C. 78f(b).

[5] 15 U.S.C. 78f(b)(5).

[6] 15 U.S.C. 78s(b)(2).

[7] In approving the proposal, the Commission has considered the rule's impact on efficiency, competition and capital formation. 15 U.S.C. 78c(f).

[8] 17 CFR 200.30–3(a)(12).

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41208; File No. SR–NASD–98–59]

Self-Regulatory Organizations; Order Approving Rule Change by the National Association of Securities Dealers, Inc. Relating to Trade Reporting

March 24, 1999.

I. Introduction

On August 10, 1998, the National Association of Securities Dealers, Inc. (''NASD'' or ''Association''), through its wholly owned subsidary, the Nasdaq Stock Market, Inc. (''Nasdaq''), filed with the Securities and Exchange Commission (''SEC'' or ''Commission''), pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'') [1] and Rule 19b–4 thereunder, [2] a proposed rule change to amend the trade reporting rules of the NASD to extend to market makers an exception to the reporting of riskless transactions in Nasdaq National Market, Nasdaq Smallcap, Nasdaq convertible debt, and non-Nasdaq OTC equity securities. The proposed rule change was published for comment in the **Federal Register** on September 4, 1998. [3] This order approves the proposal.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] Securities Exchange Act Release No. 40832 (August 28, 1998), 63 FR 47337.

II. Description of the Proposal

The rules for reporting trades in Nasdaq securities have long existed in their current form. The rules were broadly designed to capture all trading activity by broker-dealers, both dealer to dealer trades and traders with customers. These rules, and the trade reports that result, serve several important purposes. They form the basis for public dissemination of last sale transaction prices to the tape, thus providing transparency of the Nasdaq market. They are also an integral part of the audit trail used by the NASD in its regulatory efforts to surveil and regulate firms' activities. Given the historical structure of the dealer markets and the needs to provide a comprehensive view of all trading. NASD trade reporting rules currently require the reporting of all principal trades by market makers.

Non-market makers, however, generally do not report all principal trades under current rules, to the extent the trades are defined as ''riskless''—that is, they involve a trade with another member, usually a market maker, that is used to offset a trade with a customer. Even though the non-market maker firm is involved in two separate trades against its principal account, it reports one transaction to the NASD.

In light of the growth and evolution of the structure of the Nasdaq market, and in particular the recent implementation of the SEC Order Handling Rules, [4] the NASD is proposing to extend this riskless principal exception to market makers as well. Thus, certain matching principal trades involving a market maker would be explicitly included within the riskless definition, and reported to the public tape only once.

For example, under the SEC Order Handling Rules, market makers now display certain customer limit orders in their public quotes. [5] Those orders are often filled by the market maker when that quote is accessed by another market participant. [6] Because market makers generally trade exclusively from a principal account, they engage in two separate principal trades: one with the other market participant, and then another directly with the customer. Both of these trades are reported by market makers under current rules. In effect, however, these two trades can be viewed as one event—the execution of a customer order upon the execution of an offsetting transaction obtained by the market maker. Under the proposed rule change, these two trades would be reported only once.

A riskless principal trade can also be viewed as one that involves two orders, the execution of one being dependent upon the receipt or execution of the other. For example, the execution of an institutional customer order may be dependent upon finding the other side, in whole or in part. To the extent that any of the order is offset with another principal execution, that portion would be deemed riskless and should be reported only once.

The effect of the proposed rule change can be illustrated in the following examples. A market maker (MMI) holds a customer limit order that is displayed in its quote to buy 1000 shares of ABCD at $10. MM2 sells 1000 shares to MMI at $10. MM2 reports the sale of 1000 shares, as required under current rules. [7]MM1 then fills its customer order for 1000 shares at the same price, exclusive of any mark-up or commission. Under the proposal, the first trade would continue to be reported (by the selling firm MM2 in this case, as required under current rules), but the second leg between MM1 and the customer would not be reported again, as it is deemed riskless. If the first execution were through a Nasdaq facility that automatically generates a trade report to the trade, such as SOES or SelectNet, no member would report at all. Of course, members may still need to submit a ''clearing only'' entry into ACT to complete the transaction with the customer, but these submissions are not reporting purposes. Thus, there will be no public trade report for the second leg of the transaction.

In another example, an institutional customer presents a large order to a market maker (MM1) to sell 100,000 shares of XYZZ, with instructions to work the order, subject to a price limit. The market maker may attempt to solicit interest from other parties to fill the institutional order, in whole or in part. The market maker may find a willing buyer, but for only 75,000 shares, at a price of $12 per share. The market maker may determine to fill the entire customer order for 100,000 shares at $12 per share at that time (exclusive of any markdown, commission equivalent, or other fee), by trading the 25,000 share balance out of inventory. Here, there will still be two separate trade reports under the proposal because only a portion of the customer execution is deemed riskless. The size of the trade reports, however, will be adjusted to exclude the riskless portion. Specifically, instead of MM1 reporting these as a market maker sell transaction of 75,000 shares and then a market maker buy from the customer for 100,000 shares, these trades would be reported under the proposal as a market maker sell transaction of 75,000 shares and then a market maker buy from the customer of only 25,000 shares. [8]

In another variation of the previous example, MM1, while holding the institutional customer order and working it on their behalf, may obtain several executions to satisfy the order by selling to other market participants at varying prices throughout the trading day. In this example, assume that the entire order is filled with these individual executions. Because MM1 is the seller in these executions, it has the trade reporting responsibility and will continue to report under current rules each individual component trade with other market participants as they occur. Under the proposal, however, MM1 would not report the transaction with the customer, as the executions used to satisfy the order already have been reported to the tape. The transactions, however, may be confirmed to the customer at an average price of the component executions, to the extent permissible under Rule 10b–10 of the Act. [9]

In addition, the NASD is clarifying the riskless principal trade reporting provision to ensure its consistent application to any order received by a member, regardless of the person or entity that it was received from. Specifically, while the current rule refers to orders received from a ''customer,'' the proposed rule simply refers to ''an order.'' Thus, a transaction is considered riskless regardless of

[4] *See* Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996).

[5] 17 CFR 240.11Ac1–4(b).

[6] In fact, NASD Rule IM–2110–2 (Limit Order Protection Rule) requires market makers to execute customer limit orders (regardless of whether the customer is theirs or that of another member) when trading as principal at prices that would satisfy the customer's limit order. *See* NASD Rule IM–2110–2; and Securities Exchange Act Release No. 37619A (September 6, 1996), 61 FR 48290 (September 12, 1996).

[7] *See, e.g.,* NASD Rule 4632(b), which requires the selling market maker to report in a transaction between two market makers.

[8] It should be noted that in this particular example, the market maker with the order is responsible for reporting both legs of the transaction. If the customer were *buying* stock in the same example, and the market maker first buys 75,000 shares from another market maker, the 75,000 share trade would be reported by the selling market maker under current NASD rules (*i.e.,* seller reports in a trade between two market makers). The market maker with the customer order would still report the 25,000 share trade.

[9] *See, e.g.,* SEC no-action letter from Catherine McGuire, SEC, to Eugene Lopez, the Nasdaq Stock Market, dated May 6, 1997 (permitting the issuance of a single confirmation at any average price and with multiple capacities for a single customer order effected with multiple executions).

whether the market maker is holding an order from a customer, another member, the customer of another member, or any other entity, including non-member broker-dealers. Furthermore, the text of the rule is being amended to more clearly provide that such trades are reported exclusive of any mark-up, mark-down, commission, or other fee.

III. Discussion

The Commission finds that the proposed rule change is consistent with Section 15A of the Act [10] and the rules and regulations thereunder. In particular, the Commission believes that the proposal is consistent with the Section 15A(b)(6) [11] requirements that the rules of an exchange be designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to remove impediments to, and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest.[12]

The Commission agrees with the NASD that, for reporting purposes, it is appropriate to treat riskless principal trades as one trade. As the NASD noted, with the implementation of the SEC Order Handling rules, which generally require that a broker-dealer publish its customer's limit orders,[13] the number of riskless principal transactions executed by NASD member firms has increased. Reducing the number of transactions required to be reported should result in a corresponding reduction in transaction fees.

Moreover, current NASD rules for reporting principal transactions allow members that are not acting as market makers to report a riskless principal transaction as one transaction. In the past, the Commission has been concerned that a market maker making a continuous two-sided market might have difficulty identifying when a riskless principal transaction was effected. Accordingly, the principal trade reporting rule required members effecting riskless principal trades as a market maker to report both sides of the trade in an effort to avoid the possibility that compliance problems and interpretive difficulties would arise. Due to advances in the NASD's technology, however, the Commission believes that it is now appropriate for the NASD to allow a member acting as market maker to report riskless principal transactions as one transaction. The NASD has recently begun implementing its Order Audit Trail System [14] (''OATS''), which, among other things, requires market makers to record and report certain information with respect to each order, including the origin of the order (*i.e.*, in-house, customer, or another member). The implementation of OATS should assist the NASD in determining whether a trade is properly reported as a riskless principal transaction. For these reasons, the Commission believes that extending the riskless principal exception for trade reporting to market makers so that they can report certain matching principal trades only one is reasonable and consistent with the Act.[15]

IV. Conclusion

It is therefore ordered, pursuant to Section 19(b)(2§ of the Act,[16] that the proposed rule change (SR–NASD–98–59) is approved.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[17]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7805 Filed 3–30–99; 8:45 am]

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[10] 15 U.S.C. 78o–3.

[11] U.S.C. 78o–3(b)(6).

[12] In approving the proposed rule change, the Commission has considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[13] 17 CFR 240.11Ac1–4(b).

[14] OATS will be implemented in several phases. At this time, OATS reporting requirements have only been implemented for electronic orders received by ECNs and market makers in the securities in which they make a market. *See* Securities Exchange Act Release No. 39729 (March 6, 1998), 63 FR 12559 (March 13, 1998) (order approving File No. SR–NASD–97–56).

[15] The Commission notes that a riskless principal transaction is defined as a transaction where a member, after having received an order to buy a security, purchases the security as principal at the same price to satisfy the order to buy or, after having received an order to sell, sells the security as principal at the same price to satisfy the order to sell, excluding the mark-up or mark-down, commission-equivalent, or other fee. The Commission expects that the NASD will issue an interpretation giving examples of how mark-ups and other fees will be excluded for purposes of determining whether a trade is at the same price.

[16] 15 U.S.C. 78s(b)(2).

[17] For the Commission, he

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41206; File No. SR–PCX–99–02]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Exchange, Inc. Relating to Matters Subject to Arbitration

March 23, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act'')[1] and Rule 19b-4 thereunder,[2] notice is hereby given that on February 3, 1999, the Pacific Exchange, Inc. (''PCX'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I, II and III below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange is proposing to change PCX Rule 12.1 to allow for claims related to employment, including sexual harassment, or any discrimination claim in violation of a statute, to be eligible for submission to arbitration only where all parties have agreed to arbitration after the claim has arisen. The text in brackets will be deleted, and the text in italics will be added. The text of the proposed rule change is as follows:

* * * * *

Matters Subject to Arbitration

Rule 12.1(a) No change.

(b) Any claim which is related to employment, including any sexual harassment or any discrimination claim in violation of a statute, will be eligible for submission to arbitration under this Rule only where all parties have agreed to arbitrate the claim after it has arisen.

[(b)]*(c)* Any dispute, claim or controversy between a customer or non-member and a member, member organization and/or associated person arising in connection with the securities business of such member, member organization and/or associated person shall be arbitrated under this Rule as provided by any duly executed and enforceable written document, or upon the request of the customer or non-member.

[(c) Any dispute, claim or controversy between a member and an employee of such member which is related to such employment shall, at the request of any such party, be submitted for arbitration in accordance with this Rule.]

(d)–(g) No change.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of, and basis for, the proposed rule change, and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b-4.

places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

Purpose

Background. The Exchange's Constitution, Article XII, states that ''[a] dispute, claim or controversy arising in connection with the securities business of a member, member organization and/or associated person may be submitted to arbitration pursuant to the Rules of the Exchange.'' PCX Rule 12.1(a) restates the language of the Constitution, and further provides for arbitration of employment related claims in PCX Rule 12.1(c), by stating ''[a]ny dispute, claim or controversy between a member and an employee of such member which is related to such employment shall, at the request of any such party, be submitted for arbitration in accordance with this Rule.'' The Exchange has long construed the term ''employee' for purposes of PCX Rule 12.1(c) to mean registered representatives or other persons who are required to file a Form U–4 (Uniform Application for Securities Registration or Transfer) as a condition of employment with a member firm of the Exchange. The Form U–4 requires registered persons to submit to arbitration any claim that is required to be arbitrated under the rules of the self-regulatory organization with which they are registered.

Until the 1990's, PCX Rule 12.1(c) was generally used for the resolution of claims alleging breach of contract, compensation issues or wrongful discharge. However, in 1991 the United States Supreme Court held in *Gilmer* v. *Interstate/Johnson Lane Corp.*,[3] that pursuant to the language of the Form U–4 and New York Stock Exchange (''NYSE'') Rule 347, a registered representative's Age Discrimination in Employment Act (''ADEA'') claim was subject to compulsory arbitration.[4] NYSE Rule 347 specifically provides for the arbitration of ''employment or termination of employment'' matters. PCX Rule 12.1(c) likewise provides for the arbitration of matters ''related to such employment.'' The ruling of the Court in *Gilmer*, which referred to the rules of the NYSE, can thus be applied to arbitration cases as administered by the Exchange, since both NYSE Rule 347 and PCX Rule 12.1(c) specifically require the arbitration of ''employment'' matters.[5]

In 1994, several years after the decision in *Gilmer,* the General Accounting Office (''GAO'') released the findings of a two-year study on the results of employment discrimination disputes in the securities industry as administered by the various self-regulation organizations.[6] While the GAO did not address the adequacy of arbitration as a means of resolving employment discrimination disputes, it made several recommendations for improving the self-regulatory organization arbitration process as it related to employment discrimination claims. For example, the GAO recommended implementing a method of tracking employment discrimination claims, establishing formal standards for selecting arbitrator panels, or criteria for excluding arbitrators from the pool.[7]

In July 1997, the Equal Employment Opportunity Commission (''EEOC'') issued a policy statement that mandatory pre-dispute agreements to arbitrate statutory discrimination claims are inconsistent with the purpose of federal civil rights laws.[8] The EEOC stated in its policy statement that ''[t]he use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination.''[9] The EEOC further stated that ''the use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services.[10]

In October 1997, the NASD submitted a proposal to the Commission regarding the arbitration of statutory employment discrimination claims.[11] The NASD proposed to remove the requirement that registered representatives arbitrate statutory employment discrimination claims and to allow an employee to file such a claim in court unless he was obligated to arbitrate pursuant to a separate agreement between the parties, entered into before or after the dispute arose.[12] The proposal was approved June 22, 1998.

In September 1998, the NYSE filed a rule proposal regarding employment discrimination claims.[13] The NYSE filing was approved by the Commission on December 29, 1998.[14] In its rule filing, the NYSE proposed to create an exception to the rule requiring the arbitration of all employment-related claims of registered representatives. The NYSE proposed that ''any claim alleging employment discrimination, including any sexual harassment claim, in violation of a statute shall be eligible for arbitration only where the parties have agreed to arbitrate the claim *after* it has arisen'' (emphasis added).[15] Further, in conformity with the EEOC policy statement, the NYSE limited its forum to claims where the parties had agreed to arbitrate only after the dispute arose, thus providing additional safeguards to the employee that the self-regulatory organization arbitration process is entered into knowing by and voluntarily by the employee.[16]

Relevant Caselaw. In 1998, two federal courts supported the EEOC's position that mandatory pre-dispute agreements to arbitrate statutory discrimination claims are inconsistent with the purpose of federal civil rights laws. Prior to these decisions, federal courts had consistently upheld the arbitration of employment discrimination claims pursuant to the Form U–4.

First, in January 1998, in *Rosenberg* v. *Merrill Lynch,* 995 F. Supp. 190 (D.

[3] 500 U.S.C. 20 (1991).

[4] *Id.*

[5] Distinguish *Farrand* v. *Lutheran Bhd.*, 993 F.2d 1253 (7th Cir. 1993), where the court concluded that the then existing National Association of Securities Dealers, Inc. (''NASD'') arbitration rules did not require ''employment'' disputes to be arbitrated, since the language of the rule only referred to ''disputes arising out of or in connection with business transactions.''

[6] Employment Discrimination: How Registered Representatives Fare in Discrimination Disputes, (GAO/HEHS–94–17, March 30, 1994).

[7] *Id.* at 11.

[8] Equal Employment Opportunity Commission Notice No. 915.002, July 10, 1997, (''Policy Statement on Mandatory Biding Arbitration of Employment Discrimination Disputes as a Condition of Employment'').

[9] *Id.* at 22.

[10] *Id.* at 1.

[11] *See* Exchange Act Release No. 39421 (December 10, 1997), 62 FR 66164 (December 17, 1997) and Exchange Act Release No. 40109 (June 22, 1998), 63 FR 35299 (June 29, 1998).

[12] *Id.*

[13] *See* Exchange Act Release No. 40858 (December 29, 1998), 64 FR 1051 (January 7, 1999).

[14] *Id.*

[15] *Id.* at 1052, footnote 13. The NYSE qualified the ''in violation of statute'' language (as did the NASD) to include all federal, state and local anti-discrimination statutes.

[16] In December 1997, Gilbert F. Casellas, Chairman of the EEOC, wrote a comment letter to Jonathan G. Katz, Secretary of the SEC, regarding the pending NASD rule proposal. The EEOC reiterated its position ''that *pre*-dispute arbitration agreements, particularly those that mandate binding arbitration of discrimination claims as a condition of employment, are contrary to the fundamental principles reflected in this nation's employment discrimination laws.'' The EEOC therefore recommended ''that the proposed rule be revised to permit arbitration of statutory employment discrimination claims only under *post*-dispute arbitration agreements.

Mass. 1998), a Massachusetts district court, declined to compel arbitration of the Plaintiff's Title VII and ADEA claims pursuant to an agreement to arbitrate contained in a Form U–4 the plaintiff was required to sign as a condition of employment.[17]

On appeal, the United States Court of Appeals for the First Circuit found that the motion to compel arbitration was properly denied, but for reasons other than those stipulated to by the district court.[18] On a *de novo* review of the legal issues, the court found that what was at issue was whether the parties' arbitration agreement met the standard set forth in the 1991 CRA amendment to Title VII for enforcing arbitration clauses ''where appropriate and to the extent authorized by law.''[19] The court held that the standard was not met because ''[a]t a minimum the words 'to the extent authorized by law' must mean that arbitration agreements that are unenforceable under the Federal Arbitration Act (''FAA'') are also unenforceable when applied to claims under Title VII and the ADEA.''[20] The court states that ''[u]sing the 'to the extent authorized by law' standard of the 1991 CRA, we are doubtful that there was an enforceable contract.''[21] Under common law contract principles and referring to general state common-law principles, the court further stated that it was ''doubtful that there was an agreement to arbitrate Title VII and ADEA claims.''[22] Finally, with regard to this issue, the court stated that the arbitration agreement was incomplete in that it failed to define the range of claims subject to arbitration.[23] Specifically, the court found that the agreement only referred to arbitration of claims that were required by NYSE rules, but that these rules were neither provided to the plaintiff nor explained to her.[24]

In the recent California case of *Craft* v. *Campbell Soup Co.,*[25] the U.S. Circuit Court of Appeals for the 9th Circuit considered the issue of whether the FAA broadly excludes arbitration agreements within contracts of employment. The Court held that prior cases and legislative history indicate that the FAA's arbitration clause was solely intended to bind merchants who were involved in commercial dealings and contracts involving interstate commerce and is thus inapplicable to labor and employment contract.[26]

In May 1998, the United States Court of Appeals for the 9th Circuit held, contrary to *Rosenberg,* that the 1991 CRA amendments to Title VII provide for the right to a jury trial in discrimination claims and that, in adopting them, ''Congress intended to preclude compulsory arbitration of Title VII claims.''[27] The Court also noted that following the 1991 CRA, the courts have held that claimants who do not ''knowingly'' agree to arbitrate Title VII claims cannot be required to submit to arbitration.[28] The Court held that employers could not compel employees to waive their right to a judicial forum under Title VII and, therefore, the plaintiff could not be compelled to arbitrate here statutory discrimination claims pursuant to a Form U–4 that she signed as a condition of employment.[29] Specifically, the Court held that under the Civil Rights Act of 1991, employers may not compel individuals to waive their right to bring future Title VII claims to court.[30]

Proposal. The Exchange is proposing an amendment to PCX Rule 12 to provide that ''any claim which is related to employment, including any sexual harassment or discrimination claim in violation of a statute, will be eligible for submission to arbitration * * * only where all parties have agreed to arbitrate the claim after it has arisen.'' The new language excepts all employment related claims from arbitration at the Exchange, and specifically addresses claims alleging discrimination in violation of a statute, unless the parties have agreed to proceed with arbitration at the Exchange after the dispute has arisen.

By proposing these rule amendments, the Exchange is in conformity with the EEOC's ''Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment,''[31] and also goes further by proposing to except all employment claims from arbitration, unless the parties agree to arbitrate after the dispute has arisen.

The extension of the exception to all employment related claims will avoid the bifurcation of a single employment dispute. By requiring post-dispute agreement regarding whether any employment claim will be arbitrated, the parties can determine together whether the entire case should proceed through arbitration or the courts. Avoiding bifurcation will ultimately provide efficiency in the dispute resolution process, and save the parties significant time and money.

The majority of the Exchange's caseload arises from claims between customers or nonmembers and members or member organizations, pursuant to any written agreement to arbitrate or upon the demand of the customer or non-member.[32] Employment-related cases make up a very small percentage of the total caseload of the Exchange.[33] For example, from 1996 through 1998, of the total 174 cases filed, only 10 were employment-related cases alleging wrongful termination, breach of contract or other compensation issues. Only one of the 10 employment-related cases filed during those years alleged statutory discrimination.

The Exchange also proposes to delete Rule 12.1(c) so that the new proposed language and the existing language are not in conflict.

Basis

The Exchange believes the proposed rule change is consistent with Section 6(b) of the Act[34] in general, because it furthers the objectives of Section 6(b)(5) of the Act[35] in particular, in that it promotes just and equitable principles of trade by ensuring that members, member organizations and the public have a fair and impartial forum for the resolution of their disputes.

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[17] *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 995 F. Supp. 190 (D. Mass. 1998); *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 976 F. Supp. 84 (D. Mass. 1997); *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 965 F. Supp. 190 (D. Mass. 1997).

[18] Upon review, the court stated that application of pre-dispute arbitration agreements to federal claims arising under Title VII and the ADEA are not precluded by the 1991 Civil Rights Act (''1991 CRA'') amendments to Title VII or by the Older Workers Benefit Protection Act (''OWBPA'') amendments to the ADEA, and that there is no ''structural bias in the NYSE arbitration arbitral forum. *Rosenberg* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 1998 LEXIS 32522, 4–5 (1st Cir.).

[19] *Id.* at 54.

[20] *Id.* at 55.

[21] *Id.* at 56.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] 161 F.3d 1199 (9th Cir. 1998).

[26] 161 F.3d 1199; 1202–1203 (9th Cir. 1998).

[27] *Duffield* v. *Robertson, Stephens & Co.,* 144 F.3d 1182, 1199 (9th Cir. 1998), *cert. denied,* 67 U.S.L.W. 3113, 67 U.S.L.W. 3177 (U.S., Nov. 9, 1998)(Nos. 98–237–98–409).

[28] *Id.* at 1189.

[29] *Id.* at 1202–03.

[30] *Id.* at 1189.

[31] EEOC Notice No. 915.002, July 10, 1997.

[32] PCX Rule 12.1(b) provides: ''Any dispute, claim or controversy between a customer or non-member and a member, member organization and/or associated person arising in connection with the securities business of such member, member organization and/or associated person shall be arbitrated under this Rule as provided by any duly executed and enforceable written document, or upon the request of the customer or non-member.''

[33] Employment-related claims historically account for 2% or less of claims filed annually with the Exchange. Discrimination claims account for less than 1% of claims field annually.

[34] 15 U.S.C. 78f(b).

[35] 15 U.S.C. 78f(b)(5).

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

Written comments on the proposed rule change were neither solicited nor received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the date of publication of this notice in the **Federal Register** or within such longer period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will

A. by order approve such proposed rule change, or

B. institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the PCX. All submissions should refer to File No. SR–PCX–99–02 and should be submitted by April 21, 1999.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.[36]

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7806 filed 3–30–99; 8:45 am]

BILLING CODE 8010–01–M

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41201; File No. SR–PHLX–99–06]

Self-Regulatory Organizations; Notice of Filing and Order Granting Accelerated Approval of Proposed Rule Change by the Philadelphia Stock Exchange, Inc., Relating to Mandatory Trading Floor Training Requirements

March 22, 1999.

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (''Act''),[1] and Rule 19b–4 thereunder,[2] notice is hereby given that on February 12, 1999, the Philadelphia Stock Exchange, Inc. (''Phlx'' or ''Exchange'') filed with the Securities and Exchange Commission (''Commission'') the proposed rule change as described in Items I and II, below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons and to grant accelerated approval to the proposed rule change.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to adopt new Phlx Rule 625, Options Trading Floor Training. The proposed rule requires that all equity option and index option floor members and their respective personnel complete mandatory training related to that employee's function on the trading floor. The Exchange is also proposing to adopt new Option Floor Procedure Advice, F–30, Options Trading Floor Training and an accompanying fine schedule, such that a minor rule plan citation could be issued.[3] The text of the proposed new rule and new Option Floor Procedure Advice is as follows in italics:

Equity Option and Index Option Only

F–30—Options Trading Floor Training

All new equity option and index option floor members, whether specialists, floor brokers or Registered Options Traders, and their respective personnel, shall successfully complete mandatory training related to that employee's function on the trading floor. All current members and their respective personnel shall be subject to continuing mandatory training requirements in order to instruct these individuals on changes in existing automated systems or any new technology that is utilized by the Exchange.

Failure to attend the scheduled mandatory training described above may result in the issuance of a fine in accordance with the fine schedule below.

Fine Schedule (Implemented on a three year running calendar basis).

F–30

1st Occurrence: $250.00
2nd Occurrence: $350.00
3rd Occurrence: $500.00
4th Occurrence: Sanction is discretionary with Business Conduct Committee

Rule 625—Options Trading Floor Training

All new equity option and index option floor members, whether specialists, floor brokers or Registered Options Traders, and their respective personnel, shall successfully complete mandatory training related to that employee's function on the trading floor. All current members and their respective personnel shall be subject to continuing mandatory training requirements in order to instruct these individuals on changes in existing automated systems or any new technology that is utilized by the Exchange.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item III below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The purpose of the proposed rule is to require all new option floor members, whether specialists, floor brokers, or

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[36] 17 CFR 200.30–3(a)(12.

[1] 15 U.S.C. 78s(b)(1).

[2] 17 CFR 240.19b–4.

[3] The Phlx's minor rule violation enforcement and reporting plan (''Minor Rule Plan''), codified in Phlx Rule 970, contains floor procedure advices with accompanying fine schedules. Rule 19d–1(c)(2) of the Act authorizes national securities exchanges to adopt minor rule violation plans for summary discipline and abbreviated reporting; Rule 19d–1(c)(1) requires prompt filing with the Commission of any final disciplinary actions. However, minor rule violations not exceeding $2,500 are deemed not final, thereby permitting periodic, as opposed to immediate, reporting.

Registered Options Traders (''ROTs''), and their respective personnel, to attend mandatory training related to that employee's function on the trading floor. In addition, all current equity option and index option floor members and their respective personnel shall be subject to continuing training requirements. Currently, the Exchange believes that continued training requirements are necessary in order to instruct these individuals on changes in existing automated systems or new technology that is utilized by the Exchange. In this way, the proposed rule change will ensure that all members are familiar with any new technology or changes in existing technology.

Technology advances are ever-changing. In order to benefit users and remain competitive, the Exchange believes that it is imperative to continue to implement technology improvements and system enhancements. Moreover, these improvements and enhancements often provide for more efficient and quicker dissemination of information to the markets, thereby allowing investors to receive information on a more timely basis. Furthermore, technology improvements and system enhancements generally reduce the risk of clerical error. Therefore, mandated training will ensure that Exchange members and their respective personnel are proficient in using the new technology and will promote a more efficient trading environment.

Additionally, the training requirement would be incorporated as a Floor Procedure Advice, such that a minor rule plan citation could be issued.[4] Using the minor rule plan will enable the Exchange to quickly sanction members for non-compliance.[5] For example, if the staff discovers that an Exchange member has not participated in mandatory or continuing training requirements, a fine could be issued immediately. The issuance of a fine could alleviate situations where failure to participate in mandatory training is a recurring problem, because violations by a member organization would result in escalating fines, and, eventually, possible disciplinary action by the Exchange's Business Conduct Committee (''BCC''). For failure to attend an Exchange mandated training class, the Exchange proposes a fine of $250 for a first offense, $350 for a second offense, and $500 for a third offense. The sanction is discretionary with the BCC for a fourth offense. The Exchange believes that this type of violation is appropriate for the minor rule plan because it is objective and, thus violations are readily subject to verification.

For these reasons, the Exchange believes that the proposal to require attendance at training sessions is consistent with Section 6 of the Act,[6] in general, and with Section 6(b)(5),[7] in particular, in that it is designed to facilitate transactions in securities and to promote just and equitable principles of trade. Specifically, the Exchange believes that the proposal should promote a more efficient trading environment by (i) educating personnel regarding the use of improved technology and system enhancements; (ii) providing for quicker dissemination of information because the Exchange can train personnel as soon as changes are made; and (iii) lessen the risk of clerical errors. Moreover, mandatory training for equity option and index option floor members and their respective personnel is consistent with the provisions of Section 6(c)(3)(B) of the Act,[8] which makes it the responsibility of an exchange to prescribe standards of training, experience, and competence of persons associated with self-regulatory organization members.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed rule will impose any inappropriate burden on competition.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

No written comments were either solicited or received.

III. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposal is consistent with the Act. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission 450 Fifth Street, NW, Washington, DC 20549–0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying in the Commission's Public Reference Room. Copies of such filing will also be available for inspection and copying at the principal office of the Phlx. All submissions should refer to File No. SR–Phlx–99–06 and should be submitted by April 21, 1999.

IV. Commission's Findings and Order Granting Accelerated Approval of Proposed Rule Change

The Commission has reviewed carefully the Phlx's proposed rule change and believes, for the reasons set forth below, that the Phlx proposal is consistent with the requirements of the Act and the rules and regulations thereunder applicable to a national securities exchange. Specifically, the Commission finds that, consistent with Section 6(b)(5) of the Act,[9] requiring members and those associated with members to attend continuing education classes on the operation of new technology will both promote just and equitable principles of trade and benefit investors. The proposed rule change will ensure that equity option and index option floor members, and their respective personnel, are trained on an ongoing basis to competently perform their duties using the latest technology employed by the Exchange. In this regard, the Exchange's efforts are consistent with the Securities Industry Continuing Education Program, which seeks to promote the protection of investors through periodic training of securities professionals.

Moreover, the Commission finds that mandating continuing education training for members and persons associated with members is consistent with the provisions of Section 6(c)(3)(B) of the Act,[10] which makes it the responsibility of an exchange to prescribe standards of training,

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[4] The Phlx is also proposing to amend its minor rule plan to include the new advice.

[5] In a telephone conversation on March 19, 1999 between Cynthia Hoekstra, Counsel, Phlx, and Joseph Morra, Attorney, Division of Market Regulation, Commission, the Exchange explained the concept of a three-year running calendar basis as used in the Fine Schedule. The Exchange will impose sanctions on a three-year running cycle, by which a violation of the training requirements which occurs within three years of the first violation of the training requirements will be treated as a second occurrence, and any subsequent violation within three years of the previous violation of the training requirements will be subject to the next highest sanction specified in the Fine Schedule.

[6] 15 U.S.C. 78f.

[7] 15 U.S.C. 78f(b)(5).

[8] 15 U.S.C. 78f(c)(3)(B).

[9] 15 U.S.C. 78f(b)(5) requires, among other things, that the rules of an exchange be designed to promote just and equitable principles of trade and, in general, to protect investors and the public interest.

[10] 15 U.S.C. 78f(c)(3)(B).

experience, and competence for persons associated with self-regulatory organization members.

The Commission therefore finds good cause for approving the proposed rule change prior to the thirtieth day after the date of publication of notice of filing thereof in the **Federal Register**.[11]

It is therefore ordered, pursuant to Section 19(b)(2) of the Act,[12] that the proposed rule change (SR–Phlx–99–06), be, and hereby is, approved.

For the Commission by the Division of Market Regulation, pursuant to delegated authority[13].

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 99–7808 Filed 3–30–99; 8:45 am]

BILLING CODE 8010–01–M

[11] In approving this rule, the Commission notes that it has also considered the proposed rule's impact on efficiency, competition, and capital formation. 15 U.S.C. 78c(f).

[12] 15 U.S.C. 78s(b)(2).

[13] 17 CFR 200.30–3(a)(12).

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Aviation Proceedings, Agreements filed during the week ending March 19, 1999.

The following Agreements were filed with the Department of Transportation under the provisions of 49 U.S.C. 412 and 414. Answers may be filed within 21 days of date of filing.

Docket Number: OST–99–5241.
Date Filed: March 15, 1999.
Parties: Members of the International Air Transport Association.
Subject:
PTC23 Europe-South Asian Subcontinent dated March 12, 1999
Europe-South Asian Subcontinent Expedited Resolutions r1–r3
Intended effective date: April 15, 1999.

Docket Number: OST–99–5388.
Date Filed: March 18, 1999.
Parties: Members of the International Air Transport Association.
Subject:
PTC2 EUR–AFR 0072 dated 26 February 1999 r1–r17.
PTC2 EUR–AFR 0073 dated 26 February 1999 r18–r36
PTC2 EUR–AFR 0074 dated 26 February 1999 r37–r54
PTC2 EUR–AFR 0075 dated 26 February 1999 r55–r67
PTC2 EUR–AFR 0076 dated 26 February 1999 r68–r79
PTC2 EUR–AFR 0071 dated 26 February 1999 r80–r86
TC2 Europe-Africa Resolutions r1–r86 Minutes
PTC2 EUR–AFR 0066 dated 19 February 1999. Tables
PTC2 EUR–AFR Fares 0042 dated 2 March 1999.
PTC2 EUR–AFR Fares 0043 dated 2 March 1999.
PTC2 EUR–AFR Fares 0044 dated 2 March 1999.
PTC2 EUR–AFR Fares 0045 dated 2 March 1999.
PTC2 EUR–AFR Fares 0046 dated 2 March 1999.
Intended effective date: 1 May 1999.

Dorothy W. Walker,

Federal Register Liaison.

[FR Doc. 99–7896 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Notice of Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits Filed Under Subpart Q During the Week Ending March 19, 1999

The following Applications for Certificates of Public Convenience and Necessity and Foreign Air Carrier Permits were filed under Subpart Q of the Department of Transportation's Procedural Regulations (See 14 CFR 302.1701 et seq.). The due date for Answers, Conforming Applications, or Motions to Modify Scope are set forth below for each application. Following the Answer period DOT may process the application by expedited procedures. Such procedures may consist of the adoption of a show-cause order, a tentative order, or in appropriate cases a final order without further proceedings.

Docket Number: OST–99–5288.

Date Filed: March 16, 1999.

Due Date for Answers, Conforming Applications, or Motions To Modify Scope: April 13, 1999.

Description: Application of Ozark Air Lines, Inc. pursuant to 49 U.S.C. Section 41102 and Subpart Q, applies for a certificate of public convenience and necessity to engage in interstate scheduled and charter air transportation of persons, property and mail between Columbia, Missouri, Chicago, Illinois and Dallas Texas.

Docket Number: OST–99–5385.

Date Filed: March 18, 1999.

Due Date for Answers, Conforming Applications, or Motions to Modify Scope: April 15, 1999.

Description: Application of Britannia Airways AB pursuant to 49 U.S.C. Sections 41301 *et seq.* and Subpart Q, applies for a foreign air carrier permit authorizing it to engage in charter foreign air transportation of persons and their accompanying baggage, and property; (1) between a point or points in Sweden, Denmark and Norway and a point or points in the United States; (2) between a point or points in the United States and any point or points in a third country provided that such service constitutes part of a continuous operation that includes service to Sweden, Denmark and/or Norway for the purpose of carrying local traffic between Sweden, Denmark and Norway and the United States; and also authorizing the applicant to engage in other charter trips in foreign air transportation subject to the terms, conditions, and limitation of the Department's regulations governing charters.

Dorothy W. Walker,

Federal Register Liaison.

[FR Doc. 99–7897 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–62–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

The Federal Aviation Administration (FAA) Satellite Operational Implementation Team (SOIT) Hosted Forum on the Capabilities of the Global Positioning System (GPA)/Wide Area Augmentation System (WAAS) and Local Area Augmentation System (LAAS)

AGENCY: Federal Aviation Administration, Department of Transportation.

ACTION: Notice of meeting.

NAME: FAA SOIT Forum on GPS/ WAAS/LAAS Capabilities.

TIME AND DATE: 9:00 a.m.–5:00 p.m., May 17–18, 1999.

PLACE: The Holiday Inn Fair Oaks Hotel, 11787 Lee Jackson Memorial Highway, Fairfax, Virginia 22033.

STATUS: Open to the aviation industry with attendance limited to space available.

PURPOSE: The FAA SOIT will be hosting a public forum to discuss the FAA's GPS approval and WAAS/LAAS operational implementation plans. This meeting will be held in conjunction with a regularly scheduled meeting of the FAA SOIT and in response to aviation industry requests to the FAA Administrator. Formal presentations by the FAA will be followed by a question and answer session. Those planning to

attend are invited to submit proposal discussion topics.

Registration: Participants are requested to register their intent to attend this meeting by May 3, 1999. Names, affiliation, telephone and facsimile numbers should be sent to the point of contact listed below.

Point of Contact: Registration and submission of suggested discussion topics may be made to Mr. Steven Albers, phone (202) 267–7301, fax (202) 267–5086, or email at steven.CTR.albers@faa.gov.

Issued in Washington D.C. on March 22, 1999.

Hank Cabler,

SOIT Co-Chairman.

[FR Doc. 99–7882 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

Notice of Intent to Rule on PFC Application 99–03–C–00–PSC to impose and use the revenue from a passenger facility charge (PFC) at Tri-Cities Airport, submitted by the Port of Pasco, Pasco, Washington

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 TriCities Airport under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

DATES: Comments must be received on or before April 30, 1999.

ADDRESSES: Comments on this application may be mailed or delivered in triplicate to the FAA at the following address:

J. Wade Bryant, Manager, Seattle Airports District Office, SEA–ADO; Federal Aviation Administration; 1601 Lind Avenue SW, Suite 250; Renton, Washington 98055–4056.

In addition, one copy of any comments submitted to the FAA must be mailed or delivered to Mr. James L. Morasch, A.A.E., Director of Airports, at the following address; Tri-Cities Airport, 3601 North 20th Avenue, Pasco, WA 99301.

Air carriers and foreign air carriers may submit copies of written comments previously provided to Tri-Cities Airport under section 158.23 of Part 158.

FOR FURTHER INFORMATION CONTACT: Ms. Mary Vargas, (425) 227–2660; Seattle Airports District Office, SEA–ADO; Federal Aviation Administration; 1601 Lind Avenue SW, Suite 250; Renton, WA 98055–4056. 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 99–03–C–00–PSC to impose and use the revenue from a PFC at Tri-Cities Airport, under the provisions of 49 U.S.C. 40117 and Part 158 of the Federal Aviation Regulations (14 CFR Part 158).

On March 24, 1999, the FAA determined that the application to impose and use the revenue from a PFC submitted by the Port of Pasco, Pasco, Washington, 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 June 22, 1999.

The following is a brief overview of the application.

Level of the proposed PFC: $3.00

Proposed charge effective date: February 1, 2002

Proposed charge expiration date: September 1, 2003

Total estimated net PFC revenue: $740,000

Brief description of proposed project(s): Access road reconstruction; Terminal building upgrades; Loading bridge/mobile covered walkway; Security access system upgrade.

Class or classes of air carriers which the public agency has requested not be required to collect PFCs: 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, Northwest Mountain Regional, Airports Division, ANM–600, 1601 Lind Avenue S.W., Suite 315, Renton, WA 98055–4056.

In addition, any person may, upon request, inspect the application, notice and other documents germane to the application in person at Tri-Cities Airport.

Issued in Renton, Washington on March 24, 1999.

David A. Field,

Manager, Planning, Programming and Capacity Branch; Northwest Mountain Region.

[FR Doc. 99–7883 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–13–M

DEPARTMENT OF TRANSPORTATION

Research and Special Programs Administration

[Docket No. RSPA–99–5143 (Notice No. 99–3)]

Safety Advisory: Unauthorized Marking of Compressed Gas Cylinders

AGENCY: Research and Special Programs Administration (RSPA), DOT.

ACTION: Safety advisory notice.

SUMMARY: This is to notify the public that RSPA is investigating the unauthorized marking of high-pressure compressed gas cylinders. During November and December of 1998, RSPA conducted inspections of AAA Fire & Safety Company, Inc. (AAA), 48 East Newberry Road, Bloomfield, CT. The results of the inspections indicate that between the latter part of 1995 and August of 1998, AAA may have informed its customers that their cylinders had been hydrostatically retested by Aero All-Gas Company, Inc., Hartford, CT, when, in fact, the cylinders had not been retested by Aero All-Gas Company. There is no indication that Aero All-Gas Company had any involvement in the unauthorized marking of these compressed gas cylinders.

Without conducting hydrostatic retests, cylinders that should have been condemned may be returned to service. Serious personal injury, death, and property damage could result from rupture of a cylinder. Cylinders that have not been retested in accordance with the Hazardous Materials Regulations (HMR) may not be charged or filled with a hazardous material (compressed gas).

FOR FURTHER INFORMATION CONTACT: Chris Michalski, Hazardous Materials Enforcement Specialist, Eastern Region, telephone (609) 989–2256, fax (609) 989–2277, Office of Hazardous Materials Enforcement, Research and Special Programs Administration, US Department of Transportation, 820 Bear Tavern Rd, Suite 306, West Trenton, NJ 08628.

SUPPLEMENTARY INFORMATION: During November and December 1998, RSPA inspectors conducted inspections pertaining to the cylinder testing operations of AAA Fire & Safety Co., Inc. (AAA), 48 East Newberry Road, Bloomfield, CT. The results of the inspections indicate that between the latter part of 1995 and August of 1998, AAA may have informed its customers that a number of high pressure compressed gas cylinders, primarily fire extinguishers, had been hydrostatically

retested by Aero All-Gas Company, Inc., Hartford, CT. The inspectors obtained evidence from several of AAA's customers that indicates that AAA supplied its customers with cylinders marked as having been properly retested, in accordance with the HMR, by Aero All-Gas Company. An inspection conducted at Aero All-Gas Company revealed that the cylinders in question had not been retested by Aero All-Gas Company and that Aero All-Gas Company had not authorized these particular cylinders to be marked with its retester identification number (RIN). The cylinders in question were stamped with Aero All-Gas Company's (RIN) ''A393''.

The markings appear in the following pattern:

```
  A 3
X     Y
  3 9
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Where A393 is Aero All-Gas Company's RIN, X is the month of the retest (i.e. 11) and Y is the year of the retest (i.e. 98).

Aero All-Gas Company is a DOT-approved cylinder retester, that conducts hydrostatic retesting. Most cylinders marked with Aero All-Gas Company's RIN have, in fact, been tested by Aero All-Gas Company. However, the results of the RSPA investigation appear to indicate that any cylinder that had been serviced by AAA and marked with Aero All-Gas Company's RIN between the latter part of 1995 and August of 1998 may not have been tested. RSPA inspectors have obtained a list of AAA's customers, and this safety notice will be mailed to everyone appearing on that list. Anyone concerned with a specific cylinder, marked as described above, can ask for a verification of Aero All-Gas Company's retest records by providing Mr. Michalski with the following information: cylinder serial number, DOT specification and the most recent retest markings (i.e. #389467, DOT–3AA1800, 10/98).

Anyone who has a cylinder that is marked with RIN A393 and dated between late 1995 and August 1998, and that was serviced during that time by AAA, should determine from Mr. Michalski whether that specific cylinder appears on Aero All Gas Company's retest records. Any such cylinder that does not appear on Aero All-Gas Company's retest records should be considered unsafe and not charged with a hazardous material unless first properly retested by a DOT-authorized retest facility. Filled cylinders (if filled with an atmospheric gas) described in this safety advisory should be vented or otherwise safely discharged, and then taken to a DOT-authorized cylinder retest facility for proper retest, to determine compliance with the HMR.

Under no circumstances should a cylinder described in this safety advisory, and verified as not appearing on Aero All-Gas Company's retest records, be filled, refilled or used for any purpose other than scrap, until it is reinspected and retested by a DOT-authorized retest facility.

Issued in Washington, DC on March 25, 1999.

Alan I. Roberts,

Associate Administrator for Hazardous Materials Safety.

[FR Doc. 99–7798 Filed 3–30–99; 8:45 am]

BILLING CODE 4910–60–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 637

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 637, Application for Registration (For Certain Excise Tax Activities).

DATES: Written comments should be received on or before June 1, 1999 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Application for Registration (For Certain Excise Tax Activities).

OMB Number: 1545–0014.

Form Number: Form 637.

Abstract: Form 637 is used to apply for excise tax registration. The registration applies to a person required to be registered under Internal Revenue Code section 4101 for purposes of the federal excise tax on taxable fuel imposed under Code sections 4041 and 4081; and to certain manufacturers or sellers and purchasers that must register under Code section 4222 to be exempt from the excise tax on taxable articles. The data is used to determine if the applicant qualifies for the exemption. Taxable fuel producers are required by Code section 4101 to register with the Service before incurring any tax liability.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and not-for-profit institutions.

Estimated Number of Respondents: 2,000.

Estimated Time Per Respondent: 13 hours, 53 minutes.

Estimated Total Annual Burden Hours: 27,780.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 24, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–7898 Filed 3–30–99; 8:45 am]

BILLING CODE 4830–01–P

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 9041

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 9041, Application for Electronic/ Magnetic Media Filing of Business and Employee Benefit Plan Returns.

DATES: Written comments should be received on or before June 1, 1999 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form and instructions should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Application for Electronic/ Magnetic Media Filing of Business and Employee Benefit Plan Returns.

OMB Number: 1545–1079.

Form Number: Form 9041.

Abstract: Form 9041 is used by fiduciaries of estates and trusts, partnerships, and plan sponsors/ administrators as an application to file Forms 1041, 1065, 5500, 5500–C/R, or 5500–EZ electronically or on magnetic media; and by software firms, service bureaus, and electronic transmitters to develop auxiliary services.

Current Actions: Form 9041 is being revised to delete the checkbox on line 2 labeled Form 1065 (Paper Parent Option), because the IRS will no longer offer this filing option to partnerships.

Type of Review: Revision of a currently approved collection.

Affected Public: Businesses or other for-profit organizations.

Estimated Number of Respondents: 3,000.

Estimated Time Per Respondent: 18 minutes.

Estimated Total Annual Burden Hours: 900.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

REQUEST FOR COMMENTS: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 24, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–7899 Filed 3–30–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Form 1099-DIV

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)). Currently, the IRS is soliciting comments concerning Form 1099–DIV, Dividends and Distributions.

DATES: Written comments should be received on or before June 1, 1999 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Dividends and Distributions.

OMB Number: 1545–0110.

Form Number: Form 1099–DIV.

Abstract: Form 1099–DIV is used by the IRS to insure that dividends are properly reported as required by Internal Revenue Code section 6042, that liquidation distributions are correctly reported as required by Code section 6043, and to determine whether payees are correctly reporting their income.

Current Actions: There are no changes being made to the form at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations.

Estimated Number of Responses: 111,922,150.

Estimated Time Per Response: 16 minutes.

Estimated Total Annual Burden Hours: 29,099,759.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will

be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 25, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–7900 Filed 3–30–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Internal Revenue Service

Proposed Collection; Comment Request for Forms 8329 and 8330

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to take this opportunity to comment on proposed and/or continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13 (44 U.S.C. 3506(c)(2)(A)).

Currently, the IRS is soliciting comments concerning Form 8329, Lender's Information Return for Mortgage Credit Certificates (MCCs) and Form 8330, Issuer's Quarterly Information Return for Mortgage Credit Certificates (MCCs).

DATES: Written comments should be received on or before June 1, 1999 to be assured of consideration.

ADDRESSES: Direct all written comments to Garrick R. Shear, Internal Revenue Service, room 5571, 1111 Constitution Avenue NW., Washington, DC 20224.

FOR FURTHER INFORMATION CONTACT: Requests for additional information or copies of the form(s) and instructions should be directed to Carol Savage, (202) 622–3945, Internal Revenue Service, room 5569, 1111 Constitution Avenue NW., Washington, DC 20224.

SUPPLEMENTARY INFORMATION:

Title: Form 8329, Lender's Information Return for Mortgage Credit Certificates (MCCs) and Form 8330, Issuer's Quarterly Information Return for Mortgage Credit Certificates (MCCs).

OMB Number: 1545–0922.

Form Number: Forms 8329 and 8330.

Abstract: Form 8329 is used by lending institutions and Form 8330 is used by state and local governments to provide the IRS with information on the issuance of mortgage credit certificates (MCCs) authorized under Internal Revenue Code section 25. IRS matches the information supplied by lenders and issuers to ensure that the credit is computed properly.

Current Actions: There are no changes being made to these forms at this time.

Type of Review: Extension of a currently approved collection.

Affected Public: Business or other for-profit organizations, and state, local or tribal governments.

Estimated Number of Responses: 10,000—Form 8329; 2,000—Form 8330.

Estimated Time Per Response: 5 hours, 41 minutes—Form 8329; 7 hours, 15 minutes—Form 8330.

Estimated Total Annual Burden Hours: 56,900—Form 8329; 14,500—Form 8330.

The following paragraph applies to all of the collections of information covered by this notice:

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number. Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

Request for Comments: Comments submitted in response to this notice will be summarized and/or included in the request for OMB approval. All comments will become a matter of public record. Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the burden of the collection of information on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

Approved: March 25, 1999.

Garrick R. Shear,

IRS Reports Clearance Officer.

[FR Doc. 99–7901 Filed 3–30–99; 8:45 am]

BILLING CODE 4830–01–U

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

Proposed Agency Information Collection Activities; Comment Request

ACTION: Notice and request for comments.

SUMMARY: The Department of the Treasury, as part of its continuing effort to reduce paperwork and respondent burden, invites the general public and other Federal agencies to comment on proposed and continuing information collections, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Today, the Office of Thrift Supervision within the Department of the Treasury solicits comments on Voluntary Dissolution.

DATES: Submit written comments on or before June 1, 1999.

ADDRESSES: Send comments to Manager, Dissemination Branch, Information Management and Services, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, Attention 1550–0066. Comments may be hand delivered to the Public Reference Room, lower level, 1700 G Street, NW. from 9:00 a.m. to 4:00 p.m. on business days; they may be sent by facsimile transmission to FAX Number (202) 906–7755; or they may be sent by e-mail to public.info@ots.treas.gov. Those commenting by e-mail should include their name and telephone number. Comments over 25 pages in length should be sent to FAX number (202) 906–6956. Comments are available for inspection at 1700 G Street, NW., from 9:00 a.m. until 4:00 p.m. on business days.

Interested persons may also inspect copies of the Form with instructions at the Public Reference Room, Basement, 1700 G Street, NW., from 9:00 a.m. until 4:00 p.m. on business days or from PubliFax, OTS' Fax-on-Demand system, at (202) 906–5660.

FOR FURTHER INFORMATION CONTACT:
Nadine Washington, Examinations/Supervision, Office of Thrift Supervision, 1700 G Street, NW., Washington, DC 20552, (202) 906–6706.

SUPPLEMENTARY INFORMATION:

Title: Voluntary Dissolution.

OMB Number: 1550–0066.

Form Number: OTS Form 1499, also known as Form DV.

Abstract: 12 C.F.R. Section 546.4 provides for Federal associations to voluntarily dissolve through the submission of a statement of reasons and plan of dissolution. Approval is required by the board of directors, the OTS and the association's members. Plans for dissolution may be denied if the OTS believes the plan is not in the best interest of concerned parties.

Current Actions: OTS proposes to renew this information collection without revision.

Type of Review: Extension.

Affected Public: Business or For Profit.

Estimated Number of Respondents: 1.

Estimated Time Per Respondent: 81 hours.

Estimated Total Annual Burden Hours: 81 hours.

Request for Comments: The OTS will summarize comments submitted in response to this notice or will include these comments in its request for OMB approval. All comments will become a matter of public record. The OTS invites comment on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the burden of the collection of information; (c) ways to enhance the quality; and (d) ways to minimize the burden of the collection of information on respondents, including the use of automated collection techniques or other forms of information technology.

Dated: March 23, 1999.

Celia Winter,

Acting Director, Information Management and Services.

[FR Doc. 99–7794 Filed 3–30–99; 8:45 am]

BILLING CODE 6720–01–P

Corrections

Federal Register
Vol. 64, No. 61
Wednesday, March 31, 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 ENERGY

Federal Energy Regulatory Commission

[Project No. 349–051]

Alabama Power Company; Notice of Availability of Environmental Assessment

Correction

In notice document 99–7131, appearing on page 14227, in the issue of Wednesday March 24, 1999, make the following correction:

On page 14227, in the second column, the docket number is corrected to read as set forth above.

[FR Doc. C9–7131 Filed 3–30–99; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

Sunshine Act Meeting

Correction

In notice document 99–5983 appearing on page 11976, in the issue of Wednesday, March 10, 1999, make the following correction:

On page 11976, in the third column, above the signature line, add ''Dated: March 5, 1999.''

[FR Doc. C9–5983 Filed 3–30–99; 8:45 am]

BILLING CODE 1505–01–D

SECURITIES AND EXCHANGE COMMISSION

[Release No. 34–41136; File No. SR–Phix–99–02]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Philadelphia Stock Exchange, Inc. Relating to Changing the Required Minimum Value Size for an Opening Transaction in FLEX Equity Options

March 3, 1999.

Correction

In notice document 99–6045 beginning on page 12203, in the issue of Thursday, March 11, 1999, make the following correction:

On page 12203, in the first column, the docket number is corrected to read as set forth above.

[FR Doc. C9–6045 Filed 3–30–99; 8:45 am]

BILLING CODE 1505–01–D

DEPARTMENT OF TRANSPORTATION

Coast Guard

33 CFR Part 165

[CGD01–98–151]

RIN 2115–AE84

Regulated Navigation Area: Navigable Waters Within the First Coast Guard District

Correction

In rule document 99–6330 beginning on page 12746 in the issue of Monday, March 15, 1999, make the following correction(s):

1. On page 12747, in the second column, in the last paragraph, in the first line, ''33 CFR 1654.100(d)(1)(i)'' should read ''33 CFR 165.100(d)(1)(i)''.
2. On the same page, in the third column, in the first line, ''while'' should ''While''.
3. On the same page, in the same column, in the 11th line, ''exemption'' should read ''exemptions''.
4. On the same page, in the same column, in the 18th line, ''(d)(1)(ii)'' should read ''(d)(1)(iii)''.
5. On the same page, in the same column, in the second full paragraph, in the third line, ''intend'' should read ''intends''.
6. On the same page, in the same column, in the same paragraph, in the third line from the bottom, ''addition'' should read ''additional''.
7. On page 12748, in the third column, in the third full paragraph, in the 12th line, after ''implications'' add ''for''.

[FR Doc. C9–6330 Filed 3–30–99; 8:45 am]

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March 31, 1999

Part II

Department of Labor

Occupation Safety and Health Administration

29 CFR Parts 1910, 1915, et al.

Employer Payment for Personal Protective Equipment; Proposed Rule

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Parts 1910, 1915, 1917, 1918, and 1926

[Docket S–042]

[RIN No. 1218-AB77]

Employer Payment For Personal Protective Equipment

AGENCY: Occupational Safety and Health Administration (OSHA), U.S. Department of Labor.

ACTION: Proposed rule; scheduling of informal public hearing.

SUMMARY: Many Occupational Safety and Health Administration (OSHA) health, safety, maritime, and construction standards require employers to provide their employees with protective equipment, including personal protective equipment (PPE), when such equipment is necessary to protect employees from job-related injuries, illnesses, and fatalities.

These requirements are codified in Part 1910 (General Industry standards), Part 1915 (Shipyard standards), Part 1926 (Construction standards), Part 1917 (Marine Terminal standards), and Part 1918 (Longshoring standards) of Title 29 of the Code of Federal Regulations. These requirements address PPE of many kinds: hard hats, gloves, goggles, safety shoes, safety glasses, welding helmets and goggles, faceshields, chemical protective equipment and clothing, fall protection equipment, and so forth. The provisions in OSHA standards that require PPE generally state that the employer is to provide such PPE; however, some of these provisions do not specify that the employer is to provide such PPE at no cost to the employee.

In this rulemaking, OSHA is proposing regulatory language to clarify that, with only a few exceptions for specific types of PPE, the employer must pay for the PPE provided. OSHA is proposing to except in certain circumstances three specific kinds of PPE from this requirement: safety-toe protective footwear, prescription safety eyewear, and the logging boots required by 29 CFR 1910.266(d)(1)(v).

OSHA believes that the proposed rule will better implement the intent of the Occupational Safety and Health Act, make clear who is to pay for what kind of PPE, and improve protection to employees who must wear PPE.

The proposed rule would not require employers to provide PPE where none has been required before. Instead, the proposed rule merely stipulates that the employer must pay for all required PPE, except in the limited cases specified above. Since employers already pay for most of the required PPE, the proposed rule would shift to employers only the cost of that portion of PPE currently being paid for by their employees. Based on information from a number of surveys, studies, and a panel of PPE experts, OSHA believes that, even making worst case assumptions, this shift in costs from employees to employers will impose annualized costs of no more than $61.9 million across all affected industries. To the extent that the proposed rule enhances the use of PPE, employers will obtain about a three-fold return on their investment in PPE, i.e., will save an estimated three dollars in injury and illness costs for every dollar they invest in PPE.

OSHA is also scheduling an informal public hearing to provide interested parties the opportunity to orally present information and data related to the proposed rule.

DATES: Comments. Written comments on the proposed standard must be postmarked by June 14, 1999. Comments that are transmitted electronically through OSHA's internet site must be transmitted by June 14, 1999. The hearing is scheduled to begin at 9:30 a.m. on June 22, 1999.

Informal public hearing. Notices of intention to appear at the informal public hearing must be postmarked by June 1, 1999. Hearing participants requesting more than 10 minutes for their presentations, and participants who will submit documentary evidence at the hearing, must submit the full text of their testimony and all documentary evidence to the Docket Office, postmarked no later than June 14, 1999.

ADDRESSES: *Comments.* Submit four copies of written comments, notices of intention to appear at the informal public hearing, testimony, and documentary evidence to the OSHA Docket Office, Docket S–042, Room N–2625, U.S. Department of Labor, 200 Constitution Ave., NW, Washington, DC 20210. (Telephone: (202)693–2350) Please identify the document at the top of the first page as either a comment, notice of intention to appear, testimony, or documentary evidence. Comments of 10 pages or less may be faxed to the Docket Office, if followed by hard copy postmarked within two days. The OSHA Docket Office fax number is (202)693–1648.

Comments may also be submitted electronically through OSHA's Internet site at URL, http://www.osha-slc.gov/e-comments/e-comments-ppe.html. Please be aware that information such as studies, journal articles, and so forth cannot be attached to the electronic response and must be submitted in quadruplicate to the above address. Such attachments must clearly identify the respondent's electronic submission by name, date, and subject, so that they can be attached to the correct response.

Informal public hearing. The hearing will be held in the auditorium of the U.S. Department of Labor (Frances Perkins Building), 200 Constitution Avenue N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Ms. Bonnie Friedman, OSHA Office of Information and Consumer Affairs, Room N–3647, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210. Telephone: (202) 693–1999.

SUPPLEMENTARY INFORMATION:

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II. Background

Employees often need to wear protective equipment, including personal protective equipment (PPE), to be protected from injury, illness, and death caused by exposure to workplace hazards. Throughout this document OSHA uses the abbreviation PPE to cover all types of protective equipment, including personal protective equipment, because the abbreviation is widely used and understood to include all such equipment. The abbreviation PPE includes protective equipment that an employee uses or wears, such as fall arrest systems, safety shoes, and protective gloves. There are many

situations in which PPE is necessary to protect employees from hazards. For example, protective gloves can protect hands from lacerations, burns, absorption of toxic chemicals, and abrasion. Safety shoes protect an employee's feet from being crushed by falling objects. Respirators can protect employees from being over-exposed to toxic substances. There are many other examples.

Many OSHA standards require employers to provide PPE to their employees. Some indicate in general terms when PPE is to be worn, and what is to be worn (see, for example, § 1910.132). Other provisions are very specific, such as 29 CFR 1910.266(d)(1)(iv), which requires chain saw operators to wear protective leggings during specific operations, and 29 CFR 1910.1027(g), which requires respiratory protection for workers exposed to cadmium above a certain PEL, and explicitly states that the employer must pay for the respirator.

OSHA derived its PPE standards from many sources. In its first two years, OSHA, pursuant to section 6(a) of the OSH Act, adopted many Federal and national consensus standards dealing with PPE that had been written by many different standards development committees. OSHA itself has been issuing both health and safety standards requiring appropriate PPE for 28 years. Because of the many sources for these standards, the language requiring the use of PPE has varied.

The language used in OSHA's PPE standards has generally been clear that the employer must provide the PPE and ensure that employees wear it. However, the regulatory language regarding the employer's obligation to pay for the PPE has varied.

OSHA's health standards issued after 1977 have made it clear both in the regulatory text and in the preamble that the employer is responsible for providing necessary PPE at no cost to the employee. See, for example, OSHA's inorganic arsenic standard issued in 1978 at 29 CFR 1910.1018(h)(2) (i) and (j), and the recent respirator standard, issued January 8, 1998 (63 FR 1152).

The regulatory text and preamble discussion for some safety standards have also been absolutely clear that the employer must both provide and pay for PPE. See, for example, the logging standard at 29 CFR 1910.266(d)(1)(iii) and (iv). The logging standard does, however, make an exception for certain types of logging boots (see 29 CFR 1910.266(d)(1)(v)). In the case of foot protection, such as logging boots, paragraph (d)(l)(v) of that standard leaves the issue of who pays for some kinds of logging boots open for negotiation and agreement between the employer and employee.

On the other hand, the regulatory text of some safety standards has been less clear. For example, 29 CFR 1910.132(a) is the general provision requiring employers to provide PPE when necessary to protect employees. This provision states that the PPE must be provided, used, and maintained in a sanitary and reliable condition. It does not specifically state that the employer must pay for it. In some cases, employers have interpreted this requirement to mean that they must pay for as well as provide the PPE, while in other cases, employers have understood this requirement to mean only that they must provide the PPE.

OSHA attempted to establish a policy and clarify the issue of payment for required PPE in a memorandum to its field staff dated October 18, 1994, ''Employer Obligation to Pay for Personal Protective Equipment.'' OSHA stated that for all PPE standards the employer must both provide, and pay for, the required PPE, except in limited situations. The memorandum indicated that where PPE is very personal in nature and usable by the worker off the job, such as is often the case with steel-toe safety shoes (but not metatarsal foot protection), the issue of payment may be left to labor-management negotiations. This memorandum was intended to clarify the Agency's policy with regard to payment for required PPE.

Very recently, the Occupational Safety and Health Review Commission declined to accept as Agency policy the interpretation embodied in the 1994 memorandum as it applied to § 1910.132(a), OSHA's general PPE standard for general industry, in *Secretary of Labor* v. *Union Tank Car,* OSHRC Docket No. 96–0563. In that case, an employer was issued a citation for failing to pay for metatarsal foot protection and welding gloves. The Commission vacated the citation, finding that the Secretary had failed to adequately explain the policy outlined in the 1994 memorandum in light of several earlier letters of interpretation from OSHA that were inconsistent with that policy.

OSHA believes that it is important that the employer both provide and pay for PPE and ensure that employees wear it when necessary. OSHA believes that this view reflects the direction of the OSH Act and is consistent with the legislative history. Employers must maintain a safe place of work in all its aspects, and may not receive a competitive advantage by failing to pay for necessary safety equipment, including personal protective equipment. OSHA has considered the requirement for employer payment in many specific rulemakings and has concluded, based on the record in each case, that this requirement will increase employee protection.

The present proposal will also lead to greater consistency among OSHA standards. Accordingly, OSHA is proposing to require that the employer pay for all PPE required by OSHA standards, except for safety-toe protective footwear and prescription safety eyewear that meet all three of the following conditions: (1) the employer permits such footwear or eyewear to be worn off the job-site; (2) the footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site; and (3) such footwear or eyewear is not designed for special use on the job. Employers are not required to pay for the logging boots specified in 29 CFR 1910.266(d)(1)(v), as discussed above.

OSHA believes that the proposed requirement will better protect employees from work-related illness, injury, and death. Employers are in a better position to identify and select the correct equipment and to maintain it properly. They have the financial resources to purchase PPE of necessary quality and to pay for replacements as necessary. The statutory reasons for requiring the employer to pay for PPE are discussed at greater length in the Legal Considerations section of this preamble, and the health and safety reasons are discussed below, in the Summary and Explanation section of this preamble.

OSHA preliminarily concludes, for the reasons stated, that the Agency's standards should clearly require the employer to provide and pay for PPE. Accordingly, OSHA is proposing such a requirement. Rulemaking under section 6(b) of the Act will provide for full public input on all issues. The standard will, once promulgated, provide clear direction to employers and employees.

OSHA is proposing this requirement for general industry, construction, shipyards, longshoring, and marine terminals. OSHA has consulted the Advisory Committee for Construction Safety and Health on this proposal, as required by the Construction Safety Act.

OSHA requests comments on all relevant issues, including the specific issues listed in the Issues section of this preamble.

III. Legal Considerations

A. General Authority Under the OSH Act

The Occupational Safety and Health Act and the statute's legislative history demonstrate that employers are expected to pay the costs of complying with OSHA's safety and health standards. At section 2(a) of the OSH Act, Congress announced its determination that occupational injury and illness should be eliminated as much as possible: ''The Congress finds that occupational injury and illness arising out of work situations impose a substantial burden upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.'' 29 U.S.C. 651(a). Congress therefore declared ''it to be its purpose and policy . . . to assure so far as possible every working man and woman in the Nation safe and healthful working conditions.'' 29 U.S.C. 651(b).

To achieve this end, the Act directs that ''employers shall comply with occupational safety and health standards . . . issued pursuant to this Act,'' 29 U.S.C. 654(a) (2), and limits OSHA's enforcement authority to employers. 29 U.S.C. 658, 659(a). See *United Steelworkers of America* v. Marshall, 647 F.2d 1189, 1230-1231 (D.C. Cir. 1980). This statutory scheme allocates to employers sole legal responsibility for achieving compliance with safety and health standards. *Atlantic & Gulf Stevedores* v. *OSHRC,* 534 F.2d 541, 533 (3d Cir. 1976). Because employers are charged with the responsibility for achieving safe and healthful workplaces, they must bear the concomitant financial obligation. *Id.* The Act's terms, including the definition in section 3(8) of an occupational safety and health standard as one which ''requires . . . the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful places of employment,'' 29 U.S.C. 652(8), give OSHA broad discretion to devise means to achieve safe and healthful workplaces and to charge employers for the costs of reasonably necessary requirements. *United Steelworkers,* 647 F.2d at 1230–1231.

The employer's general financial responsibility is further evidenced in the Act's legislative history in the Cotton Dust decision (*American Textile Mfrs. Inst., Inc.* v. *Donovan,* 452 U.S. 490, 519–521(1980)), the Supreme Court interpreted the legislative history as showing that Congress was aware of the Act's potential to impose substantial costs on employers but believed such costs to be appropriate when necessary to create a safe and healthful working environment. Congress thus viewed the costs of health and safety as a cost of doing business. Senator Yarborough, a co-sponsor of the [Act], stated:

> We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America . . .

Senator Eagleton commented that:

> [the costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business.

Other Members of Congress voiced similar views (*American Textile Mfrs. Inst., Inc.* v. *Donovan,* 452 U.S. 490, 519–521 (1980) (*ATMI*) (internal citations omitted, original emphasis)). See also *Forging Indus, Ass'n* v. *Secretary of Labor,* 773 F.2d 1436, 1451 (4th Cir. 1985) (en banc) (which stated that, in view of the Supreme Court's ''clear statement'' in *ATMI* about Congress' intent that employers bear the costs of safety and health, OSHA may logically require employers to pay for hearing protectors under the hearing conservation standard); S. Rep. No. 91–1282, 91st Cong. 2d Sess. 4 (1970), *reprinted in*, Senate Comm. On Labor and Public Welfare, 92nd Cong. 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970 (Legislative History)* 324, 510–511, 854, 1150, 1188, 1201.

Congress was also concerned that the costs imposed by OSHA rules be borne fairly by employers within and across all affected industries and believed that uniform enforcement was crucial to reduce or eliminate the disadvantage that a conscientious employer might experience where inter-industry or intra-industry competition is present. *Legislative History* at 854; *ATMI*, 452 U.S. at 521. It also recognized that many small firms might not be able to make the necessary investment in safety and health unless all firms were required to do so. *Legislative History* at 144. For these reasons, Congress did not intend to allow individual employers to decide who should pay the costs of complying with OSHA standards. See *United Steelworkers*, 647 F.2d at 1236; *Forging Indus. Ass'n*, 773 F.2d at 1451–1452.

B. Other Statutory Considerations

In *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute*, 448 U.S. 607 (1980) (*Benzene*), the Supreme Court ruled that, before OSHA can issue a new standard, the Agency must find that the hazard being regulated poses a significant risk to workers and that a new, more protective, standard is ''reasonably necessary and appropriate'' to reduce that risk. The requirement to find a significant risk does not mean, however, that OSHA must ''wait for deaths to occur before taking any action,'' *id.* at 655, or ''support its findings with anything approaching scientific certainty.'' *Id.* at 656. ''[T]he requirement that a 'significant' risk be identified is not a mathematical straightjacket.'' *Id.* at 655.

The Act allows OSHA substantial latitude to devise means to reduce or eliminate significant workplace hazards. Clearly, OSHA need not make individual quantitative or qualitative risk findings for every regulatory requirement in a standard. Once OSHA has determined that a significant risk of material impairment of health or well being is present, and will be redressed by a standard, the Agency is free to develop specific requirements that are reasonably related to the Act's and standard's remedial purpose. OSHA standards are often designed to reduce risk through an integrated system of safety practices, engineering controls, employee training, and other ancillary requirements. Courts have upheld individual requirements based on evidence that they increase the standard's effectiveness in reducing the risk posed by significant workplace hazards. See *Forging Indus. Ass'n.*, 773 F.2d at 1447–1452 (finding ancillary provisions of hearing conservation standard, including requirements for audiometric testing, monitoring, and employer payment for hearing protectors, reasonably related to the standard's purpose of achieving a safe work environment); *United Steelworkers*, 647 F.2d at 1237–1238 (finding lead standard's medical removal protection (MRP) provisions reasonable).

Similarly, the courts have held that the Agency must consider other ancillary provisions that could provide additional protection if the standard's exposure limits will not eliminate significant risk. *Building and Constr. Trades Dept. AFL–CIO* v. *Brock*, 838 F.2d 1258, 1271 (D.C. Cir. 1988). (Remand to consider including in asbestos standard additional provisions to reduce smoking-related asbestos risks); *National Grain & Feed Ass'n* v. *OSHA*, 866 F.2d 717, 734–735 (5th Cir. 1989) (directing OSHA to consider extending the action level for clean-up measures from certain priority areas to the entire facility where such an

extension might further reduce the risk of fire and explosions).

OSHA standards must also be technologically and economically feasible, and cost effective. A standard is technologically feasible if the protective measures it requires already exist, can be brought into existence with available technology, or can be created with technology that can reasonably be expected to be developed. *ATMI*, 452 U.S. at 513. A standard is economically feasible if industry can absorb or pass on the cost of compliance without threatening its long term profitability or competitive structure. *ATMI*, 452 U.S. at 530 n.55.

A standard is cost effective if the protective measures it requires are the least costly of the available alternatives that achieve the same level of protection. *ATMI*, 452 U.S. at 514 n.32; *International Union, UAW* v. *OSHA*, 37 F.3d 665, 668 (D.C. Cir. 1994). Finally, if OSHA promulgates a rule that differs substantially from an existing national consensus standard, the Agency must publish in the **Federal Register** a statement of reasons why the rule adopted will better effectuate the purposes of the Act than the national consensus standard. 29 U.S.C. 655(b)(8).

C. Historical Overview: OSHA's Determinations in Prior Rulemakings That Employers Should Pay for Necessary Personal Protective Equipment

Since 1978, OSHA has promulgated many occupational health and safety standards explicitly requiring employers to furnish personal protective equipment "at no cost to employees." [1]

In these rulemakings, OSHA has stated that language explicitly requiring that PPE be furnished without cost to employees is necessary to effectuate the purposes of the Act and to "clarif[y] OSHA's position which has long been implicit in health standards proceedings." See, *e.g.*, 42 FR 27387 (June 23, 1978) (cotton dust preamble); 43 FR 11523 (March 17, 1978) (dibromo-3-chloropropane preamble); 52 FR 46266 (Dec. 4, 1987) (formaldehyde preamble). OSHA has also concluded in its rulemaking on the Cancer Policy that personal protective equipment should be treated no differently from engineering controls for the purposes of cost-allocation (45 FR 5261, Jan. 22, 1980):

> The requirement that employers pay for protective equipment is a logical corollary of the accepted proposition that the employer must pay for engineering and work practice controls. There is no rational basis for distinguishing the use of personal protective equipment [from other controls]. The goal in each case is employee protection; consequently the responsibility of paying for the protection should, in each case, rest on the employer.

OSHA has further determined that requiring employers to pay for personal protective equipment contributes to increased health and safety protection in several ways. The employer is most knowledgeable about hazards existing in the workplace and is therefore best able to select and maintain appropriate protective equipment. Requiring employers to purchase personal protective equipment ensures that they retain control over the selection, issuance, maintenance, and use of the devices. See 43 FR 19619 (May 5, 1978) (inorganic arsenic preamble); 46 FR 4153 (hearing conservation preamble). Shifting the financial burden to employees, on the other hand, "risks losing the necessary control over the organized and consistent selection, issuance, maintenance and use of such equipment." 46 FR 4153 (hearing conservation preamble).

OSHA has also concluded that charging employers with the cost of personal protective equipment, as well as other requirements imposed by standards, is necessary to ensure the employee's voluntary cooperation in the employer's safety program. In requiring employers to pay for hearing protectors as part of the hearing conservation standard, OSHA relied upon the testimony of the director of the Safety and Health Department of the International Brotherhood of Teamsters:

> [an] employer's attempt to require its employees to purchase their own personal ear protective devices would cause resentment among the workers and clearly demonstrate to them the lack of commitment on the part of their employer in preventing hearing loss. Such a requirement *would discourage the use of ear protective devices and would create an adversarial atmosphere in regard to the hearing conservation program.* 46 FR 4153 (*emphasis added*).

OSHA has found that the need to ensure voluntary cooperation by employees was also an important reason to require employers to pay for other protections in standards, including medical examinations and medical removal protection (MRP). In promulgating the lead standard, OSHA relied upon extensive evidence that employees' fears of adverse economic consequences from participation in a medical surveillance program could seriously undermine efforts to improve employee health. 43 FR 54442–54449 (Nov. 21, 1978). OSHA cited data from numerous sources to show that employees' concerns about the possible loss of income would make them reluctant to participate meaningfully in any program that could lead to job transfer or removal. *Id.* OSHA promulgated the lead standard's M.R.P. provision "specifically to minimize the adverse impact of this factor on the level and quality of worker participation in the medical surveillance program." *Id.* at 54449.

Courts have upheld OSHA's statutory authority to charge employers with the costs of complying with standards and have affirmed the Agency's findings of benefits accruing from this requirement. In reviewing the lead standard, the D.C. Circuit found that "[the] scheme of the statute, manifested in both the express language and the legislative history . . . appears to permit OSHA to charge employers the cost of any new means it devises to protect workers." *United Steelworkers*, 647 F.2d at 1231. The court found reasonable OSHA's determination that wage retention and other M.R.P. benefits were necessary in view of employee resistance to programs that could result even in limited loss of earnings. *Id.* at 1237. Moreover, the court found that OSHA could legitimately consider benefits that were more indirect. It upheld the standard's requirement that employers pay for medical opinions from physicians who are selected by employees, in part because employees will be more likely to cooperate in, and improve the accuracy of, medical examinations performed by physicians they trust. *Id.* at 1239. See also *Forging Indus. Ass'n*, 773 F.2d at 1451–1452 (upholding the requirement in the hearing conservation standard that employers pay for hearing protectors).

Some have suggested that employee payment for PPE helps encourage employees to maintain their PPE properly. OSHA notes that employees, because their own safety is at stake, already have significant incentives to assure that PPE is maintained in a manner that assures that the PPE will

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[1] See 29 CFR 1910.95(i)(1), (i)(3) (hearing conservation); 29 CFR 1910.1001(g)(1), (g)(2)(i), (h)(1) (asbestos); 29 CFR 1910.1018(h)(1), (h)(2)(i), (j)(1) (inorganic arsenic); 29 CFR 1910.1025(f)(1), (g)(1) (lead); 29 CFR 1910.1027(g)(1), (i)(1) (cadmium); 29 CFR 1910.1028(g)(1), (g)(2)(i), (h) (benzene); 29 CFR 1910.1030(d)(3)(i), (d)(3)(ii) (bloodborne pathogens); 29 CFR 1910.1043(f)(1), (f)(3) (cotton dust); 29 CFR 1910.1044(h)(1), (h)(2), (h)(3)(i), (j)(1) (1,2-dibromo-3-chloropropane); 29 CFR 1910.1045(h)(2)(i), (j)(1) (acrylonitrile); 29 CFR 1910.1047(g)(2)(i), (g)(4) (ethylene oxide); 29 CFR 1910.1048(g)(1), (h) (formaldehyde); 29 CFR 1910.1050(h)(2)(i), (i)(1) (4,4, methylenedianiline); 29 CFR 1910.1051(h)(1), (i) (1,3-butadiene); 29 CFR 1910.1052 (g)(1), (h)(1) (methylene chloride); 29 CFR 1910.146(d)(4)(iv) (confined spaces); 29 CFR 1910.156(e)(1)(i) (fire brigades); 29 CFR 1910.266(d)(1)(iii), (d)(1)(iv), (d)(1)(vi),(d)(1)(vii) (logging). See also OSHA's recently revised respiratory protection standard, promulgated January 8, 1998, 63 FR 1271.

function safely. Requiring employee payment for PPE could encourage employees to consider a trade-off between assuring the safety of the PPE and assuring its longevity, even though the PPE may be worn or damaged to the point that it no longer functions properly. Employee payment could also lead to perverse incentives for employers. Given a choice between engineering controls that the employer must pay for, and PPE that would be paid for by employees, employers would have a strong incentive to use PPE even though engineering controls would be more protective and might even be cheaper. OSHA views the theoretical loss of some employee incentive to maintain equipment as minor compared to the importance of assuring employers provide a safe and healthy workplace.

D. The Proposed PPE Revisions Comply With Statutory Criteria

OSHA believes that the proposed PPE revisions readily comply with the statutory criteria outlined above. In the Agency's view, the proposed language that, with certain exceptions, employers must provide personal protective equipment under existing standards ''at no cost to employees,'' does no more than clarify a requirement legally implicit under the Act. Congress itself intended to impose the costs of safety and health on employers and charged employers with sole responsibility for compliance with standards. *ATMI*, 452 U.S. at 520–5211; *United Steelworkers*, 647 F.2d at 1231. The requirement that employers pay for the means necessary to achieve compliance is implicit in the statute itself, and therefore, is properly an implied term of every occupational safety or health standard.

Based on the OSH Act's implicit cost-allocation scheme, OSHA has interpreted standards requiring employers to ''provide'' personal protective equipment to mean that this equipment must be furnished to employees at no charge. For example, OSHA has interpreted the coke oven emissions standard, 29 CFR 1910.1029(h)(1), which states that ''the employer shall provide and assure the use of appropriate protective clothing and equipment,'' to require that personal protective equipment be furnished at no charge to coke oven workers. The Occupational Safety and Health Review Commission held that interpreting ''provide'' to mean ''pay for'' was consistent with the statutory intent and with the Agency's prior published interpretation. *Secretary of Labor* v. *Erie Coke Corp.*, 15 O.S.H. Cas. (BNA) 1561, 1563–1565 (Review Comm. 1992).

OSHA has also interpreted its general personal protective equipment standards to require that equipment be furnished at no cost to employees. In 1994, OSHA issued a compliance memorandum entitled ''Employer Obligation to Pay for Personal Protective Equipment.'' In this compliance memorandum, OSHA interpreted 29 CFR 1910.132, 29 CFR 1926.95, and other PPE standards to require employers to provide PPE at no cost to employees, except where the equipment is personal in nature and usable off the job.

OSHA recognizes that the Occupational Safety and Health Review Commission has subsequently rejected OSHA's policy interpretation of 29 CFR 1910.132 as requiring employer payment for PPE. See *Union Tank Car Co.*, OSHRC No. 96–0563 (assuming the 1994 memorandum represented a change in position, and finding that OSHA had not presented an adequate justification for the change).

Section IX of this preamble, *OSHA's Supplementary Statement of Reasons for its Interpretation of 29 CFR 1910.132(a)*, contains a detailed explanation of OSHA's interpretation of section 1910.132(a), which addresses in detail the Commission's concerns and demonstrates that the Agency's reading of its general personal protective equipment standard is consistent with the statutory scheme and is reasonable.

In OSHA's view, the proposed rule simply clarifies the employer's pre-existing obligations under the personal protective equipment standards. See *Edison Elec. Inst.* v. *OSHA*, 849 F.2d 611, 620 (D.C. Cir. 1988); *OSHA's Supplemental Statement of Reasons*. Assuming, however, that the language in existing § 1910.132 does not clearly convey a requirement for employer payment, the proposed rule is necessary and appropriate to conform the standard to the requirements of the statute and to the position the Agency has consistently adopted in rulemaking proceedings for more than twenty years.

The Agency believes, moreover, that implementation of the proposed revisions will contribute in a significant way to a safer work environment. The existing PPE standards reflect a determination that the use of PPE is necessary to reduce a significant risk of injury.[2] OSHA considers the proposed revisions to be ancillary requirements of the existing PPE standards. They are reasonably related to the existing standards' purpose of preventing injury by requiring the provision and use of appropriate personal protective equipment.

Moreover, OSHA believes that the principle expressed in *National Grain and Feed,* discussed above, provides analogous support for this proposed rule. In amending 29 CFR 1910.132 in 1994 to include new requirements for, among other things, hazard assessments and employee training, the Agency examined PPE use in general industry. OSHA found that, although the standard had been in effect since 1971, the data demonstrated that a significant risk of injury attributable to the non-use or misuse of PPE remained. See 59 FR 16335 (April 6, 1994). OSHA determined that compliance with the final rule would result in more widespread acceptance and use of appropriate PPE, and would, therefore, significantly reduce the risk of injury. However, OSHA did not find that compliance with the rule would eliminate the significant risk due to the non-use or misuse of PPE. As discussed below, there is evidence that requiring employers to pay for PPE will result in a further substantial reduction in the risk of non-use or misuse of PPE by centralizing the control over PPE programs, and by eliminating economic disincentives to the voluntary use of PPE. Cf. *National Grain and Feed,* 866 F.2d at 735.

As OSHA found in promulgating the hearing conservation standard, requiring employers to pay for personal protective equipment ensures that employers retain control over the selection, issuance, maintenance, and use of such equipment. OSHA believes that ensuring centralized control over these critical functions promotes a more organized and consistent approach to personal protective equipment requirements. See 46 FR 4153 (Jan 16, 1981). See also 43 FR 19619 (Inorganic Arsenic) (May 5, 1978).

OSHA also believes that employees are more likely to cooperate in achieving full compliance with existing standards if protective equipment is provided at no charge. The evidence adduced during the rulemaking for the lead standard demonstrated that many employees would be reluctant to participate fully in a program that could result in a loss of income. OSHA

[2] For existing standards adopted as national consensus or established Federal standards pursuant to section 6(a) of the Act, the determination of significant risk is implied in Congress's direction that such standards should be promulgated as ''occupational safety or health standard[s].'' 29 U.S.C. 655(a). The Court in *Benzene* interpreted the definition of ''occupational safety and health standard'' in section 3(8) of the Act to mean a standard that addresses a significant risk of harm. 448 U.S. at 639–642.

believes that this problem is not limited to MRP provisions. In *Secretary of Labor* v. *Phelps Dodge Corp.,* 11 O.S.H. Cas. (BNA) 1441, 1443 (Rev. Comm. 1983), the Review Commission held that the employer did not provide medical examinations under the Inorganic Arsenic standard ''without cost to the employee'' when it allowed employees to take examinations only during their free time and did not reimburse them for travel expenses or the time consumed in taking the examinations. The Commission noted the ALJ's finding that when employees were required to provide their own transportation to and from the hospital and to sacrifice their personal time to take examinations, 42% of them failed to participate.

Such evidence, showing that employees often make decisions that risk their health and safety to avoid suffering economic loss, is relevant to the proposed revision. It is certainly reasonable to believe that employees who are furnished personal protective equipment at no charge are more strongly motivated to wear it, and to replace it promptly when worn or damaged, than are employees who must purchase such equipment. Indeed, OSHA is aware of evidence presented in enforcement litigation that employees have continued to use worn-out or defective items of personal protective equipment because of the cost of replacing this equipment. In the *Union Tank* case, the employee representative presented an affidavit that some employees taped or wrapped wire around their damaged metatarsal safety boots in order to avoid having to pay up to $130 per pair to replace them. Similarly, in *Ormet Primary Aluminum Corp.,* OSHRC Docket No. 96–0470, an employee testified that he continued to wear safety boots, even though the protective steel toes were exposed and posed an electrocution hazard, because he could not afford a new pair. The employee also testified that some workers put a cement-like substance over the steel toes of their boots when the leather covering wore away, but that this practice was hazardous because the substance was flammable.

Based on the available evidence, OSHA preliminarily concludes that the proposed revisions will significantly enhance compliance with existing standards. OSHA estimates that the proposed rule will prevent over 47,000 injuries that occur annually as a result of the non-use or misuse of personal protective equipment, including seven fatal injuries. See Section VI., *Preliminary Economic Analysis.*

OSHA has also preliminarily concluded that excepting safety-toe footwear and prescription safety eyewear from the payment requirement is appropriate and does not conflict with the legislative intent. OSHA has long taken the position that employers should not be required to pay for safety-toe footwear because it is personal in nature and frequently worn off the job. See *The Budd Co.,* 1 O.S.H. Cas. (BNA) 1548 (Rev. Comm. 1974). OSHA believes that prescription safety eyewear shares these characteristics. Because of the special nature of safety-toe footwear and prescription safety eyewear, the statutory and policy reasons for requiring employers to pay for other types of PPE do not carry the same weight for these types of PPE[3]. OSHA believes that there is little statutory justification for requiring employers to pay for such personal equipment if it is used away from the workplace and if all three of the proposed conditions are met: (1) The employer permits the footwear or eyewear to be worn off the job-site; (2) the footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site; and (3) such footwear is not designed for special use on the job.

The Commission and one court of appeals have agreed with the Secretary's interpretation that 29 CFR 1910.132(a) does not require employees to pay for safety shoes. *The Budd Co.* O.S.H. Cas. (BNA) 1548 (Rev.Comm. 1974); 513 F.2d 201, 205 (3d Cir. 1975). See also *United Steelworkers,* 647 F.2d at 1231 n.66 (noting special character of safety-toe protective footwear which the employee would wear off-the-job as well as on-the-job). Moreover, OSHA's logging standard (see 29 CFR 1910.266 (d)(1)(v)) provides analogous support for the proposed exceptions for safety shoes and prescription safety eyewear. OSHA excepted logging boots from among the types of equipment that employers must provide at no cost under the logging standard, based in part on evidence that logging boots are personal in nature and used away from work. See 59 FR 51684 (Oct. 12, 1994). See also section IX., *OSHA's Supplementary Statement of Reasons for its Interpretation of 29 CFR 1910.132(a).* The three conditions OSHA is proposing to apply to the exception for safety-toe footwear and prescription safety eyewear all relate to off-site use. For example, if the employer prohibits off-site use of the footwear or eyewear, employees would clearly not be able to wear it off the job, and the exception would not apply. Similarly, if the footwear or eyewear is used at work in a way that makes it unsafe for use off the job, e.g., safety-toe footwear is worn in a lead chromate pigment plant, it would be unsafe for the employee to wear it at home, and the exception would not apply. Finally, if the footwear or eyewear is designed for special use on the job, e.g., the eyewear is built into a welding mask, or the footwear has built-in metatarsal guards as well as safety-toes, it could not be worn off-site, and the exception would not apply.

If one or more of these conditions is not met for safety-toe footwear or prescription eyewear, the exception for these types of PPE does not apply, and the employer would be required to pay for the PPE.

For these reasons, OSHA has preliminarily concluded that employers should not be required to pay for safety-toe protective footwear and prescription safety eyewear, provided that all three of the excepted conditions are met. However, as discussed in other sections of this document, OSHA seeks comment on whether these exceptions, and the conditions restricting their applicability, are appropriate and whether other types of personal protective equipment should be excepted or other limiting conditions should be considered.

OSHA believes that compliance with the proposed standard is technologically feasible because the PPE affected by this rulemaking has already been shown to be technologically feasible in numerous other rulemakings, e.g., OSHA's 1994 PPE rulemaking and the individual rulemakings requiring particular types of PPE (e.g., fall protection in construction, and various shipyard employment standards). The affected PPE, as shown by the record evidence in these rulemakings, is widely manufactured, distributed, and used in workplaces in all industries. OSHA believes that the proposed standard is also economically feasible because the PPE of concern has been shown to be economically feasible in the earlier rulemakings referred to above and, additionally, for this proposed rule, as detailed in Section VI., *Preliminary Economic Analysis.* The proposed rule merely shifts some costs previously borne by employees to their employers.

[3] In her brief to the Commission in *Budd* filed in 1973, the Secretary stated her interpretation that 29 CFR 1910.132(a) does not require employers to pay for safety shoes. The Secretary noted that ''safety shoes are purchased by size, are available in a variety of styles, and are frequently worn off the job, both for formal and casual wear. Furthermore, it is neither feasible for a different employee to wear the shoes each day nor feasible that upon resigning from the position an employee will leave the shoes behind to be worn by another individual.'' See Section IX., *OSHA's Supplemental Statement of Reasons For Its Interpretation of 29 CFR 1910.132(a).*

Indeed, in its economic analyses of other rules requiring PPE, OSHA has always assumed that PPE would be paid for by the employer. The *Preliminary Economic Analysis* also indicates that to the extent that, the proposal enhances PPE use, employers will save money because their employees will avoid the injuries and illnesses that would otherwise continue to occur from the improper use of PPE. Finally, this preamble explains why the proposed regulatory text will enhance safety protection for workers and will better effectuate Congress' intent that employers pay for the costs of compliance with OSHA standards. 29 U.S.C. 655(b)(8). Accordingly, the proposed standard complies with all applicable statutory criteria.

IV. Summary and Explanation of the Proposed Rule

A. Introduction

OSHA is proposing to revise its standards requiring employers to provide PPE to clarify that the employer must pay for the PPE, except for safety-toe footwear and prescription safety eyewear that meets all three conditions—the employer permits off-site use, the footwear or eyewear is safe for off-site use, and the footwear or eyewear is not designed specially for on-site use. The logging boots required by 29 CFR 1910.266(d)(1)(v) are also excepted from the employer payment requirement. This proposal applies to standards in the following industry sectors: general industry, construction, and maritime (including shipyards, marine terminals, and longshoring operations). It does not apply to agriculture.

The Agency believes that requiring employers to pay for PPE is central to the effective implementation of the Act. As noted earlier in this preamble, OSHA is using the abbreviation PPE to cover all protective equipment, including personal protective equipment, that is provided to employees to protect them from workplace hazard. However, some inconsistent statements and interpretations by OSHA over the years regarding the Agency's PPE payment policy, and the recent *Union Tank* decision by the Review Commission, have now made it difficult for the Agency to uniformly enforce this policy.

Therefore, OSHA is proposing to resolve this issue by clearly identifying, through regulation, who is required to pay for PPE. OSHA intends this rulemaking to lead to the consistent application of the Agency's protective equipment requirements throughout the regulated community and by Agency compliance personnel. The rulemaking process will also give interested parties an opportunity to participate in the Agency's decisions through written comments and informal public hearings.

The following discussion presents the Agency's reasons and preliminary conclusions regarding the proposed revisions to its PPE standards, and explains the proposed requirements.

B. Reasons Why the Agency Believes That Employers Must Pay for PPE

1. *The OSHAct.* The Occupational Safety and Health Act of 1970 requires employers to provide a safe and healthful workplace for their employees. This mandate includes the financial obligation of employers to provide controls to address hazards that could cause injury or physical harm to their employees. (See the Legal Considerations section of this preamble for a more detailed discussion of the employer's obligation to pay for workplace protections.)

2. *PPE is also a hazard control measure.* Most standards require employers to implement engineering controls, such as ventilation or barriers, and administrative controls, such as regulated areas or danger zones, because these are typically thought to be the primary ways to reduce hazardous exposures to employees. There has never been any doubt that employers pay for these controls.

PPE is another type of control measure that is often necessary to reduce exposures to health and safety hazards. In many cases, PPE use supplements engineering, work practice, and administrative controls where such controls do not provide adequate protection. In some circumstances, such as in some maintenance work, PPE is used as the sole or primary means to protect employees. Consequently, it is appropriate for OSHA standards to require employers both to implement and to pay for PPE as a hazard control measure, just as they must do for engineering and administrative controls.

OSHA standards require many different types of PPE to protect employees from the variety of hazards in the workplace. Table I indicates the kinds of PPE required by OSHA standards.

TABLE I.—LIST OF PERSONAL PROTECTIVE EQUIPMENT

Personal fall arrest system

—Safety belts.
—Body belts.
—Lifelines.
—Lanyards.
—Harnesses.
—Pole climbing systems.
—Climbing spikes.
—Ladder safety device belts.
—Window cleaners' safety straps.

Face & eye protection

—Side shields.
—Goggles.
—Face shields/masks.
—Safety glasses.
—Welding goggles.

Hand protection and arm protection

—Gloves (disposable, fabric, leather mesh, aluminized, chemical resistant).
—Rubber sleeves.
—Hand shields.

Hearing protection

—Ear plugs.
—Ear muffs.

Head protection

—Headgear.
—Helmets.
—Hard hats.
—Welding helmets.

Foot protection

—Safety shoes.
—Safety boots.
—Logging boots.
—Shin covers.
—Shoe covers.
—Logging chaps & kevlar pants/leg protection.
—Metatarsal protection.

Respiratory protection

—Air-purifying respirators.
—Atmosphere-supplying respirators, including supplied-air respirators and self-contained breathing apparatus.
—Escape-only respirators.
—Filtering face pieces (dust masks).

Protective clothing

—Aprons.
—Encapsulating chemical protective suits.
—Flame resistant jackets and pants.

Fire fighting PPE

—Head protection.
—Face & eye protection.
—Protective coats and trousers.
—Foot protection.
—Hand protection.
—Proximity suits.

Protective equipment

—Insulating blankets.
—Matting.
—Barriers.
—Mouthpieces.
—Finger Cots.

Lifesaving equipment

—Life preservers.
—Life jackets.
—Reflective work vests.
—Ring life buoys.
—Retrieval systems.

Protective clothing for health-related substances

—Coveralls.
—Full body work clothing.
—Laboratory coats.
—Gowns.

TABLE I.—LIST OF PERSONAL PROTECTIVE EQUIPMENT—Continued

—Disposable paper clothing.
—Shoe covers.

3. *Employers are in the best position to provide the correct type of protective equipment and keep it in repair.* OSHA believes that requiring employers to pay for PPE will directly improve safety and health because the employer is in the best position to select, order, and obtain the proper type and design of PPE, ensure that it is of the necessary quality, and maintain it.

Employers are required to perform a hazard assessment of the workplace and select the correct type of PPE to protect employees from the hazards identified in that hazard assessment (§ 1910.132(d)). Employees often do not have the expertise to select the correct type of PPE, especially where the selection of appropriate PPE, such as fall protection equipment and respirators, may be complicated.

OSHA also believes that employers are in the best position to keep the PPE in repair. Employers are required to maintain PPE in a sanitary and reliable condition (§ 1910.132(a)). Because of this responsibility, OSHA believes that employers can maintain better control over the inventory of PPE by periodically inspecting the PPE and, when necessary, repairing or replacing it due to damage or normal wear and tear.

OSHA gave these reasons for requiring employers to pay for PPE in the final standard for logging operations (59 FR 51683, October 12, 1994). A number of commenters supported this reasoning.

OSHA first used this reasoning in rulemakings conducted in the 1970's. For example, the Inorganic Arsenic standard explicitly requires employers to pay for respirators, protective clothing, and protective equipment, including gloves, shoes, and face shields or goggles. 29 CFR 1910.1018(j)(1). The preamble to the rule states that it is the employer's obligation to provide protective equipment at no cost to the employee and that doing so puts the employer in the best position to provide the correct type of equipment and keep it in repair. 43 FR 19619 (May 5, 1978). OSHA applied the same reasoning in requiring employers to pay for respirators when necessary to protect employees from exposure to cotton dust. 43 FR 27387 (June 23, 1978). These standards were subsequently upheld on appeal.

In the recent respiratory protection standard, OSHA stated clearly that the employer must pay for any respirator required to be worn by employees. Although respirators are one of the more expensive types of PPE, there was no opposition to this requirement. 63 FR 1152, 1195, (January 8, 1998.)

4. *Requiring employees to pay for PPE may discourage their use of PPE.* Another reason for requiring the employer to pay for PPE is that employees may be discouraged from using necessary PPE if they are responsible for paying for it and must select and buy it.

In the preamble to the Hearing Conservation amendment, OSHA determined that employers should pay for hearing protectors based in part on the reasoning that permitting an employer to charge employees for hearing protectors could discourage the use of such devices and thereby undermine the effectiveness of the employer's hearing conservation program. 46 FR 4153 (January 16, 1981). The Fourth Circuit Court of Appeals upheld the standard's allocation of hearing protector costs to employers. *Forging Indus. Ass'n* v. *Secretary of Labor*, 773 F.2d 1436, 1451 (4th Cir. 1985)(en banc). The Court noted in that case that the Supreme Court's finding in *ATMI* left no doubt that Congress intended to impose compliance costs on employers and that ''it is only logical that OSHA may require employers to absorb such costs.'' *Forging Indus. Ass'n*, 773 F.2d at 1451.

One of the reasons OSHA has given for medical removal protection (MRP) benefits in its lead and cadmium standards is to encourage employee participation in the medical surveillance programs mandated by those standards. MRP protects the wages and other benefits of employees removed from exposure to a toxic substance because of an exposure—related condition revealed by medical surveillance. In the preamble to the cadmium standard, OSHA stated ''(MRP) . . . increase(s) employee participation and confidence in the standard's medical surveillance program.'' 57 FR 42101, 42367 (September 14, 1992). Analogous reasoning supports the proposed requirement that employers pay for PPE. OSHA believes that requiring employers to pay for PPE will increase the likelihood that the employees will use the PPE and have confidence in the employer's PPE program. The requirement for MRP and OSHA's rationale were both specifically upheld in the lead decision, *United Steelworkers* v. *Marshall*, 647 F.2d 1189, 1231 (D.C. Cir. 1980).

As discussed in the Background and Legal Considerations sections, OSHA has explicitly required employer payment for PPE in all health standards issued since 1977. This issue has been less clearly and directly addressed, however, in OSHA's safety standards. As discussed in the Background section, OSHA attempted to clear up any ambiguity in its 1994 memo to the field which stated that employer payment for PPE was generally required (with an exception for steel-toe safety footwear and prescription eyewear).

5. *Some State-Plan States already interpret their standards to require employers to pay for PPE.* Several States with OSHA-approved State-plans already require employers to pay for PPE. These requirements have provided protection to employees without posing feasibility problems for employers. For example, the State of North Carolina requires employers to provide, at no cost to the employee, all personal protective equipment that the employee does not wear off the job-site for use off the job. However, this State requirement applies only to general industry workplaces.

California standards are somewhat more extensive than those of North Carolina. Whenever California standards use the word ''provide,'' California State Courts have uniformly interpreted the standards to mean that the employer pays for all PPE (including any replacement PPE) in all industry sectors. The only exceptions are for PPE that reflect ''special preferences'' by employees, such as prescription safety eyewear or shoes of higher quality than required, or that reflect the individual's style preference. Many other State-plan states, including Alaska, Arizona, Indiana, Kentucky, New York, and Minnesota, either require the employer to pay for all PPE or follow the practice outlined in Federal OSHA's 1994 memo to the field.

C. Scope of Proposed Rulemaking

The proposal applies to the following industry sectors: general industry, construction, and maritime (shipyard employment, marine terminals, and longshoring). It does not apply to agriculture because OSHA does not have general standards for PPE use in agriculture. However, some employees in agriculture are covered by two general industry standards, the logging standard (29 CFR 1910.266) and the cadmium standard (29 CFR 1910.1027), which specifically require employers to pay for required PPE (except in the case of the logging boots specified in 1910.266(d)(l)(v), which are specifically exempted from the requirements of the

proposed standard). The PPE requirements in these two standards will continue to apply in agriculture.

Even though the types of PPE may vary across and within industry sectors, the same OSHA policy considerations on payment apply to all of them. In addition, many OSHA safety and health standards already contain provisions requiring the employer to pay for protective equipment and PPE.

Table II lists many OSHA provisions requiring the use of protective equipment and PPE. The table identifies the provision, and the type of PPE required by that provision.

TABLE II.—PPE PROVISIONS IN OSHA STANDARDS

29 CFR OSHA references	Type of PPE
Part 1910—General Industry 6(a) Standards [1]	
§ 1910.28(g)(9)	Safetybelt and lifeline.
§ 1910.28(j)(4)	Safetybelt and lifeline.
§ 1910.94(c)(6)(iii)(a)	Air-supplied respirator.
§ 1910.94(d)(9)(ii)	Rubber and impervious boots.
§ 1910.94(d)(9)(iii)	Shoes.
§ 1910.94(d)(9)(iv)	Impervious gloves.
§ 1910.94(d)(9)(v)	Impervious aprons, coats.
§ 1910.94(d)(9)(vi)	Jackets, chemical goggles, face shields, respirators.
§ 1910.132(a)	Personal protective equipment, eye, face, head, extremities, protective clothing, and respiratory devices.
§ 1910.132(b)	Employee-owned PPE (any PPE owned by employees and used on the job-site).
§ 1910.218(a)(1)(iv)	Gloves, goggles, and aprons.
§ 1910.242(b)	PPE appropriate for hazards associated with the use of hand and portable powered tools and equipment.
§ 1910.243(d)(1)(ii)	Eye, face, head protection.
§ 1910.252(b)(1)(i)	Safetybelt, lifeline.
§ 1910.252(b)(2)(i)(A)	Welding helmet, hand shields.
§ 1910.252(b)(2)(i)(B)	Filter lens.
§ 1910.252(c)(4)(2)(ii)	Airline respirator.
§ 1910.252(c)(4)(iii)	SCBA.
§ 1910.252(c)(7)(iii)	Respirator.
§ 1910.261(b)(2)	Foot protection, shin guards, hardhats, noise attenuation.
§ 1910.261(b)(5)	Lifeline, safety harness.
§ 1910.261(c)(2)(vii)	Foot, head, eye protection.
§ 1910.261(c)(6)(ii)	Foot, head, eye protection.
§ 1910.261(c)(7)(ii)	Foot, head, eye protection.
§ 1910.261(d)(1)(i)	Respirators, goggles, protective masks.
§ 1910.261(d)(1)(ii)	Eye, face protection, clothing.
§ 1910.261(g)(2)(i),(ii),&(iii)	Gas mask, respirators, eye protection, safety belts, lifeline.
§ 1910.261(g)(4)	Respirators, lifebelts, lifelines.
§ 1910.261(g)(5)	Rubber boots, gloves, apron, eye protection.
§ 1910.261(g)(6)	Respirator.
§ 1910.261(g)(10)	Gas mask.
§ 1910.261(g)(15)(ii),(iii)&(v)	Respirator, lifeline, safetybelt.
§ 1910.261(g)(18)(i)&(ii)	Showers, bubblers.
§ 1910.261(h)(2)(iii)&(iv)	Gas mask, SCBA.
§ 1910.261(i)(4)	Eye, head, foot and shin protection.
§ 1910.261(k)(3)	Face shields, aprons, rubber gloves.
§ 1910.265(c)(21)(i)	Safetybelt, lifeline.
§ 1910.265(d)(2)(ii)(h)	Life ring and line.
§ 1910.265(d)(2)(iii)(g)	Buoyant devices.
§ 1910.335(a)(1)(i)	Electrical protective equipment.
§ 1910.335(a)(2)(i)	Protective shields, barriers, insulation.
§ 1910.66(j)	Personal fall arrest system.
§ 1910.67(c)(2)(v)	Bodybelt.
§ 1910.120(g)(3)(iii)	Positive pressure SCBA, airline.
§ 1910.120(g)(3)(iv)	Totally-encapsulated chemical suit.
§ 1910.120(c)(5(ii)	5-minute ESCBA.
§ 1910.120(c)(5)(iii)	Level B PPE.
§ 1910.120(q)(3)(iii)	Firefighting PPE.
§ 1910.120(q)(3)(iv)	Positive pressure SCBA.
§ 1910.133(a)(1)	Eye and face protection.
§ 1910.134	Respirators.
§ 1910.135	Protective helmet.
§ 1910.136	Foot protection.
§ 1910.137	Electrical protective equipment.
§ 1910.138	Hand protection.
§ 1910.146(k)(1)(i)	PPE, rescue equipment.
§ 1910.156(e)(1)(i)	Protective clothing.
§ 1910.156(e)(1)(ii)	Firefighting PPE.
§ 1910.156(f)(1)(i)	Respirators.
§ 1910.266(d)(1)(iii)	Hand protection.
§ 1910.266(d)(1)(iv)	Leg protection.

TABLE II.—PPE PROVISIONS IN OSHA STANDARDS—Continued

29 CFR OSHA references	Type of PPE
§ 1910.266(d)(1)(v)	Logging boots.
§ 1910.266(d)(1)(vi)	Head protection.
§ 1910.266(d)(1)(vii)	Eye and face protection.
§ 1910.268(g)(1)	Safetybelt and strap.
§ 1910.268(1)(i)	Head protection and eye protection.
§ 1910.272(g)(1)(iii)(B)	Respirator.
§ 1910.272(g)(2)	Body harness and lifeline.
§ 1910.94(a)(5)(i)	Respirators.
§ 1910.94(a)(5(iv)	Respirators.
§ 1910.94(a)(5)(v)(B)	Eye and face protection.
§ 1910.95(b)(1)	PPE (Hearing protection).
§ 1910.95(i)(1)	Hearing protection.
§ 1910.95(i)(3)	Hearing protection.
Part 1910 General Industry Health 6(b) Standards[1]	
§ 1910.134	Respirators.
§ 1910.1002	Protective equipment, Respirators.
§ 1910.1001(g)(2)(i)	Respirators.
§ 191.1001(h)(1)	Coveralls, gloves, head coverings, foot coverings, face shields, goggles.
§ 1910.1001(j)(7)(iii)(E)	PPE (for protection against asbestos).
§ 1910.1003(b)	Protective clothing, smocks, coveralls, gloves.
§ 1910.1003(c)(4)(iii)	Long-sleeved shirts, pants, boots.
§ 1910.1003(c)(4)(iv)	Respirators.
§ 1910.1003(c)(5)(i)	Gloves, boots, respirators.
§ 1910.1004	Respirators, protective clothing.
§ 1910.1006	Respirators, protective clothing.
§ 1910.1007	Respirators, protective clothing.
§ 1910.1008	Respirators, protective equipment.
§ 1910.1009	Respirators, protective equipment.
§ 1910.1010	Respirators, protective equipment.
§ 1910.1011	Respirators, protective equipment.
§ 1910.1012	Respirators, protective equipment.
§ 1910.1013	Respirators, protective equipment.
§ 1910.1014	Respirators, protective equipment.
§ 1910.1015	Respirators, protective equipment.
§ 1910.1016	Respirators, protective equipment.
§ 1910.1017	Respirators, protective equipment.
§ 1910.1018	Respirators, protective work clothing, eye and face protection.
§ 1910.1025	Respirators, protective work clothing.
§ 1910.1027	Respirators, protective work clothing, eye and face, head protection.
§ 1910.1028	Respirators, protective clothing, eye and face protection.
§ 1910.1029	Flame resistant pants, jacket, gloves, eye and face protection, insulated footwear, protective helmets.
§ 1910.1030	Gloves, gown, lab coat , face shield, masks, eye protection, mouthpieces, pocket mask.
§ 1910.1043	Respirators.
§ 1910.1044	Respirators, protective clothing, eye and face protection.
§ 1910.1045	Respirators, protective clothing and equipment.
§ 1910.1047	Respirators, protective clothing and equipment.
§ 1910.1048	Respirators, protective clothing and equipment.
§ 1910.1050	Respirators, aprons, coveralls, gloves, head coverings, foot coverings, face shields, chemical goggles, other PPE.
§ 1910.1051	Respirators, protective clothing, eye and face protection.
§ 1910.1052	Respirators, protective clothing, eye and face protection.
§ 1910.1200(h)(3)(iii)	PPE (for protection against hazardous chemicals).
§ 1910.1450(e)(3)(ii)	PPE (for protection against hazardous chemicals in laboratories).
§ 1910.1450(f)(4)(i)(C)	PPE (for protection against hazardous chemicals in laboratories).
§ 1910.1450(i)	Respirators.
Part 1915—Shipyard Employment 6(a) Standards[1]	
§ 1915.12(c)(4)(ii)	Respirators, other PPE.
§ 1915.12(e)(1)(i)	Respirators, other PPE.
§ 1915.13(b)(6)(iv)	Respirators, other PPE.
§ 1915.32(a)(3)	Respirators, protective clothing.
§ 1915.33(a)	Eye and face protection.
§ 1915.33(d)	Face protection.
§ 1915.33(e)	Face protection.
§ 1915.34(a)(1)	Goggles, face shields.
§ 1915.34(a)(4)	Respirators.
§ 1915.34(b)(1)	Respirators.
§ 1915.34(c)(3)(i)	Respirators.
§ 1915.34(c)(3)(ii)	Respirators.

TABLE II.—PPE PROVISIONS IN OSHA STANDARDS—Continued

29 CFR OSHA references	Type of PPE
§ 1915.34(c)(iii)	Respirators.
§ 1915.34(c)(iv)	Protective clothing, gloves.
§ 1915.34(c)(3)(v)	Safety belt.
§ 1915.35(a)(1)(i)	Respirators.
§ 1915.35(a)(1)(ii)	Respirators.
§ 1915.35(a)(1)(iii)	Respirators.
§ 1915.35(a)(2)	Respirators.
§ 1915.35(b)(9)	Eye, face, head, hand protection, protective clothing.
§ 1915.35(b)(13)	Respirators and protective clothing.
§ 1915.35(b)(14)	Respirators and protective clothing.
§ 1915.51(c)(3)	Respirators.
§ 1915.51(d)(2)	Respirators.
§ 1915.51(d)(3)	Respirators.
§ 1915.51(e)(1)(ii)	Eye protection, filter lenses.
§ 1915.51(e)(1)(iii)	Protective clothing.
§ 1915.51(f)(2)	Eye protection.
§ 1915.53(d)(1)	Respirators.
§ 1915.53(d)(2)	Respirators.
Part 1915—Shipyard employment 6(b) Standards [1]	
§ 1915.12(a)(3)(ii)	Respirators, other PPE.
§ 1915.152(a)	All PPE.
§ 1915.153(a)	Eye and face protection.
§ 1915.154	Respirators.
§ 1915.155	Head protection.
§ 1915.156	Foot protection.
§ 1915.157	Hand and body protection.
§ 1915.158	Personal flotation devices, life rings.
§ 1915.159	Personal fall arrest systems.
§ 1915.160	Positioning device systems.
Part 1917—Safety and Health Regulations for Marine Terminals 6(b) Standards [2]	
§ 1917.22(c)	Protective clothing.
§ 1917.23(d)(1)	Respirators, emergency protective equipment.
§ 1917.25(e)(1)	Respirators, emergency protective equipment.
§ 1917.26(f)	Personal flotation devices, safety belts.
§ 1917.49(i)(3)	Lifeline and safety harness.
§ 1917.73(a)(3)	Respirators.
§ 1917.73(c)	Respirators, lifeline, safety harness.
§ 1917.91(a)(1)	Eye and face protection.
§ 1917.92	Respirators.
§ 1917.93(a)	Head protection.
§ 1917.94(a)	Foot protection.
§ 1917.95(a)	Protective clothing.
§ 1917.95(b)	Personal flotation devices.
§ 1917.118(e)(1)	Ladder safety device.
§ 1917.126(b)	Personal flotation devices.
§ 1917.152(e)(8)(ii)	Eye protection, filter lenses.
§ 1917.152(e)(11)	Rubber pads, rubber boots.
§ 1917.152(f)	Respirators.
§ 1917.152(f)(4)	Eye, head, hand protection.
§ 1917.152(g)(3)	Respirators.
§ 1917.152(h)	Respirators, eye, face, head protection, filter lenses.
§ 1917. 154	PPE (For protection against hazards resulting from the use of compressed air).
Part 1918—Longshoring 6(b) Standards [1]	
§ 1918.101	Eye protection.
§ 1918.102	Respirators.
§ 1918.103	Protective clothing.
§ 1918.104	Foot protection.
§ 1918.105	Head protection.
§ 1918.106	Personal flotation devices
Part 1926 Construction 6(a) Standards [1]	
§ 1926.300(c)	PPE (for hazards from the use of hand and power tools).
§ 1926.304(e)	PPE (for hazards from the use of woodworking tools).
§ 1926.551(e)	Eye protection, hardhats.

TABLE II.—PPE PROVISIONS IN OSHA STANDARDS—Continued

29 CFR OSHA references	Type of PPE
	Part 1926—Construction 6(b) Standards[1]
§ 1926.52(b)	Hearing protection.
§ 1926.95(a)	General requirements for all PPE used in construction.
§ 1926.95(b)	Employee owned PPE.
§ 1926.95(c)	Design of PPE.
§ 1926.701(f)	Face and head protection.
§ 1926.800(d)(7)	PPE used in underground construction.
§ 1926 Subpart L	Personal fall arrest systems.
§ 1926 Subpart M	Personal fall arrest systems.

[1] A 6(a) standard is any standard that OSHA adopted from an existing Federal standard or a national consensus standard under Sec. 6(a) of the Act, i.e., without notice-and-comment rulemaking. A 6(b) standard is a standard that OSHA promulgated using the rulemaking process with public participation.

For all industry sectors, employers are in the best position to choose the proper type and quality of PPE, and to maintain the PPE selected. The same statutory considerations apply to all industry sectors, as discussed above in this preamble.

However, additional considerations apply to workplaces in construction, longshoring, and marine terminals: first, there is considerable turnover in these industries, and second, many of the affected businesses employ only a small number of employees. Based on OSHA's experience, safety-toe footwear is the type of PPE most often used in these industries and the type of PPE that employees are most often required to pay for at present. This equipment would be excluded from the ''employer pays'' requirement, provided that the three proposed conditions are met. Therefore, OSHA does not believe that its proposal will cause economic difficulties for employers in these sectors. See also section VI., *Preliminary Economic Analysis.*

D. Current OSHA Rrequirements Concerning Payment for PPE

Earlier OSHA standards promulgated under section 6(a) of the OSH Act (i.e., those standards adopted without notice-and-comment rulemaking and public participation) that required the use of PPE did not explicitly address the issue of who is required to pay for PPE. In 1978, however, several substance-specific health standards promulgated under section 6(b) of the OSH Act (i.e., promulgated using the full rulemaking process with public participation and comment) required employers to pay for PPE. Since that time, all OSHA health standards have explicitly required employers to pay for required PPE.

However, the safety standards promulgated under section 6(b) of the OSH Act have not been consistent with respect to the employer's responsibility to pay for PPE. Several of these standards require the employer to ''provide'' PPE, but do not explicitly state that the employer must pay for it. Other standards specifically require the employer to pay for all PPE. One standard, Logging Operations (§ 1910.266), requires the employer to pay for all PPE, with the exception of logging boots. The following are examples of OSHA's current PPE requirements.

Telecommunication standard. Paragraph (e) of § 1910.268 requires the employer to provide personal protective equipment, protective devices and special tools. However, this provision does not specifically state that the employer must pay for the PPE, even though it is common practice in the telecommunications industry for the employer to pay for all PPE except for safety-toe protective shoes (see the Regulatory Impact Analysis for that standard).

Electric Power Generation. Paragraph (g)(1) of § 1910.269 requires PPE to meet the requirements of subpart I of part 1910, but does not specify that the employer must pay for the PPE.

Maritime standards. Paragraph (a) of § 1915.152 (Shipyard standards) requires the employer to provide and ensure the use of PPE, but does not clearly state that the employer is required to pay for it.

Identical PPE standards apply to marine terminals (part 1917) and longshoring (part 1918). They state, in part: ''The employer shall ensure that each affected employee wears* * *[PPE].'' Again, the regulatory text does not state that the employer is required to pay for the PPE. However, the preamble to the marine terminals and longshoring standards does give guidance with respect to the payment for PPE issue (62 FR 40186–87):

> Although the equipment used in marine cargo handling operations often differs from that mentioned in the October 18 memorandum [OSHA Policy Memorandum, October 18, 1994] the same policy considerations apply in the Longshore and Marine Terminals standard PPE context. Therefore, OSHA will apply the above-stated policy when determining whether the employer is required to pay for a particular kind of PPE.

Therefore, OSHA's enforcement policy for marine terminals and longshoring requires employers to pay for all PPE except for safety-toe protective shoes and prescription safety glasses.

Subpart I of part 1910. On April 6, 1994, OSHA revised its general industry standards for PPE (59 FR 16362) and added new provisions for hazard assessment and training. The Agency had not proposed a requirement concerning the employer's responsibility to pay for PPE, and the subject was not an issue during the rulemaking.

Permit-required confined spaces (§ 1910.146). This standard specifically requires the employer to pay for PPE. It requires the employer to provide the equipment (including PPE) necessary for safe entry into, and rescue from, permit spaces at no cost to employees, to maintain the equipment properly, and to ensure its proper use by employees.

Logging operations. During the logging rulemaking, OSHA proposed that the employer provide PPE and assure its use. OSHA's intent was that the employer provide all PPE at no cost to employees. However, some commenters asserted that employers should not have to pay for all types of PPE used in logging operations.

After careful analysis of the rulemaking record, the Agency concluded that the employer should be required to pay for all PPE except for logging boots. OSHA noted that logging boots are customarily worn outside the workplace; are individually-fitted and therefore not usable by another

employee; and are used in an industry that has a high turnover rate.

E. Advisory Committee on Construction Safety and Health

The Advisory Committee on Construction Safety and Health (ACCSH) assists OSHA by providing comments and recommendations on proposed construction standards. Accordingly, the Agency provided ACCSH with the following draft revision of § 1926.95:

(d) *Payment for Protective Equipment.* All protective equipment, including personal protective equipment, required in this part, shall be provided by the employer at no cost to employees except for safety-toe protective footwear and prescription safety eyewear.

ACCSH considered the proposed language at its meeting on April 8, 1998.

ACCSH members expressed several concerns about the proposed language. Some members expressed the view that many employers were already paying for safety-toe shoes through collective bargaining agreements and that the new text might discourage them from continuing to do so (Tr. 53, 61).

Members also noted that prescription glasses are sometimes incorporated into respirator facepieces and would therefore be impractical for workers to use at home. They therefore asked why employers should not pay for that prescription eyewear (Tr. 47).

Other members of the committee mentioned the problem of employees who did not always bring their safety equipment to work. They noted that it would be expensive for an employer to have to replace that equipment frequently (Tr. 51–52).

Two resolutions were introduced. The first stated:

All protective equipment, including personal protective equipment, required in this part, shall be provided by the employer at no cost to the employees.

That resolution failed by a 6 to 7 vote.

The second resolution introduced read as follows:

The language currently in 1926.95 regarding personal protective equipment, is effective and is sufficient to protect the worker and provide the personal protective equipment. (We) recommend leav(ing) the language as is currently stated in 1926.95 (Tr. 62).

That resolution passed by a 6 to 2 vote.

Based on the recommendations and discussion of ACCSH, the Agency revised the draft regulatory text to reflect many of the Committee's concerns. OSHA is proposing the revised proposed regulatory text for general industry and maritime as well as the construction industry.

The Agency believes that the *Union Tank* decision has undercut OSHA's ability to enforce the standard as outlined in the 1994 memo. As discussed below, the proposed rule incorporates much of the 1994 memo into the text of the Agency's various protective equipment standards. OSHA believes that this action will carry out the recommendations of ACCSH effectively.

The proposed regulatory text now makes clear that the employer is not required to pay for safety-toe protective footwear and prescription safety eyewear unless: (1) The employer does not permit it to be worn off-site; (2) the footwear or eyewear is rendered unsafe for use off-site; or (3) the footwear or eyewear is designed for special use on the job. For example, contaminated safety-toe footwear would not be permitted to be worn off the job-site because it would be unsafe to do so, and prescription eyewear mounted inside a full-facepiece respirator would not be permitted for use off the job-site because it is designed for special use on-site. Consequently, the employer would be required to pay for the PPE in these two examples.

OSHA intends to require employers to pay for the initial issue of PPE and for replacement PPE that must be replaced due to normal wear and tear or occasional loss. Only in the rare case involving an employee who regularly fails to bring employer-supplied PPE to the job-site, or who regularly loses the equipment, would the employer be permitted to require the employee to pay for replacement PPE.

F. Explanation of Proposed Requirement

OSHA is proposing to add the following language to its general industry standards as § 1910.132(h):

All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees.

Exception: The employer is not required to pay for the logging boots required by 29 CFR § 1910.266(d)(1)(v). The employer is also not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met: (1) the employer permits such footwear or eyewear to be worn off the job-site; (2) the footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and (3) such footwear or eyewear is not designed for special use on the job.

OSHA is proposing to add the same language (except for the first sentence of the exception, which applies only to the general industry workplaces covered by the logging standard) as shipyard § 1915.152(f) as marine terminal § 1917.96, as longshoring § 1918.106, and as construction § 1926.95(d).

The purpose of this language is to make clear that employers must provide and pay for all necessary PPE wherever such PPE is required by an OSHA standard, with the exceptions mentioned. The reasons for this proposal have been discussed above and are also found in the Legal Considerations section of this preamble, above.

The proposal is intended to cover every situation where an OSHA standard requires the use of PPE. OSHA preliminarily concludes that all the reasons why employers should provide and pay for PPE apply generally to all types of PPE. In other words, the reasons why an employer is in the best position to purchase the correct type and quality of wire mesh gloves to prevent finger lacerations also apply to the selection and purchase of the correct type and quality of fall protection harnesses and lanyards, respirators, and metatarsal foot protection. As noted, the proposal does contain exceptions and conditions to these exceptions. OSHA requests comment on whether other types of PPE should be excepted from the employer-payment principle and if so, why.

The proposed payment requirement in § 1910.132(h) applies to ''all protective equipment required in this part.'' For example, part 1910 contains many different requirements for the use of PPE throughout general industry (see Table 2, above). Although the proposed regulatory language would be inserted only in § 1910.132 (which is in subpart I of part 1910), OSHA intends that employers pay for all PPE required throughout part 1910.

OSHA does not believe it necessary to specify in the proposed regulatory text that the employer ensure that employees use the required PPE and maintain it appropriately, because these concepts are already clearly stated in most of OSHA's PPE requirements. OSHA requests comments on the adequacy of this approach, and whether employee use and maintenance of PPE should be specifically required.

As discussed previously, some PPE requirements already include specific language requiring the employer to provide and pay for PPE (e.g., the language used in most health standards), while others use more ambiguous language. OSHA intends the proposed new language to cover all of the Agency's PPE requirements. OSHA believes that this approach will make the obligations of employers clear with regard to the provision and payment for PPE. The proposed language does not

affect or limit the ''provide-and-pay'' language in those regulatory provisions that already clearly state this requirement, such as 29 CFR 1910.266(d)(1)(v), 29 CFR 1910.1029(h)(1), 29 CFR 1910.146(d), and 29 CFR 1910.134(c).

The proposed provide-and-pay language also allows a reasonable degree of compliance flexibility. For example, the proposed language would permit an employer to send an employee to purchase appropriate PPE at a supply store if the employer paid for the employee's time and paid for the PPE.

The proposed requirement would also make the employer responsible to provide, and pay for, replacement PPE when the original PPE wears out from normal wear and tear or in the event of occasional loss or accidental damage by the employee. However, if an employee regularly and with unreasonable frequency loses or damages the PPE, the employer may request that the employee pay for the replacement PPE. This issue was discussed at the ACCSH meeting, as noted earlier. It is also important to note that current OSHA PPE standards (e.g., § 1910.132(f)(1)(v)) already require the employer to train employees in the proper care, maintenance, and useful life of PPE.

Exceptions

For the reasons discussed above, OSHA has preliminarily concluded that the Agency needs to codify the general principle that employers must both provide and pay for PPE. However, the Agency is also proposing exceptions to that rule. OSHA is not proposing to require employers to provide, or pay for, safety-toe protective footwear or prescription safety eyewear providing that the following three conditions are met: (1) the employer permits the footwear or eyewear to be worn off-site; (2) the footwear or eyewear is used on the job in a manner that does not make it unsafe for off-site use; and (3) the footwear or eyewear is not designed for special use on the job. In addition, as the current rule provides, general industry employers are not required to pay for the logging boots required by 29 CFR 1910.266(d)(1)(v).

Safety-toe protective footwear (safety shoes). This discussion of safety shoes pertains only to safety-toe protective footwear. It does not pertain to other types of foot protection, such as metatarsal or cut-resistant protective boots. (Logging boots are discussed below.)

OSHA considers safety shoes to be personal in nature. That is, safety shoes are not used by different employees. Instead, they are used by, and sized to fit, only one individual employee. Also, one employee's safety shoes are not generally used by other employees because of size and hygienic concerns. In addition, employees often wear safety shoes away from the job-site.

Safety shoes are widely available and are not difficult for the employee to select and purchase. Evidence presented in the Preliminary Economic Analysis also shows that it is customary in some workplaces for employees to pay for their safety-toe footwear. In addition, the OSHA policy memorandum of 1994 generally excepted safety-toe safety shoes from the employer payment requirement. For these reasons, OSHA is not proposing to include safety-toe safety shoes in the employer payment requirement if all three of the conditions are met.

Thus, the proposed exception would not apply to metatarsal protection (metatarsal guards or protective footwear that incorporates metatarsal protection) or special cut-resistant footwear because these kinds of footwear are not generally used off the worksite, and employers often re-issue metatarsal guards and cut-resistant footwear to subsequent employees. Also, the proposed exception would not apply to any safety-toe safety shoe that cannot safely be worn off the worksite. For example, the exception does not include safety shoes that have been worn in a regulated area where they may have been contaminated with a toxic substance. Employers must continue to provide and pay for these safety shoes because they are not safe for use off-site. However, the exception does not prohibit employers from paying for safety-toe safety footwear of any type, if they choose to do so.

Prescription safety eyewear. OSHA also considers prescription safety eyewear to be personal in nature. Prescription safety eyewear is, of course, designed for the use of a single individual. Other types of protective eyewear, such as goggles, generally remain at the job-site and can be cleaned and reissued for use by other employees.

Prescription safety eyewear is usually used both on and off the job-site. Additionally, regular prescription glasses can be worn underneath goggles and other protective eyewear that has been designed to accommodate them. Therefore, in this situation OSHA believes that employers should be required to pay only for the protective goggles. Employees can then decide either to purchase their own prescription safety glasses or to wear their own prescription glasses underneath the protective eyewear provided by the employer. Additionally, the employer may agree to pay all or part of the cost of prescription safety eyewear. However, the employer must pay for any prescription eyewear that is mounted inside the full-facepiece of a respirator, because such eyewear would fall under the ''special use'' condition of the proposed rule (this is also clearly required by the respirator standard). OSHA's position on this issue is discussed below in the Issues Section of this preamble.

The Agency realizes that there may be different opinions with respect to this proposal. Some may argue that requiring employers to pay for all PPE (including safety shoes and prescription safety eyewear) may lead to more employees wearing PPE and, consequently, may enhance employee safety. The Issues Section, below, requests comment on this issue.

OSHA emphasizes that payment for safety-toe footwear and prescription safety eyewear can be negotiated between management and labor. Also, this proposed rulemaking is not intended to affect any collective bargaining agreements, or any other responsibility to pay for safety-toe footwear and prescription safety eyewear in particular workplaces.

The Agency also emphasizes that this proposed rulemaking does not change the employer's obligation under the Act to ensure that all PPE, including employee-owned PPE, is worn when necessary, is adequate to protect employees from the hazard, and is properly maintained. If the employee chooses to furnish his or her personally-owned PPE, this rule does not require the employer to reimburse the employee for the cost of that equipment.

This proposed revision specifically restates the exception to the ''employer pays'' principle contained in the OSHA standard for logging operations (§ 1910.266(d)(1)(v)), which specifies that the employer is not required to pay for a certain type of foot protection (foot protection constructed of cut-resistant material to protect employees who operate chainsaws, etc.). OSHA considered that issue at length in the logging rulemaking and concluded that the evidence supported excluding that type of footwear from the general obligation that logging employers pay for logging PPE. See the discussion at 59 FR 51683–4 (Oct. 12, 1994).

V. Issues Pertaining to the Proposed Rule

OSHA requests comments, views, and data on all issues relevant to the proposed rule, including the following:

1. OSHA also considered proposing the following alternative regulatory text:

The employer shall provide, at no cost to the employee, all protective equipment and personal protective equipment except for protective equipment which the employer demonstrates is personal in nature and customarily used off the job.

This provision is stated in general language and would have the advantage of providing some flexibility for specific workplace situations involving PPE. However, a major disadvantage of this approach is that it uses the terms ''personal in nature'' and ''customarily used off the job,'' which OSHA would need to define and interpret. OSHA's proposed exception, which is more specific than the text of the alternative discussed above, provides greater certainty to employers and workers.

OSHA requests comments on the merits of both approaches, including views on how OSHA should interpret the regulatory text.

2. Are there other types of PPE, beside safety-toe safety footwear and prescription eyewear, that should be excepted from the proposed payment requirement? Why or why not? Please submit any available supporting documentation. Alternatively, should OSHA require employers to pay for all PPE, including safety-toe footwear and prescription safety eyewear? Why or why not?

3. OSHA realizes that there is frequent turnover in the construction industry, where employees frequently move from job-site to job-site. This is an important factor because an employer with a high-turnover workplace would have to buy PPE for more employees if the PPE was of the type that could only be used by one employee. OSHA requests comment on whether its proposed exceptions for safety-toe footwear and prescription safety eyewear are appropriate in the construction industry. Are there any other approaches to handle the turnover situation that would be protective of construction workers? Are there any other issues unique to the construction industry that should be considered in this rulemaking?

4. The longshoring and marine terminal industries have a unique employer-employee relationship in many ports. At some ports, employees are hired for a job through a labor pool, and the same employee may work for 5 different employers in the same week. How do these factors affect the issue of who is required to pay for PPE? Does the employer customarily pay for PPE in the maritime industry? Are there any other issues unique to the maritime industry that OSHA should consider in this rulemaking?

5. OSHA requests comments, information, and data on whether employee-owned PPE is less protective than employer-provided PPE, and under what circumstances.

6. The proposal covers protective equipment and personal protective equipment used in welding, including protective gloves. Does welding PPE create any unique problems on the PPE payment issue? Does the employee usually pay for welding PPE?

7. If an employee wants to use more costly PPE because of individual preference, should that employee be responsible for any difference in cost? Is there evidence that such ''individualized'' PPE has caused safety problems in the past?

8. Full-facepiece respirators present a unique problem for employees who need prescription glasses. The temples of the prescription glasses break the face-to-face piece seal and greatly reduce the protection afforded by the respirator. Special glasses and mounts inside the facepiece of the respirator are sometimes used to provide an adequate seal. Because of this special situation, OSHA believes that it is appropriate for the employer to provide and pay for the special-use prescription glasses used inside the respirator facepiece. Is it common industry practice for employers to pay for these special glasses? What is the typical cost for providing ''insert-type'' prescription glasses inside full-facepiece respirators?

9. OSHA's Preliminary Economic Analysis has found that this proposal will not impose significant impacts on firms in any industry segment or on affected small businesses. OSHA requests comments on the analysis and on any industry or subindustry that may have particular economic problems as a result of the proposed rule.

10. Should the standard require the employer to pay for inserts or other articles that are uniquely personalized components of personal protective equipment, such as head coverings used under welding helmets and custom prescription lens inserts worn under a welding helmet or a diving helmet?

11. OSHA intends to require employers to pay for the initial issue of PPE. Should employers also be required to pay for PPE that must be replaced due to normal wear and tear or occasional loss?

12. OSHA requests comments on the conclusions about the costs and benefits contained in the Preliminary Economic Analysis section.

VI. Preliminary Economic Analysis

It has been determined that this is a significant regulatory action under E.O. 12866, and a major rule under the Congressional Review provisions of the Small Business Regulatory Enforcement Fairness Act.

Introduction

OSHA has prepared this Preliminary Economic Analysis to examine the feasibility of the proposed rule on Employer Payment for Personal Protective Equipment and to meet the requirements of Executive Order 12866 and the Regulatory Flexibility Act (as amended). The proposed rule would require employers to pay for protective equipment, including personal protective equipment (PPE), when OSHA standards mandate that employers provide such equipment to their employees. The only PPE employers would not be required to pay for in certain circumstances are safety-toe footwear and prescription safety eyewear. OSHA is proposing to except PPE of these types providing that these types of PPE meet three conditions: (1) The employer permits them to be worn off-site; (2) they are not used on-site in a manner that renders them unsafe for use off-site; and (3) they are not designed for special on-site use. Logging boots are also specifically excepted from employer payment by 29 CFR 1910.266(d)(1)(v).

OSHA's requirements for PPE (again, OSHA is using the abbreviation ''PPE'' to cover all protective equipment, (including personal protective equipment) appear in many health, safety, maritime, and construction standards. In some cases, the standard is explicit in stating that employers are to provide the PPE at no cost to the employee (see, for example, OSHA's substance-specific health standards, which are codified in Subpart Z of 29 CFR 1910.1000). In other cases, however, such as in paragraph (a) of 29 CFR 1910.132 and paragraph (a) of 29 CFR 1926.28, who is required to pay for the PPE is not expressly specified. (For a complete list of OSHA's PPE requirements, see the Summary and Explanation for the proposed standard, above.)

The proposed rule would apply to general industry, construction, and maritime workplaces covered by the PPE provisions in existing OSHA standards.

The rule would clarify OSHA's intent that, with the exceptions noted, employers provide required PPE to their employees at no cost to those employees. The kinds of PPE addressed by OSHA's PPE standards include, for example, hard hats, safety shoes, gloves, safety glasses, goggles, faceshields, welding helmets and goggles, fall

protection equipment, and chemical suits. (A more detailed list of the kinds of PPE covered appears in the Summary and Explanation, above.)

Industry Profile

The proposed rule is concerned only with who pays for OSHA-required PPE; that is, it would not require employers to provide PPE where none has been required before. Instead, the proposed rule merely stipulates that required PPE be paid for by the employer, except in the case of safety-toe footwear and prescription safety eyewear that meets the three proposed conditions. In other words, the required PPE is currently being paid for either by the employer or the employee. The proposed rule would shift the costs of that portion of the PPE currently being paid for by the employee (except for safety-toe footwear and prescription safety eyewear meeting the proposed conditions) to their employers, as has been OSHA's intent. (See the Legal Considerations section of the preamble, above, for details of OSHA's legal interpretation of this issue.) To the extent that this rule has the effect of improving the quality of PPE being used or of ensuring that PPE is being used where it has not previously been used, such improved compliance would result both in additional benefits and costs to the economy. Nevertheless, to determine the extent of PPE usage and the potential magnitude of any shift in costs, OSHA has developed a profile of industry PPE use and payment patterns.

Data on PPE Usage Patterns

The data relied on to develop this industry profile derive from a number of sources, although the Agency relied on survey data for its estimates of use patterns for most types of PPE. The main source of information on PPE use patterns for general industry was a telephone survey of more than 5,000 employers conducted by OSHA in 1989 (ERG 1998), in support of the Agency's 1994 PPE rulemaking.[4] The survey yielded industry- and size-class-specific PPE use information for nearly all industries affected by that rulemaking and the current one. The survey provided information on PPE use in shipyards, within the context of SIC 37, Transportation Manufacturing. It did not, however, survey the construction industry.

Data on usage patterns in the construction industry derive primarily from a study done for the Office of Technology Assessment (OTA 1984) in 1982 by Springborne Associates. In this survey of employers, OTA provided estimates of the number of construction workers using various types of PPE. As with the 1989 PPE survey, the Agency assumes that the patterns of PPE usage (percentage of employees using PPE) within sectors of the construction industry have remained constant. The Agency believes that this is a reasonable assumption, in part because OSHA's construction rules governing PPE usage have remained the same since 1972. Further, the OTA survey reported that several types of PPE (e.g., hard hats, gloves, eye protection) are used by virtually all construction workers; thus it would be impossible for usage of these types of PPE to have increased significantly over time. The general assumption that PPE usage patterns have not changed significantly over time is supported by a recent OSHA analysis of respirator use patterns conducted for the Agency's final rule for respiratory protection (63 FR 1172, January 8, 1998). This analysis shows that respirator usage patterns have not changed substantially from those shown in the OTA report. A comparison of the OTA data for several other types of PPE (e.g., gloves, eye protection, faceshields, safety shoes and hard hats) with usage data from the 1989 PPE survey also indicated no clear shift in usage for these types of PPE. Thus, OSHA believes that these estimates of PPE usage in construction are reasonable. However, as will be discussed further below, OSHA is conducting a survey to gather more up-to-date information on PPE use and payment. This survey will be used to update the estimates of usage of PPE in construction.

To confirm the overall accuracy of the survey data on PPE use in construction, the Agency contacted several PPE distributors to obtain information on the market share for various PPE items in the construction industry, as compared to market share in other sectors. Comparing OSHA's estimates of the percentage of PPE costs attributable to construction with the distributors' estimates of the share of PPE sales occurring in the construction industry shows that OSHA's estimates of PPE use in construction are correct and may, if anything, be high. If OSHA's estimates are high, this analysis would tend to overstate the potential costs and impacts of the proposed rule on the construction industry. For example, OSHA's analysis estimates that approximately 25 percent of the costs of all PPE occur in the construction sector, while the distributors indicated that the construction sector accounted for 20 percent of the value of PPE sales.

Estimating use patterns for some specific types of PPE required additional analysis. For example, the OTA survey did not collect data on fall protection PPE. The number of employees using fall protection in construction was estimated from an analysis of occupational categories, based on data from BLS's 1994 Occupational Exposure Survey (OES)[5]. Additionally, the OES data allowed OSHA to estimate the number of workers requiring welding equipment in construction and in some industries not covered by the 1989 PPE survey (i.e., SICs 15, 16, 17, 46, 47, 59, 73, 87 and 89). Finally, because the OTA survey did not have data on the extent of the use of shoes with metatarsal guards, OSHA relied on the 1989 PPE survey data, which show that about 11 percent of all safety shoes have metatarsal guards; this percentage was applied to the OTA estimates of safety shoe usage to estimate metatarsal guard usage in the construction industry.

Table VI–1 shows OSHA's estimates of the extent of PPE use in the industries covered by the proposed rule. A total of 19.6 million workers are estimated to wear one or more kinds of PPE in these industries. Non-prescription safety glasses are worn by approximately 6.7 million workers, while 7.7 million workers wear hard hats and 10.6 million wear protective gloves of various kinds. Industries with the largest number of PPE-wearing employees include construction special trades (SIC 17), with 2.9 million such employees, building construction trades (SIC 15), with 1.2 million, wholesale trade—durable goods (SIC 50), with 1.6 million, and wholesale trade—non-durable goods (SIC 51), with 1.2 million PPE-wearing employees.

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[4] Some of the results from this survey were used in OSHA's background report in support of its 1994 PPE Regulatory Impact Assessment (OSHA 1994).

[5] For workers in some occupations, such as structural metal workers and roofers, all employees were assumed to use fall protection, clearly an overestimate. For workers in other occupations, 10–20 percent were assumed to use fall protection.

TABLE VI-1

NUMBER OF EMPLOYEES USING PERSONAL PROTECTIVE EQUIPMENT

SIC	Industry	Total Employees	Hard Hats	Gloves	Non-Prescriptio Safety Glasses	Goggles	Faceshields	Welding Helmets & Goggles	Fall Protection	Chemical Protective Suits/Clothing	Safety Shoes with Metatarsal Guards	Total Affected Employees*
078	Landscape and horticultural services	294,854	69,599	114,069	38,490	44,696	11,120	3,032	12,638	13,229	7,192	157,359
08	Forestry	19,462	4,951	5,452	1,863	2,187	523	143	595	623	254	9,081
13	Oil and gas extraction	268,561	75,514	71,034	38,403	56,259	24,724	13,177	38,921	6,479	3,317	83,813
15	Building Construction	1,152,468	1,152,468	172,869	395,592	249,344	69,148	41,707	156,590	46,098	126,771	1,152,468
16	Heavy Construction	685,706	678,845	34,885	106,990	67,437	75,427	48,027	64,046	13,714	41,485	685,706
17	Construction Special Trades	2,851,908	2,851,908	2,851,908	953,527	601,015	424,013	496,169	440,296	57,039	156,843	2,851,908
20	Food and kindred products	1,488,686	260,960	417,299	122,661	120,900	58,185	64,904	28,476	47,106	16,345	918,010
21	Tobacco products	34,746	6,752	10,948	3,475	2,648	1,244	1,488	1,016	1,593	297	21,838
22	Textile mill products	617,799	4,391	55,537	59,012	66,810	21,107	5,101	3,399	2,155	8,069	332,472
23	Apparel and other textile products	923,168	805	31,109	25,184	17,449	56,926	3,082	428	723	1,088	194,704
24	Lumber and wood products	694,477	185,129	233,242	201,834	92,121	25,110	29,146	8,652	3,569	19,881	536,800
25	Furniture and fixtures	496,292	10,130	84,627	136,160	34,266	9,322	9,269	2,720	1,188	12,721	311,600
26	Paper and allied products	621,951	52,543	105,308	100,305	63,049	37,521	27,015	12,977	11,023	14,719	336,082
27	Printing and publishing	1,481,903	4,014	128,012	63,863	33,974	12,239	3,719	192	1,496	5,201	384,966
28	Chemicals and allied products	824,185	160,783	283,702	213,576	109,327	71,258	31,965	52,196	85,937	11,660	414,662
29	Petroleum and coal products	111,611	33,918	34,720	19,365	19,955	11,357	3,554	8,546	11,588	677	39,287
30	Rubber and miscellaneous plastics produc	946,129	9,556	207,304	205,132	39,530	25,315	14,795	5,883	9,576	3,249	553,554
31	Leather and leather products	99,616	109	3,335	3,178	1,864	5,818	400	51	76	85	21,664
32	Stone, clay, and glass products	472,321	127,218	180,737	135,843	55,430	32,106	21,139	8,747	11,530	20,615	320,051
33	Primary metal industries	665,649	216,374	358,771	282,986	62,153	57,934	33,760	22,533	12,030	158,449	492,677
34	Fabricated metal products	1,385,031	99,232	457,106	419,623	75,281	42,389	72,745	9,603	6,501	109,422	842,427
35	Industrial machinery and equipment	1,764,517	22,298	335,822	508,415	121,004	81,425	86,240	6,780	8,232	39,989	942,440
36	Electronic and other electronic equipment	1,432,316	22,545	272,652	312,449	44,779	36,871	24,119	6,492	27,967	5,223	689,079
37	Transportation equipment	1,554,040	76,503	519,315	493,880	109,314	89,904	63,553	27,468	22,942	32,010	960,677
38	Instruments and related products	820,640	12,230	130,176	159,456	58,004	27,060	10,662	4,522	25,821	5,784	343,987
39	Miscellaneous manufacturing industries	377,711	6,314	64,946	68,407	35,811	17,669	6,652	2,603	14,431	3,600	157,127
41	Local and interurban passenger transit	387,174	13,267	118,567	26,535	32,943	8,225	17,839	7,461	3,719	6,900	176,704
42	Trucking and warehousing	1,695,286	63,009	495,659	126,536	124,186	42,455	68,395	31,263	16,173	37,886	761,855
46	Pipelines, except natural gas	16,354	0	0	0	0	0	218	0	0	0	218
47	Transportation services	366,516	0	0	0	0	0	983	0	0	0	983
48	Communication	1,308,828	224,254	203,063	52,153	106,458	15,878	2,433	177,419	0	8,281	239,610
49	Electric, gas, and sanitary services	913,917	305,425	307,046	153,349	160,948	88,712	42,727	144,449	42,395	16,466	357,562
50	Wholesale trade - durable goods	3,499,652	425,495	825,980	440,925	615,210	280,533	429,629	52,978	71,057	14,583	1,629,167
51	Wholesale trade - nondurable goods	2,533,293	336,688	571,292	295,526	439,710	202,801	327,304	43,525	49,758	1,046	1,168,481
52	Building materials and garden supplies	728,024	116,799	259,794	92,354	126,163	27,661	23,331	7,920	0	35,380	332,370
55	Automotive dealers and service stations	2,096,587	20,564	420,949	310,260	299,233	149,981	162,560	121	51,833	22,417	773,688
59	Miscellaneous retail stores	2477297	0	0	0	0	0	153	0	0	0	153
73	Business services	6239707	0	0	0	0	0	7,241	0	0	0	7,241
75	Auto repair, services, and parking	935,968	9,002	184,273	135,819	130,991	65,655	23,331	53	22,690	14,543	338,687
76	Welding & other repair	25,305	5,623	15,100	9,688	10,683	9,384	25,305	2,947	207	1,264	25,305
87	Engineering & management services	2,692,666	0	0	0	0	0	2,812	0	0	0	2,812
89	Miscellaneous services	85,030	0	0	0	0	0	62	0	0	0	62
	TOTAL	48,087,351	7,665,215	10,566,608	6,712,813	4,231,133	2,217,001	2,247,013	1,394,507	700,499	963,713	19,566,465

Source: OSHA Office of Regulatory Analysis

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Data on PPE Payment Patterns

To derive estimates of current employer payment patterns with regard to PPE, the Agency consulted several sources: a national study of collective bargaining agreements (BNA 1995), information from OSHA's State-plan States, information from OSHA's 1989 PPE survey (ERG 1998), and a panel of experts on PPE payment patterns (ERG 1998).

The data available to OSHA suggest that most employers in OSHA's jurisdiction are already paying for the PPE they provide to their employees to comply with OSHA standards. They do so because of labor-management agreements and collective bargaining contracts, and for other obvious reasons: if they pay for the PPE, they know what kinds of PPE their employees are using, can ensure that it is replaced when needed, and can require standardized procedures for cleaning, storing, and maintaining it. In other words, they can control what PPE is used and how it is used, and thus can have greater assurance that they are in fact in compliance with OSHA's standards. Other reasons why employers prefer to pay for PPE, according to the expert panel convened by OSHA to obtain information on PPE patterns of use and payment, are:

• The employer has experience with injuries that could have been prevented by PPE use;

• The employer has received input from his/her insurance carrier;

• The employer's staff and employees are aware of job-related hazards and know about PPE use; and

• The employer is concerned about the likelihood of an OSHA inspection (ERG 1998).

A recent study of collective bargaining agreements showed that 55% of contracts mentioning safety equipment require employers to pay for PPE, while only 11% of such agreements require the employee to pay for any PPE; this latter figure includes payment for all kinds of safety shoes. In addition, nearly half of all U.S. workers work in States covered by OSHA State plans. These States generally require employers to pay for mandatory PPE, with the exception, in some cases, of safety-toe footwear and prescription safety glasses. For example, Kentucky, which operates its own OSHA program under an approved State-plan, requires employers to pay for all required PPE except that which is personal in nature and is also used off the job. California has required employers to pay for all PPE, without exception, for many years. OSHA is currently reviewing the PPE payment policies of all of its State-plan partners; to date, all of the State plans responding have a policy of requiring employers to pay for most PPE items.

To develop detailed estimates of sectoral patterns of PPE payment, OSHA recently sponsored an expert panel of individual representatives from industry, labor, insurance companies, and safety equipment manufacturers and distributors. These individuals are recognized for their knowledge of PPE use and purchasing patterns in the general industry, construction, and maritime sectors. Many panelists indicated that the kinds of PPE that could potentially be affected by the proposed rule, i.e., those where a shift in costs from employees to employers could potentially occur, were hard hats, gloves, safety glasses (non-prescription), goggles, safety shoes (other than safety-toe safety shoes), welding hoods and goggles, faceshields, fall protection equipment, and chemical protective clothing. Based on the responses of individual members of the panel, this industry profile includes all the major types of PPE identified as having such potential. However, the Agency solicits comments on any types of PPE not included in this analysis, the extent of the use of such PPE in each affected industry, and the extent to which employers do not currently pay for such PPE, in each affected industry.

Table VI–2 summarizes the findings of the expert panel, which are presented as the percentage of all PPE costs currently estimated to be borne by employers, by industry and type of PPE. The table reports the median response, i.e., the median percentage reported by the experts in each case, except for manufacturing, where the panel estimated that 100% of costs for the affected kinds of PPE are being borne by employers (OSHA has reduced this to 95% to be conservative) and the service industries (where OSHA assumed that the percentages attributed by the experts to the wholesale trade industry would be applicable to all service industries). The panel's estimates of the percentage of PPE costs currently being borne by employers were generally highest for manufacturing and transportation and lowest for construction and shipyards, although estimates even within these industries varied widely by type of PPE. For example, the panel estimated that 87% of employers in the transportation industry currently pay for non-prescription safety eyewear, while 91.5% percent of these employers currently pay for chemical protective clothing. In construction, where the pattern of employer payment for PPE is generally lower than for other industries, 70% of employers are estimated currently to pay for non-prescription safety eyewear, while only 50% pay for gloves to protect against abrasion and laceration.

OSHA believes that Table VI–2 generally presents an accurate picture of current PPE payment patterns in various industries at the present time, comporting with the Agency's own experience. Thus the proposed rule, rather than representing a departure from current practice, will largely reflect it.

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TABLE VI-2

ESTIMATED PERCENTAGE OF PPE COST CURRENTLY BORNE BY EMPLOYERS, ON AVERAGE, BY INDUSTRY SECTOR*

PPE Type	Agricultural Services	Oil & Gas	Construction	Manufacturing	Shipyards	Longshoring	Transportation	Utilities	Wholesale
Non-prescription safety glasses	28.8%	87.0%	70.0%	95.0%	75.0%	100.0%	87.0%	91.3%	81.0%
Goggles	28.8%	87.3%	72.5%	95.0%	84.4%	100.0%	87.8%	83.8%	82.0%
Face shields	28.8%	87.3%	72.5%	95.0%	91.9%	100.0%	87.8%	83.8%	82.0%
Hard hats	43.0%	94.0%	73.8%	95.0%	86.3%	100.0%	90.3%	81.5%	83.0%
Gloves—chemical protection	82.5%	94.6%	78.8%	95.0%	90.6%	100.0%	89.5%	93.8%	81.0%
Gloves—abrasion/ laceration protect.	55.0%	85.1%	50.0%	95.0%	84.4%	100.0%	89.0%	87.5%	81.0%
Chemical protective clothing/equipmen	86.3%	99.6%	78.8%	95.0%	94.5%	100.0%	91.5%	95.6%	81.0%
Welding goggles	57.5%	90.1%	73.8%	95.0%	83.1%	100.0%	90.5%	83.8%	81.0%
Welding helmets	57.5%	90.1%	73.8%	95.0%	83.1%	100.0%	90.5%	83.8%	81.0%
Fall protection	82.5%	93.4%	76.3%	95.0%	75.0%	100.0%	90.8%	92.5%	77.0%
Safety shoes with metatarsal guards	40.0%	66.0%	26.3%	51.3%	48.8%	N/A	77.5%	72.5%	72.5%

*Based on median response of a panel of experts, with the exception of manufacturing, where 100% of the costs were indicated to be currently borne by employers for most items and OSHA reduced this to 95% to be conservative.

Source: OSHA, Office of Regulatory Analysis

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In order to further ensure that the Agency has accurate data on current patterns of PPE payment and usage, OSHA is conducting a nationwide telephone survey of American workplaces dealing specifically with that question. The Agency intends to have the results available for review and comment before the final rule is published. The information from the survey will be used to modify and update this economic analysis as needed with respect to both PPE use patterns (Table VI–1) and PPE payment patterns (Table VI–2). When the PPE survey is completed, OSHA will reopen the record to enable the public to comment on the results.

Technological Feasibility

This rule does not change any PPE requirements, but affects only the issue of who pays for PPE. All of the PPE affected by this rulemaking has already been found to be technologically feasible in other rulemakings. Personal protective equipment is widely manufactured, distributed, and used in workplaces in all of the industries covered by OSHA standards. The proposed rule thus raises no issues of technological feasibility.

Benefits of the Proposed Rule

Both OSHA's own enforcement experience and the experience of members of OSHA's expert panel show that when employers do not provide and pay for PPE, it is often not worn, is worn improperly, or is not cared for and replaced appropriately. In the words of one panel member:

> Our experience has been that the biggest factor in determining proper, effective use of eye protection is effective supervision—if the supervisor leads by example; if he/she reinforces use of eye protection by the workers under his/her supervision; if he/she has replacement eye protection readily available when it gets scratched or otherwise damaged or lost—then there is more likely to be a pattern of effective use among the workforce. This is significantly more difficult to accomplish when employees are expected to buy their own PPE. (It is not generally feasible to provide PPE and then charge the workers for it.) . . . It is also difficult to ensure that the employees are properly trained in the care and use of PPE if the employer does not provide it. (ERG 1998)

Thus, two key problems can occur when employers fail to pay for PPE: either the PPE is not worn in cases where it is needed to protect against injury or illness, or the PPE is worn inappropriately. The consequences of these failures are the same: employees are exposed to chemical, physical, or safety hazards in the workplace, which, in turn, results in injuries, illnesses, and death (as documented in OSHA's recent respiratory protection rule (63 FR 1152, January 8, 1998). Another panel member tried to estimate the quantitative differences between employer and employee payment for PPE:

> When employees are made responsible for purchasing their own PPE, I believe that their probabilities of (1) actually purchasing PPE, and (2) purchasing appropriate PPE, are diminished because they must use some or all of their funds for this equipment, whereas they would rather save this money for their own purposes, and they simply don't have the resources to understand and choose among available PPE. There is always a reluctance to use one's own funds to pay for replacing or repairing workplace PPE. I believe that when employees are responsible for their own PPE that a higher incidence of non-use or misuse occurs. I would expect that figure would be approximately 40% for employee-purchased PPE versus 15 to 20% for employer-purchased PPE. (ERG 1998)

The estimates provided by this expert panelist are consistent with the statements of other panelists, as well as with OSHA's enforcement and regulatory experience. Most panel members indicated that if the employer did not pay for PPE, the PPE was not provided. To the extent that this is the case, OSHA's estimates may actually underestimate the effects of having employers pay for and provide PPE. To estimate the benefits of employer PPE payment, OSHA used the panel's estimates of the differences in effectiveness between employee-paid and employer-paid PPE, and the estimates of the total numbers of injuries, illnesses and deaths preventable by PPE that were developed for the 1994 PPE rulemaking. OSHA invites comment from those with experience in this area, to assist the Agency to refine, revise if necessary, or confirm the accuracy of this estimate, as discussed below.

In 1994, OSHA examined, for each body part, the number of injuries preventable by the then newly revised PPE rule [59 FR 16352]. OSHA reviewed 1,170 OSHA Form 200s describing almost 64,000 injuries; these forms had been submitted to OSHA in response to the 1989 PPE survey. The profile of injuries, as defined by body part, very closely tracked those in BLS's injury data base [OSHA 1994, pp. V–11–13]. Information on the nature of the injury and the circumstances surrounding the accident was used to determine the extent to which PPE would have prevented the injury. Most injuries were not considered preventable by PPE. For example, sprains and strains (nature), or injuries caused by overexertion (circumstance), were considered not to be preventable by PPE. Eye injuries, by contrast, tended to be highly preventable.

From these injury descriptions, it was possible to determine that approximately one-third of injuries in general industry were preventable with PPE. However, within this group, it was apparent that PPE could be particularly effective in protecting certain body parts. As indicated in the 1994 analysis [OSHA 1994, p. V–16], eye injuries were estimated to be 95 percent PPE preventable; foot and toe, 75 percent; face and ear, 68 percent; and hand and finger, 63 percent. Head injuries were judged to be 45 percent preventable. Over 90 percent of these injuries were incurred by production workers in the subset of high-hazard industries selected for study in the PPE survey; in other words, they reflect the sort of preventable process-related PPE injuries which § 1910.132 was intended to prevent. The full analysis of the injuries judged to be preventable through the proper use of PPE is presented in detail in the Regulatory Impact Assessment [OSHA 1994]. In that analysis, OSHA found that almost 900,000 injuries in the general industry and maritime sectors would be preventable by full compliance with the new PPE rule, i.e., that 900,000 injuries could have been prevented if employees had actually worn the appropriate protective equipment. This analysis did not cover the construction sector. OSHA assumed that the same preventability factors would apply in construction as in the general industry and maritime sectors.

For the analysis of the Employer Payment for PPE rule, OSHA took into consideration the fact that compliance with the rule will not be perfect and that the likelihood of full compliance is influenced by who pays for the PPE. Therefore, OSHA developed an estimate of the number of injuries, illnesses, and deaths potentially averted by this rule by combining the following information: [6]

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[6] The number of injuries resulting from the lack of appropriate PPE can be determined by examining both the likelihood of employers not providing PPE under the two payment scenarios, and data on the current pattern of payment for PPE. The equation for a particular body part and relevant type of PPE can be described this way:

$((.4Ep/(.4Ep + .175En)) \times$ total PPE-preventable injuries = # injuries among employees paying for their own PPE Where:

Ep = # of employees paying for their own PPE

En = # of employees not paying for their own PPE (employer paying)

Having determined the number of injuries falling into this group, it is possible to estimate the number of injuries preventable by reassigning payment responsibility to the employer. Once the number of injuries among the employee-paying group is derived, it has to be recognized that not all of these

Continued

(1) the number of injuries preventable through proper use of PPE, classified by type of PPE (from 1994 economic analysis);

(2) the expert panel member's estimate that PPE will be missing or used inappropriately 17.5% of the time when the employers pay for their employee's PPE;

(3) the expert panel member's estimate that PPE will be missing or used inappropriately 40% of the time when employees pay for their own PPE; and

(4) the number of employees with employer paid PPE (see the Industry Profile section of this analysis).

Table VI–3 presents the number of injuries preventable by this rulemaking in general industry and construction, by body part. This analysis indicates that the proposed rule would avert approximately 47,785 injuries annually.

Although the primary benefit of the proposed rule is that it will avert injuries and save their associated costs, there are cases where the lack of appropriate PPE has been fatal. At the time of the 1994 rulemaking, 24 fatal head injuries were considered to be preventable every year in general industry through the use of PPE. Based on that analysis, the Agency estimates that 6.9 percent of these cases, or an average of 1.7 (.069 × 24) fatal head injuries annually, will be averted by the proposed rule. According to BLS's Census of Fatal Occupational Injuries, there were 263 fatal head injuries in the construction industry in 1993, 44 of which were coded as ''struck by'' or ''struck against.'' Since a larger portion of employees pay for their own PPE in construction, the impact of the proposed rule is likely to be greater in construction than in general industry. OSHA therefore estimates that 12.7 percent of these 44 fatalities are preventable, for a total of 5.6 (44 × .127) averted fatal head injuries annually. Therefore, in general industry and construction, the Agency estimates that approximately 7 (5.6 + 1.7) lives could be saved annually by compliance with the proposed rule.

The Agency also believes that the proposed rule will achieve substantial benefits in the area of fall protection, particularly in construction. The proposal would prevent a number of fatalities and severe injuries that are now occurring either because employee-provided PPE provides inadequate protection or because the employee arrives on site without the necessary PPE. For example, OSHA estimated in the Regulatory Impact Analysis for Subpart M that fall protection systems would prevent nearly 80 fatalities and 26,600 lost workdays annually. To the extent that employers provide more effective harnesses and lanyards than those currently being provided by employees, or ensure that this equipment is available for use by the employee, this rule will avert deaths and injuries caused by falls. However, at the current time the Agency does not have sufficient detail on these accidents to quantify the benefits of this effect.

TABLE VI–3.—INJURIES JUDGED TO BE PREVENTABLE IF EMPLOYERS ARE REQUIRED TO PAY FOR PPE NOW BEING PAID FOR BY EMPLOYERS

Body part	Injuries judged to be preventable by PPE	Percent of those judged to be preventable by this rulemaking [1]	Total judged to be preventable and within scope of this rulemaking	Total injuries judged to be preventable among employees paying for PPE	Injuries judged to be prevented by requiring employer payment for PPE
General Industry					
Eye	117,296	31.0	36,362	8,085	4,548
Face & ear	36,810	50.0	18,405	4,427	2,490
Head & neck	116,050	50.0	58,025	14,272	8,028
Hand & finger	281,221	50.0	140,611	30,771	17,309
Foot & toe	129,452	5.5	7,120	4,109	2,311
Subtotal	680,830	....	260,522	61,665	34,686
Construction:					
Eye	25,524	31.0	7,912	3,824	2,151
Face & ear & head & neck	13,445	50.0	6,722	3,027	1,703
Hand & finger	44,589	50.0	22,295	15,509	8,724
Foot & toe	21,399	5.5	1,177	926	521
Subtotal	104,957	....	38,106	23,286	13,098
Total	785,787	....	298,629	84,951	47,785

[1] Only half of these injuries are judged to be within the direct coverage of this rule because employer payment rules already apply in State plan States; non-prescription safety glasses constitute approximately 62% of safety glasses; shoes with metatarsal guards account for 11% of all safety shoes.

Source: OSHA Office of Regulatory Analysis.

will be preventable by switching payment systems. Since the number of injuries was derived assuming that 60% of the employee-paying population is already wearing PPE, the proper comparison is between the 40% nonusage in the employee-paying population and the 17.5% nonusage in the employer-paying population. Therefore, the percentage of injuries remaining after switching to employer-payment would be .175/.4 or 44 percent of the original number of injuries among the employee-paying group. Thus, 1–0.175/.4 provides the percentage prevented. In the abstract, this equation is:

The number of injuries prevented by switching to employer payment= (# of PPE-related injuries occuring among the employee-paying group) × 1-(% of time PPE is not worn when employers pay / % of time PPE is not worn when employees pay))

Using the specific numbers in this analysis, this becomes:

The number of injuries prevented by switching to employer payment= (# of PPE-related injuries occurring among the employee-paying group) × (1-(.175/.4))

In other words, 56 percent (1-(.175/.4)) of these injuries would be preventable by switching payment patterns from employees to employers.

This analysis has included only half of the PPE-related injuries occurring currently in the United States because approximately half of all employees are already covered by employer payment requirements in State-plan States. This analysis also focuses only on those body parts, e.g., eyes, head, hand, foot, most likely to be protected by PPE.

Direct Savings Resulting From the Reduction in Injuries Attributable to the Proposed Rule

This section evaluates the direct savings associated with the injuries averted by the proposed rule; it does not attempt to place a monetary value on the lives that will be saved by compliance with the rule or on pain, suffering and other similar effects avoided. These other effects of occupational injuries and illnesses include the pain and suffering experienced by workers and their families, loss of esteem, disruption of family life, and feelings of anger and helplessness. Occupational injuries and illnesses impose an enormous burden on society in addition to the direct outlays of money for medical expenses, lost wages and production, and other purely economic effects.

Some aspects of the burden of occupational injuries and illnesses can be quantified in monetary terms. These aspects of the problem of work-related injuries and illnesses can be measured by the losses experienced by employees and by the other costs that are externalized to the rest of society. One consequence of the failure of PPE programs to prevent job-related injuries is the growth of enormously expensive income maintenance programs such as workers' compensation and long-term disability programs. These costs impose a burden on society separate from and in addition to the human toll in pain and suffering caused by workplace-related injuries.

One measure of some of the losses associated with lost time due to work-related injuries is the lost output of the worker, measured by the value the market places on his or her time. This value is measured as the worker's total wage plus fringe benefits. Other costs include: (1) Medical expenses, (2) costs of workers' compensation insurance administration, (3) indirect costs to employers (other than those for workers' compensation administration), and (4) legal expenses of employees.

OSHA estimates the value of lost output by starting with workers' compensation indemnity payments and then adding other losses associated with work-related illnesses and injuries. The Agency then follows four steps to arrive at a value for lost output:

(1) Calculate PPE-related illness and injury in terms of workers' compensation indemnity payments;

(2) Add the difference between the value of these indemnity payments and the worker's after-tax income, based on various studies comparing workers' compensation payments with after-tax income. This step estimates the magnitude of lost after-tax income;

(3) Add the estimated value of taxes, based on the typical value of taxes as a percentage of after-tax income. This step estimates the value of total income lost; and

(4) Add the value of fringe benefits, based on data on fringe benefits as a percentage of total income. This step estimates the total market value of the lost output.

In this approach, injuries are clearly undervalued, because OSHA assumes that the value associated with injuries is the same as the value of claims for workers' compensation. An analysis of workers' compensation claim data from the Argonaut Insurance Company for 1993 show that the weighted average claim value of the injuries shown in Table VI–3 is $2,408. Based on nationwide estimates from the U.S. Social Security Administration, an average of 58 percent of these payments are paid out for indemnity, and the remaining 42 percent are paid out for medical costs [USSA, 1993].

Indemnity/Lost Income

Workers' compensation indemnity payments typically take two forms: temporary total disability payments, which cover absences from work prior to the stabilization of the condition, and permanent disability payments, which compensate the worker for the long-term effects of a stabilized condition. On a nationwide basis, it is estimated that permanent disability payments account for 61.5 percent of all indemnity payments [Berkowitz and Burton].

The extent to which income is replaced by each type of indemnity payment (i.e., temporary or permanent) differs. First, although rules vary by State, temporary disability income is designed in most States to replace two-thirds of the worker's before-tax income. However, most States place a maximum and minimum on the amount of money paid out to the worker, regardless of his/her actual former income. Studies by the Worker Compensation Research Institute (WCRI) show that temporary total disability payments replace between 80 to 100 percent of the after-tax income of the majority of workers [WCRI, 1993]. From 3 to 44 percent of the workers receive less than 80 percent of their after-tax income, and from 0 to 16 percent receive more than 100 percent of their after-tax income. Unfortunately, WCRI does not provide estimates of the average replacement rates for all workers in a State. However, based on these data, it seems reasonable to assume that, on average, workers receive no more than 90 percent of their after-tax income while on temporary disability. On the other hand, data show that permanent partial disability payments replaced 75 percent of income lost in Wisconsin, 58 percent in Florida, and 45 percent in California [Berkowitz and Burton]. OSHA uses the simple average of these three—59 percent—to estimate the extent of after-tax income replacement for permanent partial disabilities [7].

Based on these data, OSHA estimated after-tax income from the total indemnities paid for injuries preventable by the proposed rule by assuming, based on estimates for all workers' compensation claims provided by Berkowitz and Burton, that temporary disabilities account for 38.5 percent of all PPE-preventable indemnity payments and replace 90 percent of after-tax income, and that permanent partial disabilities [8] account for 61.5 percent of PPE-preventable indemnity payments and replace 60 percent of after-tax income.

Fringe Benefits

In addition to after-tax income loss, lost output includes the value of taxes that would have been paid by the injured worker and fringe benefits that would have been paid by the worker's employer. Total income-based taxes (individual Social Security payments, Federal income tax, and State income tax) paid were assumed to be 30 percent of total income. Fringe benefits were estimated as 39 percent of before-tax income, based on the average fringe benefit data provided by BLS [BLS, 1997].

Tables VI–4 and VI–5 apply the estimation parameters developed above to calculate the total value of the lost output potentially associated with temporary and permanent partial disabilities, respectively, once the final standard has been fully implemented. As shown, the total value of the lost output associated with potentially avoidable accepted workers' compensation claims that result in temporary total disability is estimated at $55.8 million, and that associated with permanent partial disabilities at $129.7 million a year.

[7] The use of a simple average rather than a population-weighted average results in a lower estimate of income loss and is thus a conservative approach.

[8] Permanent "partial" disabilities include all permanent disabilities, ranging from 1 to 100 percent disabled.

TABLE VI–4.—VALUE OF LOST OUTPUT ASSOCIATED WITH TEMPORARY TOTAL DISABILITIES RESULTING FROM PPE-PREVENTABLE INJURIES

Type of benefit	Injuries/costs prevented
Total Number of PPE-Preventable Cases Annually ..	47,785
Weighted Average Total Cost per Claim	$2,408
Indemnity Share of Payment (58% of Total Claim)	$1,396
Medical Share of Payment (42% of Total Claim)	$1,011
Value of Temporary Total Disability Indemnity Payments [1]	$25,689,814
Lost-After-Tax Income Above the Value of Indemnity Payments [2]	$2,854,424
Lost Value of Tax Payments [3]	$11,866,247
Lost Value of Fringe Benefits [4]	$15,426,122
Total	$55,836,606

[1] Number of cases X indemnity payments per case X 38.5 percent indemnity value share attributable to temporary total disability.
[2] Temporary total disability payments have been estimated to equal 90 percent of lost after-tax income.
[3] Taxes are estimated to equal 30 percent of before-tax income.
[4] Fringe benefits=39 percent of wage income [BLS, 1995].
Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

TABLE VI–5.—VALUE OF LOST OUTPUT ASSOCIATED WITH PERMANENT PARTIAL DISABILITIES RESULTING FROM PPE-PREVENTABLE INJURIES

Type of benefit	Injuries/costs prevented
Number of PPE-Preventable Injury Cases	47,785
Value of Indemnity Payments (Permanent Partial) [1]	$41,036,975
Lost-After-Tax Income Above the Value of Indemnity Payments [2]	$28,517,220
Lost Value of Tax Payments [3]	$26,142,441
Lost Value of Fringe Benefits [4]	$33,985,174
Total	$129,681,810

[1] Number of cases prevented X indemnity payments per claim X 61.5 percent value share attributable to permanent partial disability.
[2] Permanent partial disability payments are estimated to equal 59 percent of the value of lost after-tax income.
[3] Taxes are estimated to be 30 percent of before tax income.
[4] Fringe benefits=39 percent of wage income (BLS, 1995].
Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

Medical

Medical costs do not include any first-aid costs incurred by the employer and, in some cases, costs for transportation to a medical facility; however, most elements of medical costs are included in the share of payments paid for medical costs, estimated to be 42 percent of the cost of the claims. Costs for treating injuries will remain relatively constant, regardless of who is actually paying for the medical care (i.e., the employer through workers' compensation, or a medical insurer). As presented in Table VI–6, OSHA estimates the medical costs of injuries preventable by the proposed standard to be $48.3 million a year.

TABLE VI–6. ANNUAL SOCIAL BENEFITS ASSOCIATED WITH THE REDUCTION IN INJURIES AS A RESULT OF EMPLOYER PAYMENT FOR PPE

Type of benefit	Injuries/costs prevented
Lost Output Associated with Temporary Disabilities [1]	$55,836,606
Lost Output Associated with Permanent Disabilities [2]	129,681,810
Medical Costs [3]	48,319,399
Insurance Administrative Costs [4]	29,912,009
Indirect Costs [5]	23,929,607
Total	287,679,432

[1] Derived from Table VI–4.
[2] Derived from Table VI–5.
[3] Calculated by multiplying the number of injuries by the value of medical payments presented in Table VI–4.
[4] Calculated by multiplying the total value of claims times 26 percent.
[5] Calculated by multiplying the total value of workers' compensation medical and indemnity payments times 20.8 percent.
Source: U.S. Department of Labor, OSHA, Office of Regulatory Analysis.

Administrative Costs

The administrative costs of workers' compensation insurance include all of the costs associated with the administration of workers' compensation insurance. Such costs include any funds spent directly on claims adjustment, as well as all other administrative costs incurred by the insurer in conjunction with experienced losses.

OSHA estimates the administrative costs of PPE-related injury claims as follows:

• Costs to private insurance companies are estimated, based on 1990 data, as 35.8 percent of the costs of incurred claims [Klein et al., 1993]. These costs include those for claims adjustment, sales, general expenses, taxes, licenses, and fees (historical data show that all of these elements of private insurance costs increase as the value of benefits paid out increases).

• Costs to State funds were estimated, based on 1990 data, as 17.8 percent of the costs of incurred claims [Klein et al., 1993]. These costs include those for claims administration and for costs labeled as ''general costs.''

• Costs to self-insured companies, estimated by the Social Security Administration to be 6.8 percent of the value of benefits paid in 1990 [Social Security Administration, 1993].

To estimate the aggregate value of the administrative costs of insurance, these costs are weighted by the value of the benefits payments made by each type of insurer (i.e., private insurer, state fund, etc.), based on 1990 data. This calculation is shown in Table VI–7, which indicates that estimated weighted administrative costs constitute 26 percent of the total value of claims. The total value of claims includes the value both of the indemnity and medical portions of insurance company payments. The costs shown in Table VI–7 represent the administrative costs associated with workers' compensation.

TABLE VI–7.—DERIVATION OF AVERAGE ADMINISTRATIVE COSTS AS A PERCENT OF THE VALUE OF CLAIMS, BY TYPE OF INSURANCE

Type of insurance	Administrative costs as a percentage of incurred claims [1] (1990)	Percentage of total benefits paid [2] (1990)	Weighted value
Private Insurance	35.5	58.1	20.6
State Fund	17.8	22.8	4.1
Self-Insurance	6.8	19.4	1.3
Total	....	....	26.0

[1] From Klein et al. (1993) for private insurance and State funds, and U.S. Social Security Administration (1993) for self-insurance.
[2] Values for administrative costs as a percent of incurred claims, weighted by total benefits paid.

It should be noted that cases that fall outside the workers' compensation system will typically have administrative costs associated with them—indeed, to the extent they are borne by private medical insurers, they will carry relatively greater administrative expenses than the average estimated here.

Indirect Costs

The term ''indirect costs'', describes the costs of work-related injuries that are borne directly by employers but are not included in workers' compensation claim costs. Such costs are best estimated by looking at the costs an employer actually incurs at the time a workers' compensation claim is filed. These costs include a number of social benefits, such as payments of sick leave to workers for absences that are shorter than the workers' compensation waiting period, losses in production associated with the injured workers' departure and return to work, losses in the productivity of other workers, and a wide variety of administrative costs other than those borne directly by the workers' compensation insurer, e.g., medical management costs for the injured worker. Based on a study [Hinze & Applegate] of indirect costs of injuries in the construction industry, OSHA estimates that indirect costs are 20.8 percent of the value of workers' compensation medical and indemnity payments, i.e., add up to an indirect cost multiplier of 1.21. As indicated in Table VI–6, the Agency estimates that this proposed revision to the PPE standard will save $23.9 million annually in these indirect costs.

Taken in its entirety, the proposed amendment to the PPE standard is estimated to save $287.7 million annually in direct costs savings by avoiding preventable injuries. These direct cost savings do not include the economic value of the loss of leisure time. They do not account for the burden of chores that are forced on other household members or hired out. The direct savings also do not include the value of preventing pain and suffering or loss of life.

Costs of Compliance

To assess the costs employers may incur to comply with the proposed rule, OSHA first estimated the total costs associated with PPE currently covered by OSHA PPE standards and affected by this rule. OSHA's estimates of the costs of all required PPE were derived from the PPE use estimates shown in Table VI–1, subtracting employees in State plan States, who, as indicated in the previous section, comprise approximately half of the affected workers. Unit costs for equipment were taken from the Agency's economic analysis (Ex. 56, Docket S–060) in support of the 1994 rulemaking that revised the personal protective equipment standard (29 CFR 1910.132). Data from that analysis were supplemented with new estimates of the unit costs of welding equipment and goggles, and of fall protection equipment (ERG 1998). All cost estimates were then updated to reflect 1998 prices.[9] This figure was then multiplied by the percentage of these costs not currently being borne by employers (see Table VI–2).

Table VI–8 shows the total annualized costs of compliance for the proposed rule, by industry and kind of PPE. Total annualized costs are $61.9 million. Gloves and safety shoes (with metatarsal guards) account for the largest portion of these costs, at $17.3 and $14.3 million, respectively; welding helmets/goggles account for an additional $10.2 million per year. These three types of PPE together account for 68 percent of all of the proposed rule's costs of compliance. Construction special trades (SIC 17), at $24.2 million, and building construction contractors (SIC 15), at $6.2 million, are the industries estimated to incur the greatest costs.

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[9] Annualized costs, updated from those used in the Final Regulatory Impact Analysis for the 1994 PPE rulemaking (OSHA 1994), are hard hats, $6.67; non-prescription safety glasses, $6.69; goggles, $15.07; gloves, $14.07; and faceshields, $13.45. According to the expert panel, welders need both helmets and goggles at different times of the year. Welding helmets were assumed to have a life expectancy of 5 years and to cost $32.00; welding goggles were assumed to be replaced every 3 months, and to cost $11.00 (these assumptions yield a combined annualized welding unit cost of $51.80). Fall protection (body harness and lanyard) is assumed to have a life expectancy of 5 years, and to cost $60.00 (harnesses) and $60.00 (lanyards), respectively, yielding a combined annualized fall protection unit cost of $29.27. Reusable chemical protective coveralls were assumed to have a life expectancy of one year and to cost $20.00, based on a current supply catalog (Lab Safety 1995). Safety shoes with metatarsal guards cost approximately $100 (ERG 1998); based on an average two year life (OSHA 1994) this yields an annualized cost of $55.17.

TABLE VI-8

ESTIMATED INCREMENTAL EMPLOYER COST OF PROVIDING PPE BY ITEM, AS REQUIRED BY PROPOSED PPE RULE

SIC	Industry	Hard Hats	Gloves	Safety Glasses	Goggles	Faceshields	Welding Helmets & Goggles	Fall Protection	Chemical Protective Suits/Clothing	Safety Shoes with Metatarsal Guards	Total Affected PPE
078	Landscape and horticultural services	$132,284	$377,297	$91,773	$239,976	$53,264	$33,382	$32,364	$18,189	$119,341	$1,097,870
08	Forestry	$9,410	$18,034	$4,443	$11,744	$2,507	$1,571	$1,523	$856	$4,216	$54,304
13	Oil and gas extraction	$15,108	$77,665	$16,707	$54,052	$21,192	$33,705	$37,733	$243	$31,187	$287,592
15	Building Construction	$1,008,762	$635,316	$397,149	$516,706	$127,838	$283,579	$544,220	$97,959	$2,585,524	$6,197,054
16	Heavy Construction	$594,197	$128,205	$107,411	$139,746	$139,447	$326,554	$222,590	$29,142	$846,096	$2,533,390
17	Construction Special Trades	$2,496,293	$10,481,107	$957,279	$1,245,459	$783,900	$3,373,622	$1,530,225	$121,208	$3,198,860	$24,187,953
20	Food and kindred products	$43,509	$153,363	$20,524	$45,552	$19,558	$84,058	$20,835	$4,711	$220,352	$612,461
21	Tobacco products	$1,126	$4,024	$582	$998	$418	$1,927	$744	$159	$3,998	$13,974
22	Textile mill products	$732	$20,411	$9,874	$25,172	$7,095	$6,607	$2,487	$215	$108,784	$181,377
23	Apparel and other textile products	$134	$11,433	$4,214	$6,574	$19,135	$3,992	$313	$72	$14,662	$60,530
24	Lumber and wood products	$30,866	$85,719	$33,771	$34,709	$8,441	$37,748	$6,330	$357	$268,030	$505,971
25	Furniture and fixtures	$1,689	$31,101	$22,783	$12,911	$3,134	$12,004	$1,990	$119	$171,501	$257,232
26	Paper and allied products	$8,760	$38,702	$16,783	$23,755	$12,612	$34,987	$9,495	$1,102	$198,433	$344,631
27	Printing and publishing	$669	$47,046	$10,686	$12,801	$4,114	$4,816	$141	$150	$70,125	$150,546
28	Chemicals and allied products	$26,807	$104,264	$35,736	$41,192	$23,953	$41,398	$38,191	$8,594	$157,199	$477,332
29	Petroleum and coal products	$5,655	$12,760	$3,240	$7,518	$3,818	$4,603	$6,253	$1,159	$9,131	$54,138
30	Rubber and miscellaneous plastics prod	$1,593	$76,187	$34,323	$14,894	$8,509	$19,162	$4,304	$958	$43,797	$203,726
31	Leather and leather products	$18	$1,226	$532	$702	$1,956	$518	$37	$8	$1,147	$6,143
32	Stone, clay, and glass products	$21,210	$66,423	$22,730	$20,885	$10,792	$27,378	$6,400	$1,153	$277,925	$454,896
33	Primary metal industries	$36,075	$131,853	$47,350	$23,418	$19,474	$43,723	$16,487	$1,203	$2,136,145	$2,455,727
34	Fabricated metal products	$16,544	$167,992	$70,212	$28,364	$14,249	$94,213	$7,026	$650	$1,475,182	$1,874,433
35	Industrial machinery and equipment	$3,718	$123,419	$85,069	$45,591	$27,370	$111,690	$4,961	$823	$539,111	$941,752
36	Electronic and other electronic equipme	$3,759	$100,203	$52,280	$16,872	$12,394	$31,236	$4,750	$2,797	$70,410	$294,700
37	Transportation equipment	$9,284	$157,854	$109,358	$34,065	$12,997	$73,523	$26,596	$3,340	$437,410	$864,426
38	Instruments and related products	$2,039	$47,841	$26,681	$21,854	$9,096	$13,808	$3,309	$2,582	$77,982	$205,192
39	Miscellaneous manufacturing industries	$1,053	$23,868	$11,446	$13,493	$5,939	$8,615	$1,904	$1,443	$48,539	$116,300
41	Local and interurban passenger transit	$4,313	$95,865	$11,544	$30,409	$6,774	$43,896	$10,099	$3,161	$42,932	$248,993
42	Trucking and warehousing	$20,485	$400,753	$55,048	$114,636	$34,963	$168,300	$42,317	$13,747	$235,738	$1,085,987
46	Pipelines, except natural gas	$0	$0	$0	$0	$0	$537	$0	$0	$0	$537
47	Transportation services	$0	$0	$0	$0	$0	$2,419	$0	$0	$0	$2,419
48	Communication	$138,338	$186,570	$15,271	$130,360	$17,346	$10,241	$194,718	$0	$62,976	$755,821
49	Electric, gas, and sanitary services	$188,411	$282,108	$44,903	$197,084	$96,913	$179,843	$158,533	$18,548	$125,223	$1,291,567
50	Wholesale trade - durable goods	$241,198	$1,153,519	$280,351	$834,463	$339,473	$2,114,387	$178,306	$135,009	$110,903	$5,387,610
51	Wholesale trade - nondurable goods	$190,857	$797,836	$187,903	$596,417	$245,410	$1,610,804	$146,492	$94,540	$7,957	$3,878,216
52	Building materials and garden supplies	$66,209	$362,814	$58,721	$171,126	$33,473	$114,823	$26,657	$0	$269,069	$1,102,892
55	Automotive dealers and service stations	$11,657	$587,874	$197,271	$405,876	$181,492	$800,026	$406	$98,482	$170,480	$2,453,565
59	Miscellaneous retail stores	$0	$0	$0	$0	$0	$753	$0	$0	$0	$753
73	Business services	$0	$0	$0	$0	$0	$35,636	$0	$0	$0	$35,636
75	Auto repair, services, and parking	$5,103	$257,346	$86,357	$177,675	$79,450	$350,217	$178	$43,111	$110,603	$1,110,039
76	Welding & other repair	$3,188	$21,088	$6,160	$14,490	$11,355	$56,107	$9,919	$393	$9,614	$132,315
87	Engineering & management services	$0	$0	$0	$0	$0	$13,840	$0	$0	$0	$13,840
89	Miscellaneous services	$0	$0	$0	$0	$0	$306	$0	$0	$0	$306
		$5,341,053	$17,269,084	$3,136,465	$5,311,541	$2,399,851	$10,196,407	$3,298,834	$706,184	$14,260,581	$61,934,145

Note: Columns and rows may not sum precisely due to rounding
Source: OSHA Office of Regulatory Analysis

TABLE VI-9

COST OF THE PROPOSED PPE STANDARD AS A PERCENT OF REVENUES AND PROFITS OF AFFECTED ESTABLISHMENTS

SIC	INDUSTRY	Number of Affected Establishments	Annual Compliance Cost	Average Cost per Establishment	Average Sales per Establishment	Average Pre-Tax Profits per Establishment	Cost as Percent of: Revenue	Profit
078	Landscape and horticultural services	22,624	$1,097,870	$49	$255,843	$16,253	0.02%	0.35%
08	Forestry	821	$54,304	$66	NA	NA	NA	NA
13	Oil and gas extraction	2,962	$287,592	$97	$6,493,110	$570,586	0.00%	0.03%
15	Building Construction	94,247	$6,197,054	$66	$1,355,108	$57,393	0.00%	0.13%
16	Heavy Construction	17,744	$2,533,390	$143	$2,993,564	$206,107	0.00%	0.11%
17	Construction Special Trades	199,400	$24,187,953	$121	$646,775	$35,001	0.02%	0.41%
20	Food and kindred products	11,970	$612,461	$51	$14,642,402	$732,094	0.00%	0.01%
21	Tobacco products	339	$13,974	$41	$88,951,671	$12,264,130	0.00%	0.00%
22	Textile mill products	997	$181,377	$182	$9,943,687	$557,429	0.00%	0.05%
23	Apparel and other textile products	4,135	$60,530	$15	$2,721,259	$187,359	0.00%	0.01%
24	Lumber and wood products	18,169	$505,971	$28	$2,229,264	$164,448	0.00%	0.03%
25	Furniture and fixtures	5,516	$257,232	$47	$3,680,567	$271,508	0.00%	0.03%
26	Paper and allied products	3,075	$344,631	$112	$18,054,335	$902,685	0.00%	0.02%
27	Printing and publishing	13,097	$150,546	$11	$3,119,302	$271,012	0.00%	0.01%
28	Chemicals and allied products	7,331	$477,332	$65	$21,498,526	$1,368,040	0.00%	0.01%
29	Petroleum and coal products	3,629	$54,138	$15	$17,283,692	$864,154	0.00%	0.00%
30	Rubber and miscellaneous plastics pro	7,129	$203,726	$29	$6,330,960	$487,781	0.00%	0.01%
31	Leather and leather products	493	$6,143	$12	$3,640,190	$214,824	0.00%	0.01%
32	Stone, clay, and glass products	7,052	$454,896	$65	$4,163,365	$300,299	0.00%	0.04%
33	Primary metal industries	4,375	$2,455,727	$561	$15,232,602	$784,682	0.00%	0.11%
34	Fabricated metal products	13,908	$1,874,433	$135	$4,774,384	$344,371	0.00%	0.06%
35	Industrial machinery and equipment	21,995	$941,752	$43	$4,541,860	$335,045	0.00%	0.02%
36	Electronic and other electronic equipm	6,622	$294,700	$45	$11,093,186	$806,748	0.00%	0.01%
37	Transportation equipment	9,637	$864,426	$90	$28,134,011	$1,491,903	0.00%	0.01%
38	Instruments and related products	4,187	$205,192	$49	$11,346,901	$842,391	0.00%	0.01%
39	Miscellaneous manufacturing industri	5,461	$116,300	$21	$2,565,768	$222,920	0.00%	0.02%
41	Local and interurban passenger transit	4,284	$248,993	$58	$892,732	$39,910	0.01%	0.17%
42	Trucking and warehousing	27,079	$1,085,987	$40	$1,391,837	$72,372	0.00%	0.07%
46	Pipelines, except natural gas	32	$537	$17	$17,877,734	$5,850,694	0.00%	0.00%
47	Transportation services	13	$2,419	$180	$24,831,976	$1,504,916	0.00%	0.01%
48	Communication	9,499	$755,821	$80	$6,151,483	$2,013,142	0.00%	0.01%
49	Electric, gas, and sanitary services	6,463	$1,291,567	$200	$15,362,493	$931,027	0.00%	0.02%
50	Wholesale trade - durable goods	86,296	$5,387,610	$62	$4,908,643	$840,389	0.00%	0.01%
51	Wholesale trade - nondurable goods	47,635	$3,878,216	$81	$7,695,282	$734,523	0.00%	0.02%
52	Building materials and garden supplie	18,537	$1,102,892	$59	$1,751,380	$81,728	0.00%	0.10%
55	Automotive dealers and service station	62,021	$2,453,565	$40	$3,442,262	$146,029	0.00%	0.04%
59	Miscellaneous retail stores	6	$753	$125	$13,662,026	$1,304,057	0.00%	0.01%
73	Business Services	159	$35,636	$224	$11,682,236	$619,490	0.00%	0.05%
75	Auto repair, services, and parking	59,282	$1,110,039	$19	$430,710	$15,707	0.00%	0.14%
76	Welding & other repair	2,860	$132,315	$46	$298,464	$11,586	0.02%	0.47%
87	Engineering & Management Services	72	$13,840	$191	$17,873,531	$568,682	0.00%	0.05%
89	Miscellaneous Services	7	$306	$43	$4,109,167	$303,126	0.00%	0.01%
	TOTAL	811,081	$61,934,145	$76	$7,190,602	$664,562	0.00%	0.02%

Figures less than 0.005% round down to 0.00%.

Source: OSHA Office of Regulatory Analysis

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Economic Impacts and Certification of No Significant Impact

OSHA analyzed the economic impacts of the proposed rule by calculating average annualized compliance costs as a percentage of the sales and profits of all establishments in affected industries. As shown in Table VI–9, annualized costs to employers for establishments in all affected industries are less than 0.01 percent of sales and only 0.02 percent of profits. Even in the most affected industry, Welding & Other Repair (SIC 76), annualized costs are still less than 0.5 percent of profits. Costs of this magnitude do not threaten the financial health of even the most marginal firm. Since most employers in most industries already pay for PPE, the major competitive effect of the rule is to limit any small short-term competitive advantage a few firms gain by not paying for PPE, i.e., by requiring their employees to pay for PPE that other employers in their industry pay for. As shown in the benefits section, many firms already pay for PPE because it proves cost-effective; many other firms may find that, when benefits as well as costs are considered, the costs of PPE are more than offset by these benefits.

OSHA also assessed the economic impacts of the proposed rule on small firms within each affected industry. Impacts on two sizes of small firm were estimated: those with fewer than 500 employees, and those with fewer than 20 employees. In using 500 employees and 20 employees to characterize firms for this screening analysis for impacts, OSHA is not proposing definitions of small business that are different from those established by the Small Business Administration (SBA) in its *Table of Size Standards.* The SBA size definitions are SIC-code specific, and are generally expressed either in terms of number of employees or as annual receipts. Instead, OSHA is using 500 employees and 20 employees as a simple method of screening for significant impacts across the large number of industries potentially affected by the proposed rule. Use of this approach avoids the need to interpolate because the underlying industry profile data do not correspond with the SIC-specific size categories established by the SBA. (OSHA notes that, for almost all of the industries affected by this rulemaking, the SBA size definitions fall within the 20- to 500-employee range.) OSHA believes that this screening approach will capture any significant impacts on small firms in affected industries. The Agency welcomes data supporting this assumption or data demonstrating that firms in the industry-specific size classes used by the SBA will experience significant impacts.

The results of these analyses (Tables VI–10 and VI–11, respectively) demonstrate that the annualized costs of compliance do not exceed 0.1 percent of sales or 1 percent of profits for small firms in any covered industry. Based on these analyses, in accordance with the Regulatory Flexibility Act (5 U.S.C. 605) OSHA certifies that the proposed rule will not have a significant impact on a substantial number of small entities.

Because statistically meaningful survey data are available only at the two-digit Standard Industrial Classification level, OSHA has conducted this analysis of economic impacts at the 2-digit level. OSHA believes that this level of analysis adequately captures meaningful variations in economic impacts. Further, the costs are so low that even if a sub-industry were to have substantially higher costs as a percentage of sales or profits, the financial health of that sub-industry would not be in any danger. However, the Agency requests comment on any specific industry that may have an unusual pattern of PPE usage or payment that could lead to more severe impacts than those portrayed for its 2-digit sector.

To test its conclusions that the regulation is economically feasible and will not have a significant impact on a substantial number of small entities, the Agency performed sensitivity analyses relying on ''worst case'' scenarios. First, in order to test the potential impact on OSHA's estimates of errors in the expert panel's characterization of payment patterns, the Agency examined impacts across all industries using the extreme assumption that employers were not currently paying for any protective equipment. Under this extreme scenario, the proposed rule's costs of compliance would quadruple, but the impacts of even these costs in nearly all industries would still be below one percent of profits. The largest impacts would occur in SIC 76 (Welding & other repair), where costs under this extreme scenario would be less than 3 percent of profits.

Second, the Agency focused on the construction industry, which was not covered in OSHA's 1989 PPE use survey and is estimated in OSHA's analysis to account for half of the rule's costs of compliance, to see what the impacts would be under an extremely unlikely scenario that assumed that all construction employees wore all types of PPE.[10] Under this scenario, the largest impact would occur in SIC 17, where costs would equal 2.1 percent of profits. This result shows that, even if the Agency had no data on PPE usage in the construction industry and simply assumed that every employee in the sector used every possible type of PPE, the proposed standard would still be economically feasible and would not have a significant impact on a substantial number of small entities.

Third, the Agency has constructed a ''worst-worst'' case scenario for the construction industry; this scenario assumes that employees in this industry are wearing all types of PPE and pay for all of this PPE, i.e., that no employer currently pays anything for any type of PPE. Even under this scenario, the costs of the proposed rule would be less than 5 percent of profits and less than 1 percent of revenues for firms in all construction subsectors. This analysis shows that even if the Agency had no data on either PPE use or PPE payment patterns in the construction industry, it would still be reasonable to conclude that the proposed standard is economically feasible in the construction sector and that small firms in that sector would not experience significant impacts.

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[10] This assumes that all construction employees need welding PPE, fall protection, chemical protective clothing and safety shoes with metatarsal guards and that the same workers need faceshields and standard goggles in addition to welding helmets and welding goggles.

TABLE VI-10

COST OF THE PROPOSED PPE STANDARD TO AFFECTED ENTERPRISE WITH FEWER THAN 500 EMPLOYEES AS A PERCENT OF REVENUES AND PROFITS

SIC	INDUSTRY	Number of Affected Enterprises	Annual Compliance Cost	Average Cost per Enterprise	Average Sales per Enterprise	Average Pre-Tax Profits per Enterprise	Cost as Percent of: Revenue	Cost as Percent of: Profit
078	Landscape and horticultural services	22,995	$1,064,278	$46	$203,029	$12,897	0.02%	0.36%
08	Forestry	824	$48,688	$59	$556,040	$37,941	0.01%	0.16%
13	Oil and gas extraction	2,533	$258,734	$102	$2,073,259	$197,123	0.00%	0.05%
15	Building Construction	93,112	$4,790,195	$51	$1,190,588	$50,425	0.00%	0.10%
16	Heavy Construction	16,537	$1,836,181	$111	$2,464,742	$169,697	0.00%	0.07%
17	Construction Special Trades	197,372	$12,153,846	$62	$601,794	$32,567	0.01%	0.19%
20	Food and kindred products	6,292	$409,385	$65	$7,520,235	$406,820	0.00%	0.02%
21	Tobacco products	24	$4,353	$181	$11,835,119	$1,631,755	0.00%	0.01%
22	Textile mill products	1,140	$92,551	$81	$4,662,782	$282,815	0.00%	0.03%
23	Apparel and other textile products	4,132	$50,846	$12	$1,767,907	$98,999	0.00%	0.01%
24	Lumber and wood products	16,696	$469,448	$28	$1,621,362	$97,278	0.00%	0.03%
25	Furniture and fixtures	4,423	$223,139	$50	$2,278,053	$168,047	0.00%	0.03%
26	Paper and allied products	1,498	$260,100	$174	$8,176,155	$442,303	0.00%	0.04%
27	Printing and publishing	13,871	$132,501	$10	$1,415,333	$113,650	0.00%	0.01%
28	Chemicals and allied products	2,799	$238,746	$85	$8,705,825	$553,987	0.00%	0.02%
29	Petroleum and coal products	298	$45,071	$151	$14,282,763	$714,112	0.00%	0.02%
30	Rubber and miscellaneous plastics produc	5,116	$181,405	$35	$4,472,080	$344,559	0.00%	0.01%
31	Leather and leather products	314	$4,806	$15	$2,460,099	$134,181	0.00%	0.01%
32	Stone, clay, and glass products	4,507	$427,050	$95	$2,656,582	$191,616	0.00%	0.05%
33	Primary metal industries	2,070	$888,724	$429	$7,468,383	$416,258	0.01%	0.10%
34	Fabricated metal products	12,733	$1,741,611	$137	$3,109,554	$224,288	0.00%	0.06%
35	Industrial machinery and equipment	19,473	$805,426	$41	$2,167,640	$147,787	0.00%	0.03%
36	Electronic and other electronic equipment	4,745	$178,595	$38	$4,171,209	$328,216	0.00%	0.01%
37	Transportation equipment	3,803	$365,115	$96	$3,810,491	$218,627	0.00%	0.04%
38	Instruments and related products	3,160	$160,084	$51	$3,441,294	$276,423	0.00%	0.02%
39	Miscellaneous manufacturing industries	5,548	$112,787	$20	$1,642,138	$131,863	0.00%	0.02%
41	Local and interurban passenger transit	4,790	$221,257	$46	$646,961	$28,922	0.01%	0.16%
42	Trucking and warehousing	30,707	$847,105	$28	$894,533	$41,043	0.00%	0.07%
46	Pipelines, except natural gas	183	$894	$5	NA	NA	NA	NA
47	Transportation services	14	$2,236	$159	$25,351,523	$1,536,402	0.00%	0.01%
48	Communication	3,666	$489,750	$134	$2,194,304	$406,473	0.01%	0.03%
49	Electric, gas, and sanitary services	3,300	$920,246	$279	$4,038,145	$417,042	0.01%	0.07%
50	Wholesale trade - durable goods	84,969	$5,249,059	$62	$4,930,915	$282,912	0.00%	0.02%
51	Wholesale trade - nondurable goods	49,118	$3,763,134	$77	$7,337,144	$372,860	0.00%	0.02%
52	Building materials and garden supplies	17,228	$1,089,709	$63	$1,419,546	$55,112	0.00%	0.11%
55	Automotive dealers and service stations	47,392	$2,453,159	$52	$4,139,108	$131,693	0.00%	0.04%
59	Miscellaneous retail stores	135	$12,105	$90	$659,251	$34,901	0.01%	0.26%
73	Business Services	3,142	$319,069	$102	$680,308	$56,025	0.01%	0.18%
75	Auto repair, services, and parking	52,667	$1,109,861	$21	$406,108	$21,021	0.01%	0.10%
76	Welding & other repair	2,848	$126,171	$44	$300,365	$21,555	0.01%	0.21%
87	Engineering & Management Services	73	$13,122	$181	$635,837	$44,882	0.03%	0.40%
89	Miscellaneous Services	7	$251	$36	$526,769	$28,507	0.01%	0.13%

Figures less than 0.005% round down to 0.00%.

Source: OSHA Office of Regulatory Analysis

TABLE VI-11

COST OF PROPOSED PPE STANDARD TO AFFECTED ENTERPRISES WITH FEWER THAN 20 EMPLOYEES AS A PERCENT OF REVENUES AND PROFITS

SIC	INDUSTRY	Number of Affected Enterprises	Annual Compliance Cost	Average Cost per Enterprise	Average Sales per Enterprise	Average Pre-Tax Profits per Enterprise	Cost as Percent of: Revenue	Profit
078	Landscape and horticultural services	21,647	$771,030	$36	$142,684	$9,064	0.02%	0.39%
08	Forestry	746	$25,162	$34	$327,420	$22,341	0.01%	0.15%
13	Oil and gas extraction	1,902	$50,582	$27	$939,464	$72,649	0.00%	0.04%
15	Building Construction	88,543	$2,658,102	$30	$638,583	$27,045	0.00%	0.11%
16	Heavy Construction	13,433	$455,798	$34	$777,749	$38,430	0.00%	0.09%
17	Construction Special Trades	183,519	$6,024,901	$33	$324,117	$17,540	0.01%	0.19%
20	Food and kindred products	4,022	$14,778	$4	$1,112,743	$43,200	0.00%	0.01%
21	Tobacco products	15	$37	$3	$1,157,051	$172,603	0.00%	0.00%
22	Textile mill products	355	$3,873	$11	$706,350	$30,746	0.00%	0.04%
23	Apparel and other textile products	2,406	$17,399	$7	$431,127	$21,302	0.00%	0.03%
24	Lumber and wood products	14,095	$128,006	$9	$549,424	$29,087	0.00%	0.03%
25	Furniture and fixtures	2,972	$16,399	$6	$443,302	$23,468	0.00%	0.02%
26	Paper and allied products	577	$5,546	$10	$1,061,389	$41,207	0.00%	0.02%
27	Printing and publishing	9,277	$24,233	$3	$416,601	$25,976	0.00%	0.01%
28	Chemicals and allied products	1,834	$30,561	$17	$1,665,517	$93,265	0.00%	0.02%
29	Petroleum and coal products	203	$7,808	$38	$3,359,261	$181,724	0.00%	0.02%
30	Rubber and miscellaneous plastics produc	2,586	$40,124	$16	$757,780	$41,901	0.00%	0.04%
31	Leather and leather products	182	$1,892	$10	$438,331	$18,564	0.00%	0.06%
32	Stone, clay, and glass products	3,111	$35,681	$11	$738,830	$38,245	0.00%	0.03%
33	Primary metal industries	1,040	$16,697	$16	$930,429	$37,217	0.00%	0.04%
34	Fabricated metal products	7,592	$143,755	$19	$663,340	$34,337	0.00%	0.06%
35	Industrial machinery and equipment	13,814	$345,096	$25	$526,351	$27,865	0.00%	0.09%
36	Electronic and other electronic equipment	2,653	$14,341	$5	$717,989	$40,545	0.00%	0.01%
37	Transportation equipment	2,547	$18,410	$7	$653,906	$26,925	0.00%	0.03%
38	Instruments and related products	2,033	$21,129	$10	$698,237	$40,251	0.00%	0.03%
39	Miscellaneous manufacturing industries	4,049	$45,401	$11	$456,063	$28,436	0.00%	0.04%
41	Local and interurban passenger transit	2,898	$82,169	$28	$197,133	$8,812	0.01%	0.32%
42	Trucking and warehousing	20,929	$433,794	$21	$405,150	$18,588	0.01%	0.11%
46	Pipelines, except natural gas	25	$2,348	$94	$2,414,152	$790,058	0.00%	0.01%
47	Transportation services	13	$1,216	$93	$269,219	$12,668	0.03%	0.73%
48	Communication	2,684	$136,329	$51	$657,195	$99,013	0.01%	0.05%
49	Electric, gas, and sanitary services	2,338	$114,833	$49	$904,668	$75,989	0.01%	0.06%
50	Wholesale trade - durable goods	61,286	$2,867,557	$47	$2,137,838	$99,762	0.00%	0.05%
51	Wholesale trade - nondurable goods	33,423	$1,498,042	$45	$3,148,919	$147,897	0.00%	0.03%
52	Building materials and garden supplies	13,880	$454,819	$33	$754,755	$29,302	0.00%	0.11%
55	Automotive dealers and service stations	40,367	$2,243,689	$56	$1,161,906	$28,705	0.00%	0.19%
59	Miscellaneous retail stores	6	$302	$53	$420,332	$22,252	0.01%	0.24%
73	Business services	138	$11,089	$80	$305,796	$25,182	0.03%	0.32%
75	Auto repair, services, and parking	50,844	$1,288,534	$25	$292,021	$15,115	0.01%	0.17%
76	Welding & misc. repair	2,753	$120,864	$44	$221,241	$15,876	0.02%	0.28%
87	Engineering & management servicest	66	$3,309	$50	$303,720	$21,438	0.02%	0.23%
89	Miscellaneous services	7	$207	$30	$312,370	$16,904	0.01%	0.18%

Figures less than 0.005% round down to 0.00%.

Source: OSHA Office of Regulatory Analysis

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Environmental Impact Analysis

OSHA has reviewed this proposed rule in accordance with the National Environmental Policy Act (NEPA) (42 USC 4321 *et seq.*), the regulations of the Council on Environmental Quality (40 CFR Part 1500), and DOL's NEPA procedures (29 CFR Part II). As a result of this review, OSHA has determined that this action will have no significant impact on the external environment.

Unfunded Mandates Analysis

This proposed rule on Employer Payment for Personal Protective Equipment has been reviewed in accordance with the Unfunded Mandates Reform Act of 1995 (UMRA) (2 USC 1501 *et seq.*) and Executive Order 12875. As discussed in the Preliminary Economic Analysis, OSHA estimates that compliance with the proposed rule will require expenditures of $62.3 million per year by affected employers. Therefore, this proposed rule is not a Federal private sector mandate and is not a significant regulatory action within the meaning of Section 202 of UMRA. OSHA standards do not apply to State and local governments except in States that have voluntarily elected to adopt an OSHA State plan. Consequently, the proposed rule does not meet the definition of a ''Federal intergovernmental mandate'' (Section 421(5) of UMRA). In addition, the Agency has concluded that virtually all State-plan States, the only States in which this rule could have any effect on State and local government employers, already require that employers pay for required PPE. Thus, this rule will not have an impact on employers who are State and local governments. In sum, this proposed rule does not impose unfunded mandates within the meaning of UMRA.

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VII. Public Participation

Written Comments

Interested parties are invited to submit written data, views, and comments with respect to this proposal. These comments must be postmarked by June 14, 1999. Written comments are to be submitted in quadruplicate, or in 1 original (hard copy) and 1 disk (3½″ or 5¼″) in WordPerfect 5.0, 5.1, 6.0, 8.0, or ASCII, to the Docket Office, Docket No. S–042, Room N2625, U.S. Department of Labor, 200 Constitution Ave. N.W., Washington, DC. 20210.

Comments may also be submitted electronically through OSHA's Internet site at URL, http://www.osha-slc.gov/e-comments/e-comments-ppe.html. Please be aware that information such as studies, journal articles, and so forth cannot be attached to the electronic response and must be submitted in quadruplicate to the above address. Such attachments must clearly identify the respondent's electronic submission by name, date, and subject, so that they can be attached to the correct response. These comments must be transmitted by June 14, 1999.

All comments, views, data, and arguments received within the specified comment period will be made part of the record and will be available for public inspection and copying at the above Docket Office address.

Notice of Intention To Appear at the Informal Hearing

Under section 6(b)(3) of the Occupational Safety and Health Act, OSHA is scheduling an informal public hearing to provide the public with an opportunity to testify on the issues raised by the proposed standard. The informal public hearing will be held in Washington, DC on June 22, 1999, and will extend through July 2, 1999, depending on the number of persons intending to participate.

The hearing will begin at 9:30 a.m. on June 22, 1999 in the auditorium of the Frances Perkins Building, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210.

All persons who wish to participate in the hearing must file four copies of a notice of intention to appear. This notice must be postmarked on or before June 1, 1999. The notice of intention to appear, which will be available for inspection and copying at the OSHA Docket Office (Room N2625), telephone (202) 693–2350, must contain the following information:

1. The name, address, and telephone number of each person to appear;
2. The capacity in which the person will appear;
3. The approximate amount of time required for the presentation;
4. The issues that will be addressed;
5. A brief statement of the position that will be taken with respect to each issue; and,
6. Whether the party intends to submit documentary evidence and, if so, a brief summary of it.

Mail the notice of intention to appear to: Docket Office, Docket S–042, U.S. Department of Labor, 200 Constitution Avenue NW, Washington, DC 20210; telephone (202) 693–2350.

A notice of intention to appear also may be transmitted by facsimile to (202) 693–1648 (Attention: Docket S–042), by June 1, 1999 provided that the original and 3 copies are sent to the same address and postmarked no more than 3 days later.

Filing of Testimony and Evidence Before the Hearing

Any party requesting more than 10 minutes for a presentation at the

hearing, or who will submit documentary evidence, must provide in quadruplicate, the complete text of the testimony, including any documentary evidence to be presented at the hearing. One copy must not be stapled or bound and must be suitable for copying. These materials must be provided to the Docket Office at the address above and be postmarked no later than June 14, 1999.

Each such submission will be reviewed in light of the amount of time requested in the notice of intention to appear. If the information contained in the submission does not justify the amount of time requested, the Agency will allocate a more appropriate amount of time and notify the participant of that fact prior to the informal public hearing.

Any party who has not substantially complied with this requirement may be limited to a 10 minute presentation, and may be requested to return for questioning at a later time.

Any party who has not filed a notice of intention to appear may be allowed to testify for no more than 10 minutes as time permits, at the discretion of the Administrative Law Judge, but will not be allowed to question witnesses.

Notices of intention to appear, testimony, and evidence will be available for copying at the Docket Office at the address noted above.

Conduct and Nature of the Hearing

The hearing will commence at 9:30 a.m. on June 22, 1999. At that time, any procedural matters pertaining to the proceeding will be resolved.

The nature of an informal rulemaking hearing is established in the legislative history of section 6 of the Occupational Safety and Health Act and is reflected in OSHA's rules of procedure for hearings (29 CFR 1911.15(a)). Although the presiding officer is an Administrative Law Judge (ALJ), and limited questioning by persons who have filed notices of intention to appear is allowed on crucial issues, the proceeding is informal and legislative in type. OSHA hearings provide interested persons with an opportunity to make effective oral presentations, without procedural restraints that unnecessarily impede or protract the rulemaking process.

Additionally, the hearing is primarily for information gathering and clarification. It is an informal administrative proceeding, rather than an adjudication. The technical rules of evidence, for example, do not apply. The regulations that govern OSHA hearings, combined with the pre-hearing guidelines that the ALJ will issue for this hearing, will ensure fairness and due process and also facilitate the development of a clear, accurate, and complete record. Questions of relevance, procedure, and participation generally will be decided in favor of the most effective development of the record.

The hearing will be conducted in accordance with 29 CFR part 1911. It should be noted that § 1911.4 specifies that the Assistant Secretary may, upon reasonable notice, issue alternative procedures to expedite proceedings or for other good cause.

The hearing will be presided over by an Administrative Law Judge who makes no decision or recommendation on the merits of OSHA's proposal. The responsibility of the Administrative Law Judge is to ensure that the hearing proceeds at a reasonable pace and in an orderly manner. The Administrative Law Judge, therefore, will have all of the powers necessary and appropriate to conduct a full and fair informal hearing as provided in 29 CFR part 1911, including the powers:

1. To regulate the course of the proceedings;
2. To dispose of procedural requests, objections, and comparable matters;
3. To confine the presentations to the matters pertinent to the issues raised;
4. To regulate the conduct of those present at the hearing by appropriate means;
5. At the Judge's discretion, to question and permit the questioning of any witness and to limit the time for questioning; and,
6. At the Judge's discretion, to keep the record open for a reasonable, stated time (known as the post-hearing comment period) to receive written information and additional data, views, and arguments from any person who has participated in the oral proceedings.

OSHA recognizes that there may be interested persons who, through their knowledge of safety or their experience in the subject matter of this proceeding, would wish to endorse or support certain provisions in the proposed standard. OSHA welcomes such supportive comments in order that the record of this rulemaking will present a balanced picture of the public response on the issues involved.

VIII. State-Plan States

The 25 States and Territories with their own OSHA-approved occupational safety and health plans must revise their existing standards within six months of the publication date of the final standard or show OSHA why there is no need for action, e.g., because an existing State standard covering this area is already "at least as effective" as the revised Federal standard. These States are: Alaska, Arizona, California, Connecticut (State and local government employees only), Hawaii, Indiana, Iowa, Kentucky, Maryland, Michigan, Minnesota, Nevada, New Mexico, New York (State and local government employees only), North Carolina, Oregon, Puerto Rico, South Carolina, Tennessee, Utah, Vermont, Virginia, Virgin Islands, Washington, and Wyoming.

IX. OSHA's Supplementary Statement of Reasons for Its Interpretation of 29 CFR 1910.132(a)

This supplementary statement explains OSHA's interpretation that the general protective equipment standard, 29 CFR 1910.132(a), requires employers to provide protective equipment, including personal protective equipment, at no cost to employees, except for equipment that is personal in nature and normally used away from the worksite. (OSHA uses the abbreviation PPE to cover both protective equipment and personal protective equipment.) OSHA initially published this interpretation in an October 1994 memorandum to the field. In October 1997, the Occupational Safety and Health Review Commission decided that the Secretary had not adequately explained the basis for her interpretation, in light of a perceived conflict between the 1994 memorandum and interpretive statements made by OSHA officials in letters issued between 1974 and 1994. OSHA is including the following supplementary statement in this Notice of Proposed Rulemaking to set forth in detail the basis for its position on this important issue.

A. Background

OSHA's general protective equipment standard, 29 CFR 1910.132 states, in relevant part, as follows:

Section 1910.132 General Requirements

(a) *Application*. Protective equipment, including personal protective equipment for eyes, face, head, and extremities, protective clothing, respiratory devices, and protective shields and barriers, shall be provided, used, and maintained in a sanitary and reliable condition wherever it is necessary by reason of hazards of processes or environment, chemical hazards, or mechanical irritants encountered in a manner capable of causing injury or impairment in the function of any part of the body through absorption, inhalation or physical contact.

(b) *Employee-owned equipment*. Where employees provide their own protective equipment, the employer shall be responsible to assure its adequacy, including proper maintenance, and sanitation of such equipment.

On October 18, 1994, Deputy Assistant Secretary James Stanley issued a memorandum to OSHA's regional administrators and heads of directorates announcing a uniform agency policy on employers' responsibility to pay for personal protective equipment under section 1910.132 and other standards requiring employers to ''provide'' such equipment. The interpretation outlined in the Deputy Assistant Secretary's memorandum requires employers to pay for all personal protective equipment that is necessary for the employee to do his or her job safely and in compliance with OSHA standards, except for equipment that is personal in nature and normally used away from the worksite such as steel-toe safety shoes. OSHA subsequently issued a compliance directive, STD 1–6.6, incorporating this interpretation and stating that violations of the policy would be cited.

In March 1996, OSHA issued a citation alleging that the Union Tank Car Company violated 29 CFR 1910.132(a) by requiring employees to pay for metatarsal safety shoes and welding gloves. Upon review, the Occupational Safety and Health Review Commission issued a decision vacating the citation. *Secretary of Labor* v. *Union Tank Car Co.,* 18 O.S.H. Cas. (BNA) 1067 (Rev. Comm. 1997). In *Union Tank,* the Commission stated that it had addressed the meaning of 29 CFR 1910.132 in *The Budd Company,* 1 O.S.H. Cas. (BNA) 1548 (Rev. Comm. 1974), and had concluded that the standard could not be interpreted to require employers to pay for personal protective equipment. 18 O.S.H. Cas. (BNA) at 1068. The Commission also noted that OSHA had issued at least five letters of interpretation between 1974 and 1994 stating that the standard does not specify who pays the cost of personal protective equipment. *Id.* Characterizing the Agency's approach in these letters as acquiescence in *Budd,* the Commission criticized OSHA for failing to provide an adequate explanation for the apparently new interpretation announced in the Stanley memorandum. The Commission noted that an agency changing its course ''must supply a reasoned analysis indicating that prior policies and standards were being deliberately changed, not casually ignored.'' *Id.* at 1069.

The Secretary believes that requiring employers to pay for personal protective equipment that must be worn because of hazards in the workplace is central to the effective administration of the Act. While the Secretary believes that the interpretation announced in STD 1–6.6 is faithful both to the standards' plain language and to the legislative intent, she is mindful of the Commission's concern that the Agency has not provided an adequate explanation of the basis for this interpretation. To address these concerns, this supplementary statement reviews the history of prior interpretive statements and explains in detail the linguistic and policy bases for requiring employers to pay for personal protective equipment.

The following discussion is organized into two sections. Section II, below, explains the bases for the Secretary's interpretation, including the meaning of the word ''provide'' in the standard, the legislative intent that employers bear the costs of safety and health requirements, and the reasons why requiring employers to pay for personal protective equipment contributes in practical ways to increased safety protection for employees. Section III addresses the decisions issued by the Commission and the Third Circuit in *Budd.* The section examines in detail the separate rationales offered by the Commissioners in the case, and explains why those rationales (none of which commanded a Commission majority) are not Commission precedent, nor are they consistent with subsequent Federal and Commission case law. The section also addresses OSHA's prior statements regarding personal protective equipment and demonstrates that OSHA did not have a settled national policy on the standard's interpretation until 1994.

B. The Language and Purpose of the Standard, as Well as the Policy of the OSH Act, Support the Secretary's Construction

The Secretary's interpretation of section 1910.132 is that the employer's duty to ''provide'' personal protective equipment when hazards dictate its use includes the obligation to pay for the equipment. See *Borton, Inc.* v. *OSHRC,* 734 F.2d 508, 510 (10th Cir. 1984) (usual meaning of provide is ''to furnish, supply, or make available''). *Accord, Usery* v. *Kennecott Copper Corp.,* 577 F.2d 1113, 1119 (10th Cir. 1978); *Secretary* v. *Baker Concrete Constr. Co.,* 17 O.S.H. Cas. (BNA) 1236, 1239. These definitions strongly imply that what is to be ''provided'' is to be given without cost to the recipient.

The Review Commission itself has found that ''provide'' includes the requirement to ''pay for'' under a standard closely analogous to section 1910.132. In *Secretary of Labor* v. *Erie Coke Corp.,* 15 O.S.H. Cas. (BNA) 1561 (Rev. Comm. 1992), the Commission addressed the meaning of 29 CFR 1910.1029(h)(1), which requires employers to ''provide and assure the use of'' appropriate personal protective equipment for coke oven workers. The Commission held that the plain meaning of ''provide,'' as well as other factors, supported the Secretary's interpretation that flame resistant gloves must be furnished at no charge. Id. at 1563 (the dictionary definitions ''suggest . . . that ''provide'' encompasses more that merely making items available'').

Courts have relied upon this meaning in holding that safety equipment and other items to be ''provided'' under analogous state and Federal regulations must be furnished at no charge. In *Bendix Forest Prods. Corp.* v. *Division of Occupational Safety and Health,* 600 P.2d 1339 (Cal. 1979) (en banc), the California Supreme Court held that Cal/OSHA standards requiring employers to ''furnish'' and ''provide'' safety devices precluded employers from charging employees for personal protective equipment. The Court found, *inter alia,* that ''a reasonable and ordinary interpretation of ''furnish'' . . . concomitantly requires the employer to pay for the safety equipment.'' *Id.* at 1344.[11] See also *Nelson* v. *Thornburg,* 567 F. Supp. 369, 379–82 (E.D. Pa. 1983), *aff'd,* 732 F.2d 146 (3d Cir), *cert. denied,* 469 U.S. 1188 (1985) (HHS regulations defining ''reasonable accommodation'' under section 504 of the Rehabilitation Act to include ''the provision of readers'' required employer to pay for readers to accommodate qualified blind employees, unless such costs would pose an undue burden).

The Secretary's construction that employers are responsible for the cost of personal protective equipment finds further support in the language and purpose of the OSH Act. A central principle embodied in the Act is that the fundamental duty of ensuring safe working conditions is to be borne by employers, not employees. Early in the Act's development, Federal appellate courts established that section 5(a), 29 U.S.C. 654(a), allocates to employers sole legal responsibility for achieving compliance with safety and health standards.[12] *Atlantic & Gulf Stevedores* v. *OSHRC,* 534 F.2d 541, 553 (3d Cir. 1976); *United Steelworkers of America* v. *Marshall,* 647 F.2d 1189, 1231 (D.C. Cir. 1980). These courts concluded that although section 5(b) nominally refers to

[11] The words ''provide'' and ''furnish'' are often used interchangeably. *Webster's Third New Int'l Dictionary, id.*

[12] Section 5(a)(2) of the Act provides, in relevant part, that ''[each employer shall comply with occupational safety and health standards . . . issued pursuant to this Act.'' 29 U.S.C. 654(a)(2).

duties of employees as well as employers, the Act's substantive requirements and enforcement scheme [13] are directed only at employers. Accordingly, the statute's reference to employee duties is:

essentially an exhortation to employees to cooperate in the standards and is not meant to diminish in any way the employer's compliance responsibilities or his responsibility to assure compliance by his own employees. Final responsibility for compliance with the requirements of this Act remains with the employer.

United Steelworkers, 647 F.2d at 1231. See also *Atlantic & Gulf Stevedores,* 534 F.2d at 553 (the Act's reference to employee duties in section 5(b) is ''essentially devoid of content'').

The legislative history demonstrates that employers' compliance responsibilities include the obligation to pay for devices and work practices necessary to render workplaces safe. The Supreme Court found that the legislative history:

shows that Congress understood that the Act would create substantial costs for employers, yet intended to impose such costs when necessary to create a safe and healthful working environment. Congress viewed the costs of health and safety as a cost of doing business. Senator Yarborough, a cosponsor of the [Act], stated: ''We know the costs would be put into consumer goods but that is the price we should pay for the 80 million workers in America . . . Senator Eagleton commented that ''[t]he costs that will be incurred by employers in meeting the standards of health and safety to be established under this bill are, in my view, reasonable and necessary costs of doing business.'' Other Members of Congress voiced similar views.

American Textile Mfrs. Inst., Inc. v. *Donovan,* 452 U.S. 490, 519–521 (1980) (*ATMI*) (internal citations omitted, original emphasis). See also *Forging Indus. Ass'n* v. *Secretary of Labor,* 773 F.2d 1436, 1451 (4th Cir. 1985) (en banc) (in view of Supreme Court's ''clear statement'' in *ATMI* that Congress intended employers to bear the costs of safety and health, OSHA may logically require employers to bear the costs of hearing protectors under the hearing conservation standard).

The D.C. Circuit also found persuasive indications of Congress's intent to have employers bear general financial responsibility under the Act. It noted that the report of the Senate subcommittee from which the statute emerged stressed the need to place the cost of standards on employers:

many employers—particularly smaller ones—simply cannot make the necessary investment in health and safety and survive competitively, unless all are compelled to do so. The competitive disadvantage of the more conscientious employer is especially evident where there is a long period between exposure to a hazard and manifestation of an illness. In such instances a particular employer has no economic incentive to invest in current precautions, not even in the reduction of workmen's compensation costs, because he will seldom have to pay for the consequences of his own neglect.

United Steelworkers, 647 F.2d at 1231 (quoting S. Rep. No. 91–1282, 91st Cong. 2d Sess. 4 (1970), *reprinted in,* Senate Comm. on Labor and Public Welfare, 92nd Cong. 1st Sess., *Legislative History of the Occupational Safety and Health Act of 1970,* at 144). See also *Legislative History* at 444, 1150.

Conspicuously absent from the legislative history is any indication from Congress that compliance costs should be borne by employees. Indeed, it is reasonably implicit in the statutory scheme that Congress sought to maintain the standard of living of working men and women and did not contemplate that employees' pay and benefits would be sacrificed to achieve safe and healthful workplaces. For example, the Senate report notes that employers are bound by the ''general and common duty to bring no adverse effects to the life and health of their employees throughout the course of their employment. Employers have primary control of the work environment and should ensure that it is safe and healthful.'' *Legislative History* at 149.

In view of the OSH Act's structure and history, there is no serious dispute that employers must pay for engineering controls necessary to reduce exposures to toxic substances. See, *e.g. Budd,* 1 O.S.H. Cas. (BNA) at 1550, n.5. In the Secretary's view, there is no principled distinction between engineering controls, which employers undoubtedly must pay for, and the personal protective equipment for which payment is required under STD 1–6.6.[14] OSHA addressed this issue in rulemaking on the Cancer Policy in 1980 and found no distinction, for payment purposes, between engineering controls and personal protective equipment necessary to protect employees from exposure to carcinogenic substances. OSHA stated:

[T]he requirement that employers pay for protective equipment is a logical corollary of the accepted proposition that the employer must pay for the institution of required engineering and work practice controls. To the extent that protective equipment, like engineering controls, is intended also to protect against . . . contamination, employers logically must pick up the expense. There is no rational basis for distinguishing . . . personal protective equipment [from engineering controls] The goal, in each case, is employee protection; consequently, the responsibility of paying for the protection should, in each case rest on the employer.

45 FR 5261 (January 22, 1980).[15]

OSHA has further determined, in rulemakings addressing specific hazards, that placing payment responsibility on the employer best carries out the Act's purpose of fostering employee safety. 29 U.S.C. 651(b). Requiring employers to pay for personal protective equipment contributes to increased health and safety protection in several practical ways. The employer is most knowledgeable about hazards existing in the workplace and is therefore best able to select and maintain appropriate protective equipment. Requiring employers to purchase personal protective equipment ensures that they retain control over the selection, issuance, maintenance and use of the devices. See 43 FR 19619 (May 5, 1978) (preamble to final rule on inorganic arsenic); 46 FR 4153 (January 16, 1981) (hearing conservation preamble). Shifting the financial burden to employees, on the other hand, ''risks losing the necessary control over the organized and consistent selection, issuance, maintenance and use of such equipment.'' 46 FR 4153.

Employer payment for protective equipment also contributes to improved health and safety by removing economic disincentives to cooperation by employees. In promulgating requirements for medical surveillance and medical removal protection (MRP) for some health standards, OSHA found that employees would be reluctant voluntarily to cooperate in such programs if they believed that they would suffer a loss of income as a result. See, *e.g.,* 43 FR 54442–54449 (November 21, 1978) (attachments to lead

[13] Sections 9(a) and 10(a) provide for the issuance of citations and notifications of proposed penalties only to employers. 29 U.S.C. 658(a), 659(a). Similarly, section 10(a) refers only to employer contests of citations and proposed penalties. While employees may intervene in proceedings initiated by the employer, the only independent right granted employees is to contest the reasonableness of any time period fixed by the Secretary for abatement of a violation. 29 U.S.C. 659(c). Section 17 provides for the assessment of civil monetary penalties only against employers. 29 U.S.C. 666. See *Atlantic & Gulf Stevedores,* 534 F.2d at 553.

[14] OSHA recognizes that safety-toe shoes do possess special characteristics which distinguish them from other types of personal protective equipment for cost-allocation purposes. See, *e.g., Budd,* 1 O.S.H. Cas. (BNA) at 1550 (distinguishing safety shoes, which are uniquely personal in nature and used away from work, from capital equipment, which employers ordinarily pay for).

[15] OSHA's approach to payment for PPE under health and safety standards is discussed in detail above.

preamble). See also *United Steelworkers of America,* 647 F.2d at 1230–12377 (finding lead standard's MRP provisions to be authorized under the statute and reasonable). OSHA has also required employers to provide medical examinations without cost to the employee in part to ensure employee cooperation in taking the exams. 43 FR 19624 (May 5, 1978) (preamble to inorganic arsenic standard). See also *Secretary of Labor* v. *Phelps Dodge Corp.,* 11 O.S.H. Cas. (BNA) 1441, 1443 (Rev. Comm. 1983) (noting ALJ's finding that when employees were required to provide their own transportation to and from the hospital and to sacrifice their personal time to take medical examinations for arsenic exposure, 42% of them failed to participate in the medical surveillance program).

OSHA considers that this evidence, which shows that employees make decisions that risk their health and safety to avoid suffering economic loss is relevant to the issue of payment for personal protective equipment. It is certainly reasonable to believe that employees who are furnished personal protective equipment at no charge are more strongly motivated to wear the devices, and to replace them when they wear out or are damaged, than are employees who must purchase these devices. In the *Union Tank* case, the employee representative presented an affidavit that some employees taped or wrapped wire around their damaged metatarsal safety boots in order to avoid having to pay up to $130 per pair to replace them. Similarly, in *Ormet Primary Aluminum Corp.,* OSHRC No. 96–0470, an employee testified that he continued to wear safety boots though the protective steel toes were exposed and posed an electrocution hazard because he could not afford a new pair. The employee also testified that some workers put a cement-like substance over the steel toes of their boots when the leather covering wore away, but that this practice was hazardous because the substance was flammable. Thus, the policy outlined in STD 1–6.6 is not only consistent with the plain meaning of the standard's text, it is supported by the statutory context and by significant practical safety considerations.

C. The Interpretation of § 1910.132 Announced in STD 1–6.6 is Supported by Better Reasoned Authority and Reflected OSHA's Initial Determination on an Appropriate National Policy Regarding Payment for Personal Protective Equipment Under the Standard

1. Introduction

This section addresses the grounds relied upon by the Commission in *Union Tank* for rejecting the Secretary's interpretation that section 1910.132(a) requires employers to pay for most types of personal protective equipment. The Commission first stated that in *Budd* it had determined that ''provide'' in section 1910.132(a) could not be interpreted to mean ''pay for.'' 18 O.S.H. Cas. (BNA) at 1068. The Commission then stated that OSHA had, for twenty years, acquiesced in the interpretation of the standard announced in *Budd. Id.* at 1069. The Commission held that the Secretary's ''new interpretation'' of section 1910.132(a) announced in 1994 was unreasonable because it represented a change in policy without adequate explanation. *Id.* This holding was based on five letters of interpretation issued from 1976 to 1993 stating that the standard does not specify who pays for personal protective equipment.

The following sections address the *Budd* decisions, as well as other relevant precedent, and explain in detail why *Budd* did not announce an authoritative interpretation of section 1910.132(a). The sections also address the agency's prior approaches to the cost allocation issue.

During the period from 1974 through October 1994, OSHA made a variety of statements on the question of employer payment for personal protective equipment. OSHA concedes that the statements of some agency officials during this period are inconsistent with the interpretation outlined in STD 1–6.6. However, these letters do not amount to an authoritative agency interpretation that employers are not required to pay for personal protective equipment. During the period from 1978 through 1994, OSHA promulgated health standards, pursuant to section 6(b) of the OSH Act, requiring employers to pay for personal protective equipment. In these standards, OSHA interpreted the Act to require employers to pay for personal protective equipment to the same extent that they would be required to pay for engineering controls. Furthermore, during the relevant time period some OSHA officials interpreted section 1910.132 to require employers to pay for personal protective equipment, other than safety shoes, and one court of appeals noted that the Act's legislative history supported this interpretation. Considered as a whole, OSHA's actions during the period from 1974–1994 cannot reasonably be viewed as reflecting an official agency interpretation contrary to STD 1–6.6.

2. The Commission's *Budd* Decision

The Commission's decision in *Budd* arose from a citation alleging that the employer violated 29 CFR 1910.132(a) by failing to provide safety-toe shoes to its employees. Prior to the hearing, the employer moved to withdraw its notice of contest on the understanding that its obligation to provide safety shoes did not include the requirement to pay for them. The Secretary agreed that the employer was not required to pay for the shoes because of their special characteristic, as noted below; however, the union representing the employees objected on the ground that the standard required employer payment. The issue presented to the Commission was whether the employer's motion should be granted.

The Secretary stressed the special characteristics of safety shoes, including their use away from work, as the rationale for not requiring employers to pay for this specific type of protective equipment. In her brief in *Budd,* the Secretary stated that:

> by tradition, in this country shoes are considered unique items of a personal nature. Safety shoes are purchased by size, are available in a variety of styles, and are frequently worn off the job, both for formal and casual wear. Furthermore, it is neither feasible for a different employee to wear the shoes each day nor feasible that upon resigning from the position an employee will leave the shoes behind to be worn by another individual.

See Brief of the Secretary, served January 10, 1973, at 8. However, the Secretary emphasized that an interpretation requiring employers generally to provide personal protective equipment free of charge would be consistent with the statutory scheme. She noted that such an interpretation could improve safety and health by giving employees greater incentive to use personal protective equipment. *Id.* at 9. She also noted that the Act's legislative history demonstrated Congress's intent to place the costs of achieving safe and healthful workplaces upon employers. *Id.* at 10. The Secretary concluded that ''[p]ersonal protective equipment cannot be segregated from equipment necessary to provide proper working conditions and therefore the purchase of such equipment by the employer was contemplated by the Act

in cases where a standard might require it.'' *Id.* at 10–11.

The Commission held that the employer's motion should be granted because section 1910.132(a) could not be interpreted to require the employer to pay for safety shoes. However, the Commission did not announce a majority rationale for this conclusion. Commissioners Van Namee and Cleary authored separate opinions explaining their different reasoning, while Commissioner Moran concurred in the determination on the motion without stating a rationale.[16]

Commissioner Van Namee reasoned that it would be anomalous to read section 1910.132(a) to require employers to provide or pay for personal protective equipment in light of the wording of section 1910.132(b), which contemplates the use of employee-provided equipment. 1 O.S.H. Cas. (BNA) at 1549, 1550. In the Commissioner's view, such a construction would render paragraph (b) meaningless. *Id.* at 1550. Thus, he interpreted section 1910.132(a) to mean that ''where personal equipment is necessary, the employer shall ensure that it is used. If [the employer] provides such equipment, he is responsible for ensuring that it is 'provided, used and maintained in a sanitary and reliable condition.' '' *Id.*

Commissioner Van Namee found support for his interpretation of section 1910.132(a) in the OSH Act's purpose of achieving safe workplaces, a purpose he believed to be unrelated to the question of payment. He stated that ''[p]rescription of cost allocations is not essential to the effectuation of the Act's objectives. It is irrelevant for purposes of the Act who provides and pays for the equipment. Either employer or employee provision is consistent with the purpose of the Act.'' *Id.* Commissioner Van Namee also noted that the steel-toed safety shoes at issue were ''uniquely personal'' and could be used by employees away from the workplace. *Id.*, n. 5.

Commissioner Cleary concurred in the determination on a different basis. He concluded that section 1910.132(a) does impose a duty upon an employer to provide directly or indirectly the required personal protective equipment. *Id.* at 1552. He found that this reading was not inconsistent with the text of paragraph (b), because paragraph (b) imposes no duty upon employees to furnish the equipment. ''Rather,'' Commissioner Cleary wrote, ''what paragraph (b) seems to recognize is that equipment which is owned by employees may sometimes be used by the employees themselves . . . . When this occurs, the paragraph establishes a duty upon the employer to assure its adequacy. Under its express terms, paragraph (b) does not require employees to provide the equipment in the first instance.'' *Id.*

Commissioner Cleary found that the OSH Act ''clearly contemplates that an employer will generally assume the costs of complying with its terms.'' *Id.* However, he concluded that the Commission lacked jurisdiction to provide relief as to costs in the *Budd* case because section 1910.132 did not, by its express terms, require employers to assume the costs of personal protective equipment. *Id.* In the Commissioner's view, the Commission lacked authority, in a proceeding to enforce a citation, to interpret the standard to require payment. *Id.* At the same time, the Commissioner noted that other relief might be available. He suggested that an employer's policy of requiring employees to pay for personal protective equipment could, in some cases, constitute a violation of section 11(c) of the OSH Act, which is enforced through actions in Federal district court. *Id.* at 1553.

3. The Court of Appeals' Affirmance

The Commission's decision was affirmed on appeal in *Budd* v. *OSHRC,* 513 F.2d 201 (3d Cir. 1975). The court found that the interpretation reached by the Commission and the Secretary that 29 CFR 1910.132 does not require employers to pay for safety-toe footwear was reasonable. 513 F.2d at 205. The court expressly reserved judgment on whether employers could be required to pay for other types of protective equipment. *Id.*

As support for affirmance of the Commission's order, the court found the joint position not inconsistent with the statutory scheme. The panel noted that Congress did not expressly require that the employer pay for protective equipment, and, in apparent agreement with Commissioner Van Namee's view, observed that ''[t]his Act, unlike such legislation as the Fair Labor Standards Act, is not concerned with wages and hours, but rather with reducing the incidence of job-related injuries.'' *Id.* at 206. The court also found the joint position reasonable in light of the standard's language. It noted that the verbs ''provided, used and maintained'' in section 1910.132(a) are phrased in the passive voice without specifying whether the employer or the employee is to perform these functions, and that section 1910.132(b) contemplates that employees will provide some protective equipment. *Id.*

In sum, in *Budd,* the Secretary, the Commission and the Third Circuit agreed that 29 CFR 1910.132 does not require employers to pay for safety-toe shoes. However, neither the Commission decision nor the court decision is an authoritative interpretation of the standard as it applies to other types of personal protective equipment. In *Union Tank,* the Commission referred to Commissioner Van Namee's rationale as the *Commission's* holding on the meaning of section 1910.132(a). 18 O.S.H. Cas. (BNA) at 1068 (stating that, in *Budd*, ''the Commission held that to read subpart (a) as requiring the employer to provide protective equipment would negate subpart (b), which contemplates the use of employee provided equipment''). This characterization is substantially flawed because no one opinion in *Budd* can be said to represent the Commission's official view. See *Atlantic Gulf & Stevedores* v. *OSHRC,* 534 F.2d at 546 (where Commission order affirms citation but each Commissioner files a separate opinion announcing a different rationale, no one opinion represents Commission consensus).

In sum, four different approaches to the payment issue emerged from the *Budd* litigation: (1) Employers should not be required to pay for personal protective equipment that is uniquely personal in nature and usable off the worksite, but may be required to pay for other types of PPE (the Secretary's position); (2) the OSH Act is indifferent to the question of who pays for personal protective equipment (the view of Commissioner Van Namee, supported by the court of appeals at least for safety shoes); (3) section 1910.132(a) cannot be interpreted to require employers to pay for personal protective equipment in light of the language of section 1910.132(b) (the view of Commissioner Van Namee); and (4) section 1910.132(a) cannot be interpreted to require employers to pay because it does not say so expressly (Commissioner Cleary's view).

4. OSHA's Interpretive Statements

From 1974 through 1994, OSHA embraced a variety of approaches to the issue of employer payment for personal protective equipment. In its most formal statements on the issue, made in the context of rulemaking proceedings on a broad spectrum of health hazards, OSHA determined that the Act generally contemplates employer payment of the

[16] Commissioner Moran joined the majority on the question of the disposition of the employer's motion to withdraw its notice of contest relating to 29 CFR 1910.132. He dissented from the Commission's decision on another cited violation, not relevant here.

costs of safety and health, including personal protective equipment. OSHA's determinations on employers' responsibility to pay for personal protective equipment, made on the record in rulemakings for specific standards, are discussed *infra.* Similarly, OSHA issued an Interpretive Instruction stating that under 29 CFR 1910.1029 (h)(1), personal protective equipment for coke oven workers must be furnished by employers at no charge. See *Erie Coke Corp.,* 15 O.S.H. Cas. (BNA) at 1563 (citing STD 1–6.4 (March 12, 1979)).

Prior to 1994, OSHA did not publish enforcement guidance on section 1910.132 in the Field Operations Manual or by interpretive memorandum. In some letters responding to requests for information, however, agency officials suggested that *Budd* foreclosed an interpretation of section 1910.132, or of OSHA personal protective equipment standards generally, requiring employers to pay for personal protective equipment. In other letters, OSHA noted that the standards do not specifically allocate the cost of such equipment to employers, and suggested that the issue be resolved through collective bargaining, where appropriate. Typical of this viewpoint is the September 2, 1976 letter to Adlai E. Stevenson quoted by the Commission in *Union Tank.*

On the other hand, OSHA continued at times to enforce the standard to require employers to pay for personal protective equipment. In September 1990, OSHA issued a citation to a meatpacking firm alleging that it violated section 1910.132(a) by charging its employees for repair or replacement of steel mesh gloves and plastic wrist bands used for protection against knife cuts.[17] A July 17, 1990 agency memorandum stated that although section 1910.132(a) does not specifically allocate the costs of personal protective equipment to employers, ''it is our position that the employer is obligated to pay for PPE which is not worn off the worksite. This includes welding gloves, but not safety shoes . . .'' [18] A May 20, 1994 agency letter responding to a request for information on OSHA's enforcement policy stated that the interpretation outlined in the agency's July 1990 memorandum ''is still in effect.''

Deputy Assistant Secretary Stanley's memorandum of October 1994 and the subsequent compliance directive STD 1–6.6 were intended to harmonize the different approaches to the question of employer responsibility for the costs of personal protective equipment. In requiring employers to pay for all except uniquely personal equipment, used off the worksite, the directive did not break new ground. Rather, the interpretation enunciated in the directive closely paralleled the interpretation in the July 1990 memorandum and the position taken in the Secretary's brief in *Budd.* This policy also reflected OSHA's formal position in rulemaking proceedings under section 6(b) that personal protective equipment, like engineering controls, must be paid for by employers unless special circumstances make it appropriate for employees to provide their own equipment. In stating that the matter of payment for items such as safety shoes and prescription eyewear may be left to negotiation, the Stanley memorandum recognizes the unfairness of requiring employers to pay for items of equipment that are normally used away from work, are purchased to fit particular employees, and are not, as a practical matter, reusable by other employees.

5. Why OSHA rejects the positions of Commissioners Van Namee and Cleary on the interpretation of section 1910.132 as it applies to PPE other than safety-toe shoes and prescription safety eyewear

The preceding discussion establishes two points of central importance in addressing the Commission's analysis in *Union Tank.* First, the Commission did not reach a consensus in *Budd* on the interpretation to be given section 1910.132(a) regarding payment for personal protective equipment other than safety shoes. The interpretation relied upon in *Union Tank* as the ''holding'' in *Budd* is, in fact, no more than the view of a single Commissioner. Second, the interpretation announced in STD 1–6.6 was not a wholly new policy, nor was it a change in OSHA's national policy since 1994. The statements in the agency letters relied upon by the Commission reflected the views of some officials that are at odds with the agency's positions taken (a) in rulemaking proceedings under the Act; (b) in its brief to the Commission in *Budd*; and (c) in a 1990 contested enforcement action before the Commission. Viewed in this context, the interpretation announced in the Deputy Assistant Secretary's memorandum, and formally published in STD 1–6.6, is OSHA's national policy, not a change in such policy.

The following sections examine the interpretive views expressed by the individual Commissioners in *Budd.* In light of the case law and other developments since *Budd*, the Secretary believes that the position she outlined in her Commission brief—that employers should not be required to pay for equipment that is uniquely personal in nature and usable off of the job—remains the only viable basis for the disposition of that case. To the extent that the positions outlined in the concurring opinions support an interpretation that section 1910.132 does not require employers to pay for any type of personal protective equipment, they are inconsistent with subsequent Federal court and Commission case law.

a. The Act is not indifferent to cost-allocation. Commissioner Van Namee's position that the OSH Act is indifferent to the question of who pays for equipment mandated by OSHA standards has been rejected by subsequent court and Commission decisions. That position ignores the extensive legislative history of the Act, discussed above, indicating Congress's intent to place fiscal responsibility for the safety of employees on industry, which can pass the costs to consumers. Based on this history, OSHA has promulgated numerous standards under section 6(b) of the Act, mandating that employers pay for protective devices and other requirements necessary for safety and health.

The lead standard (29 CFR 1910.1025), promulgated in 1978, clearly stated the principle that employers should bear the costs of requirements necessary to achievement of healthful working conditions. The standard requires that an employer who removes employees from their jobs because of high blood-lead levels must maintain the workers' earnings and seniority rights during removal for up to eighteen months. 29 CFR 1910.1025(k). The standard also requires employers to provide, at no charge to employees, respirators and protective clothing. 29 CFR 1910.1025 (f), (g). In the preamble to the Medical Removal Protection (MRP) provision, OSHA explained its determination that compliance costs were properly allocable to employers under the Act.

> OSHA has determined that the foregoing costs should be borne by employers in the first instance . . . MRP is meant to place those costs of worker protection directly on the industry at large rather than on the

[17] The citation was not contested, and thus became a final order of the Commission by operation of law. 29 U.S.C. 659(a).

[18] OSHA's issuance of the citation under section 1910.132(a) was in step with the agency's approach under other standards that do not expressly require employers to pay for personal protective equipment. In 1979, OSHA issued an interpretive Instruction clarifying that 29 CFR 1910.1029(h)(1), which states that the employer ''shall provide'' protective clothing and equipment, including flame resistant gloves, for coke oven workers, requires that this equipment be furnished at no cost to employees. OSHA Instruction STD 1–6.4 (March 12, 1979).

shoulders of individual workers unfortunate enough to be at risk of material impairment to health due to occupational exposure to lead. The costs of protecting worker health are appropriate costs of doing business, thus employers should properly bear the economic impact of temporary medical removals. The [OSH] Act . . . recognized that the costs which consumers pay for goods should reflect all costs of production, including costs associated with preventing . . . occupational disease. Under the Act, employers have the primary obligation to provide a safe and healthful work experience, [and] thus should incur the costs necessary to satisfy this obligation.

(43 FR 54449/3).

Beginning in 1978, OSHA determined that the costs of personal protective equipment necessary to guard employees against exposure to toxic substances should be paid for by employers. The standard on Inorganic Arsenic requires employers to pay for respirators, protective clothing and protective equipment, including gloves, shoes, and face shields or goggles. 29 CFR 1910.1018(j)(1). The preamble to the rule states that:

the obligation is on the employer to provide protective equipment at no cost to the employee. In this way the employer is in the best position to provide the correct type of equipment and keep it in repair. Also, as the employer has permitted exposures to exceed the permissible exposure limits, the obligation properly rests on the employer.

43 FR 19619 (May 5, 1978). OSHA applied the same reasoning in requiring employers to pay for respirators when necessary to protect employees from exposure to cotton dust. 43 FR 27387/2 (June 23, 1978) (preamble to final rule on occupational exposure to cotton dust). The Cotton Dust preamble notes that the language requiring employers to provide respirators '''at no cost to the employee' . . . makes explicit the position which has long been implicit in all OSHA health standard proceedings under section 6(b) of the Act'' *Id.* OSHA expressed a similar view in the preamble for the 1,2–Dibromo-3-chloropropane (DBCP) standard. 43 FR 11523/3 (March 17, 1978).

In the following decades, OSHA has expanded its justification for explicitly requiring employers to bear the costs of necessary protective devices. In the preamble to the hearing conservation standard, OSHA determined that employers should pay for hearing protectors based in part on a commenter's statement that ''where personal protective equipment is necessary to afford [a safe and healthful working] environment, it is . . . almost universally accepted that its purchase is the responsibility of the employer.'' 46 FR 4153 (January 16, 1981). The preamble also noted that permitting an employer to charge employees for hearing protectors could discourage the use of such devices and thereby undermine the effectiveness of the employer's hearing conservation programs. *Id.*

The formaldehyde standard, promulgated in 1987, expressly linked the question of payment for personal protective equipment and the employer's duty to ''provide'' such equipment under 29 CFR 1910.132. The formaldehyde standard requires employers to comply with 29 CFR 1910.132 and 1910.133 and specifies that the appropriate protective equipment is to be provided at no cost to the employee. 29 CFR 1910.148(h). The preamble to the formaldehyde standard stated that the standard ''reminds all employers of their obligation to comply with . . . 29 CFR 1910.132 . . . and requires the employer to provide such clothing or equipment at no cost to the employee.'' 52 FR 46269/1 (December 4, 1987).

By 1991, OSHA's policy was firmly established. In the bloodborne pathogens standard, the Agency justified the requirement that employers pay for various items of specialized equipment necessary to protect health care workers from exposure to blood or other potentially infectious materials. The preamble states that:

[i]t has been the Agency's longstanding policy to hold the employer responsible for controlling exposure to hazards in his or her workplace and to fulfill this responsibility at no cost to the employee. Therefore, the financial burden for purchasing and providing personal protective equipment rests upon the employer *just as it does for all other control measures (e.g., engineering controls).*

56 FR 64125/1 (December 6, 1991) (emphasis added).

This policy has been carried forward to the present. OSHA's standards for methylenedianiline, 29 CFR 1910.1050(h)(2)(i), (i)(1); cadmium, 29 CFR 1910.1027(g)(1), (i)(1); 1,3 butadiene, 29 CFR 1910.1051(h)(1), (i); and methylene chloride, 29 CFR 1910.1052(g)(1), (h)(1), promulgated between 1992 and 1997, all require employers to pay for respirators, protective clothing and personal protective equipment when such devices are necessary. OSHA's new Respiratory Protection standard, promulgated January 8, 1988, also requires employers to provide respirators, as well as training and medical evaluations, at no cost to the employees. 63 FR 1271 (January 8, 1988).

While OSHA has generally required employers to pay for all types of personal protective equipment, it has recognized an exception to the policy in certain circumstances. In the safety standard on logging operations, promulgated shortly before issuance of the Deputy Assistant Secretary's memorandum in October 1994, OSHA determined that logging employers should pay for protective equipment for the head, eyes, face, hands, and legs, but should not be required to pay for logging boots. OSHA excepted logging boots from among the types of equipment that employers must purchase for three reasons. First, the Agency found that the logging industry is highly transient and that logging boots, unlike other types of personal protective equipment, are not reusable. Therefore, OSHA concluded, ''employers would have to purchase non-reusable logging boots costing $200 to $400 many times a year for newly-hired employees, even though there is a significant likelihood that these employees will remain in the job for only a short time.'' 59 FR 51684 (October 12, 1994).

OSHA also found that logging employees tend to move from one establishment to another, taking their logging boots with them as tools of the trade. OSHA noted that logging boots are readily portable, and, unlike head and leg protection, are sized to fit a particular employee. OSHA found that it was appropriate to allow employees to follow the established custom of taking their boots with them from job to job rather than requiring employers to provide logging boots. *Id.*

Finally, the Agency noted that there was evidence in the record that employees use their logging boots away from work, for such activities as hunting and cutting their own wood, and that there was not comparable evidence that employees also use other types of protective equipment off-site. *Id.* For all of these reasons, OSHA decided not to require employers to purchase logging boots. However, it found no basis to depart from its ''long established policy'' regarding the costs of other items of required personal protective equipment. *Id.*

Federal appellate courts have upheld OSHA's statutory authority to impose on employers the costs of requirements reasonably necessary for safe and healthful workplaces. In *United Steelworkers of America,* the D.C. Circuit upheld OSHA's authority to charge employers with the costs of MRP, finding that ''the scheme of the statute, manifest in both the express language and the legislative history, appears to

permit OSHA to charge to employers the cost of any new means it devises to protect workers'' 647 F.2d at 1231. The *United Steelworkers* court noted that the Third Circuit's decision in *Budd* should be confined to its facts, stating ''[t]he court [in *Budd*] stressed the special character of protective devices which the employee would wear off-the-job as well as on-the-job and made clear it was expressing no opinion on the proper party to be charged for other devices and methods. Moreover, the court there failed to address the relevant parts of the legislative history.'' 647 F.2d at 1231–1232, n.66.

The Fourth Circuit upheld the hearing conservation standard's allocation of the costs of hearing protectors to employers in *Forging Indus. Ass'n* v. *Secretary of Labor,* 773 F.2d 1436, 1451 (4th Cir. 1985) (en banc). The *Forging Indus.* court noted that in view of the Supreme Court's finding in *ATMI* that Congress intended to impose compliance costs on employers, ''it is only logical that OSHA may require employers to absorb such costs.'' 773 F.2d at 1451.

The Commission itself has squarely rejected the view that the Act is indifferent to cost allocation in *Erie Coke Corp.,* discussed *supra,* at p.4. In *Erie Coke,* the commission upheld the reasonableness of the Secretary's construction that the coke oven emissions standard at 29 CFR 1910.1029(h)(1)(ii) required employers to pay for flame resistant gloves. In doing so, the Commission addressed the legislative history and court precedent establishing that Congress intended employers to bear the costs of compliance with standards. The Commission stated: ''[w]e agree with these courts of appeals that, based on the legislative history, Congress intended that the cost of compliance with OSHA would be uniformly reflected in the price of goods and services, so as not to place the safety-conscious employer at a competitive disadvantage.'' 15 O.S.H. Cas. (BNA) at 1565. Thus, Commissioner Van Namee's view that it is irrelevant under the Act whether employers or employees pay for protective devices finds no support in the statute and has been rejected by subsequent court and Commission case law.

b. Neither the language of section 1910.132(b), nor the use of the passive voice in section 1910.132(a) poses interpretive difficulties. The view of Commissioner Van Namee that section 1910.132(a) cannot be interpreted to require employers to ''provide'' personal protective equipment because section 1910.132(b) contemplates the use of employee-owned equipment, is similarly unsupported. If Commissioner Van Namee were correct that reading section 1910.132(a) to require employers to provide protective equipment would render section 1910.132(b) superfluous, it could only be because section 1910.132(b) itself imposes some duty upon employees to provide their own protective equipment. See 1 O.S.H. Cas. (BNA) at 1550. However, section 1910.132(b), by its terms, does not require employees to ''provide'' anything. As Commissioner Cleary correctly noted, section 1910.132(b)'s introductory phrase ''where employees provide their own protective equipment . . .'' is to be read, not as imposing a duty upon employees to furnish equipment, but rather, as recognizing that employees may sometimes wish to use their own equipment. See 1 O.S.H. Cas. (BNA) at 1552. Such use might occur, for example, if employee-owned equipment is more comfortable or provides a greater degree of protection than would be afforded by employer-provided equipment.[19] Thus read, in accordance with its terms, section 1910.132(b) poses no conflict with a reading of section 1910.132(a) that requires employers to provide personal protective equipment.

This result not only follows from the plain language of the standard: it is also compelled by case law, decided subsequent to *Budd,* rejecting the premise that the OSH Act imposes enforceable duties upon employees. In *Atlantic Gulf & Stevedores,* the Third Circuit expressly rejected Commissioner Van Namee's position, stated in his concurring opinion in that case, that the Act imposes enforceable compliance responsibilities upon employees. The court found that the ''detailed scheme of enforcement set out in sections 9, 10 and 17 of the Act . . . is directed only against employers.'' 534 F.2d at 553. The court also found section 5(b) of the Act, upon which Commissioner Van Namee relied as a basis for his view, to be ''essentially devoid of content.'' *Id.*

In *USWA,* the D.C. Circuit similarly concluded that the Act imposes compliance obligations exclusively upon employers. It found, based on the legislative history, that section 5(b) ''is essentially an exhortation to employees to cooperate in standards and is not meant to diminish in any way the employer's compliance responsibilities or his responsibility to assure compliance by his own employees.'' 647 F.2d at 1231 (quoting legislative history). This case law necessarily precludes any reading of section 1910.132(b) that would impose a duty upon employees to provide protective equipment.

Considered in the statutory context of exclusive employer responsibilities, section 1910.132(a)'s language stating that personal protective equipment ''shall be provided'' is equivalent to a direction that ''employers shall provide'' the equipment. Though the paragraph itself lacks precision, the Act leaves no room for doubt about which actor—the employer or the employee—is to do the providing. Moreover, the standard, considered in its entirety, provides further assurance that employers are to provide protective equipment. Section 1910.132(d)(i)–(iii) requires employers to perform a hazard assessment of their workplaces and to ''select and have each employee use'' appropriate personal protective equipment. ''Selection'' and ''provision'' are closely related functions that should logically be performed by the same actor. It would be an anomalous reading that required the employer to ''select'' items of PPE suitable for each of its employees, yet required employees to ''provide'' such equipment. All of these reasons compel rejection of Commissioner Van Namee's position in favor of the Secretary's construction, accepted by Commissioner Cleary, that the standard requires employers to provide and pay for personal protective equipment when necessary to employee safety.[20]

c. The standard may be interpreted to require employer payment in the absence of explicit cost-allocation language. Finally, the position of Commissioner Cleary—that if the standard does not explicitly allocate the costs of personal protective equipment, the Commission cannot require employers to pay—must be rejected. Unquestionably, the Secretary possesses the power authoritatively to interpret ambiguous OSHA standards in an administrative adjudication before the Commission. *Martin* v. *OSHRC (CF& I*

[19] As Deputy Assistant Secretary Stanley noted in his 1994 memorandum, section 1910.132(b) permits employees to use their own equipment in some circumstances but does not specify that practice as the norm. ''[I]nstead, the standard underscores the employer's obligation to assure that such equipment is adequate and that it is properly maintained.''

[20] Section 1910.132(a)'s general requirement that personal protective equipment ''shall be provided, used and maintained . . . .'' is given additional specificity by the other standards in Subpart I, *Personal Protective Equipment.* These standards make clear that the duties listed in section 1910.132(a) fall upon employers. See, *e.g.,* section 1910.133(a) (''The employer shall ensure that each employee uses appropriate eye or face protection . . .''); section 1910.134 (a)(2) (''Respirators shall be provided by the employer when such equipment is necessary to protect the health of the employee''). The active and passive voices are used interchangeably in the standards comprising Subpart I.

Steel Corp.), 499 U.S. at 144, 151 (1991). The Secretary's interpretation may, as in *Budd,* be embodied initially in a citation, ''a form expressly provided for by Congress.'' *Id.* at 157. It may also be disseminated by other means, including interpretive rules and enforcement guidelines. *Id.*

The Commission has held that the Secretary properly exercised her delegated interpretive authority to construe the word ''provide'' to mean ''pay for.'' *Erie Coke Corp.* 15 O.S.H. Cas. (BNA) at 1563 (affirming Secretary's interpretation of coke oven emissions standard to require employers to pay for flame resistant gloves). Therefore, the Commission's authority is not limited to enforcement of explicit regulatory requirements, as Commissioner Cleary supposed.

Summary and Conclusion

The uniform interpretation of section 1910.132 announced in STD 1–6.6 is consistent with the standard's language and purpose, as well as with the statute's clear design to place fiscal responsibility for achievement of workplace safety on employers. The interpretation is also consistent with Federal appellate decisions recognizing the Secretary's statutory authority to charge employers with the cost of regulatory requirements and with the Commission's precedent in *Erie Coke Corp.* Finally, the interpretation is consistent with the result in *Budd* that employers need not pay for safety shoes. To the extent that the concurring rationales offered by Commissioners Van Namee and Cleary in *Budd* address payment for other types of personal protective equipment, the foregoing discussion demonstrates that the positions taken by these Commissioners are contrary to case law decided since *Budd* and to now-settled principles of regulatory construction.

The fact that some agency letters issued prior to Deputy Assistant Secretary Stanley's memorandum suggest agency acquiescence in the Commissioners' concurring opinions in *Budd,* does not render invalid the Secretary's interpretation here. These letters must be considered in the context of OSHA's overall approach to the payment issue in rulemaking under section 6(b) of the Act, and the Agency's 1990 interpretive memorandum and citation under section 1910.132(a). In this context, the letters reflected divergent positions within the Agency concerning the employer's duty to pay for personal protective equipment, rather than a settled agency interpretation. Significantly, when these letters were sent out, OSHA had not developed an authoritative, nationwide position on the allocation of such costs, Cf. *Drummond Coal Co.* v. *Hodel,* 796 F.2d 503, 508 (D.C. Cir. 1986) (regulatory interpretation given by some agency personnel in Alabama and relied upon by some Alabama companies for four years did not amount to a national policy which the Agency could not change without reasoned explanation). See also *Martin,* 144 U.S. at 157 (interpretive rules and agency enforcement guidelines contained in Field Operations Manual may be consulted by reviewing courts to determine consistency of interpretation advanced in enforcement litigation). In fact, OSHA did not develop such a position until the field directive (STD 1–6.6) in 1994.

Furthermore, the inconsistent statements prior to 1994 resulted, in substantial part, from the erroneous positions stated in the separate concurring opinions in *Budd:* that section 1910.132(a) either imposes no duty upon employers to provide personal protective equipment, or cannot be interpreted to require employers to pay for such equipment absent explicit cost allocation language.

The Supreme Court has observed that:

> The Secretary is not estopped from changing a view she believes to have been grounded upon a mistaken legal interpretation. Indeed, an administrative agency is not disqualified from changing its mind; and when it does, the courts still sit in review of the administrative decision and should not approach the statutory construction issue de novo and without regard to the administrative understanding of the statutes.

Good Samaritan Hospital v. *Shalala,* 508 U.S. 402, 418 (1993). And in the circumstances presented here, ''where the Agency's interpretation of [its regulation] is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction.'' *Id.* The interpretation in STD 1–6.6 is reasonable, even if it is not the only permissible reading of the standard.

X. List of Subjects in 29 CFR Parts 1910, 1915, 1917, 1918, and 1926

Construction industry; Eye and face protection; Foot protection; General industry; Hand protection; Head protection; Longshoring operations; Marine terminals; Occupational safety and health; Personal protective equipment; Protective equipment; Safety glasses; Safety shoes; Shipyard industry.

XI. Authority

This document was prepared under the authority of Charles N. Jeffress, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210.

Accordingly, pursuant to sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653,655, 657), section 107 of the Construction Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333), section 41 of the Longshore and Harbor Workers Compensation Act (33 U.S.C. 941), Secretary of Labor's Order No. 6–96 (62 FR 111), and 29 CFR part 1911, it is hereby proposed to amend 29 CFR parts 1910, 1915, 1917, 1918, and 1926 as set forth below.

Signed at Washington, D.C., this 18th day of March, 1999.

Charles N. Jeffress,

Assistant Secretary of Labor.

XII. Proposed Standards

General Industry

PART 1910—[AMENDED]

29 CFR part 1910 is proposed to be amended as follows:

1. The authority citation for subpart I of 29 CFR part 1910 would be revised to read as follows:

Authority: Sections 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653,655,657); Secretary of Labor's Order No. 12–71 (36 FR 8754), No. 8–76 (41 FR 25059) No. 9–83 (48 FR 35736), No. 1–90 (55 FR 9033) and No. 6–96 (62 FR 111) as applicable, and 29 CFR Part 1911.

2. A new paragraph (h) would be added to § 1910.132, to read as follows:

§ 1910.132 General requirements.

* * * * *

(h) *Payment for protective equipment.* All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees. *Exception:* The employer is not required to pay for the logging boots required by 29 CFR § 1910.266(d)(1)(v). The employer is also not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:

(1) The employer permits such footwear or eyewear to be worn off the job-site;

(2) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and

(3) Such footwear or eyewear is not designed for special use on the job.

Shipyards

PART 1915—[AMENDED]

29 CFR Part 1915 is proposed to be amended as follows:

1. The Authority citation for Subpart I of 29 CFR Part 1915 would be revised to read as follows:

Authority: Secs. 4, 6, and 8, Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); section 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941), Secretary of Labor's Order No. 8–76 (41 FR 25059), No. 9–83 (48 FR 35756), No. 1–90 (55 FR 9033) and No. 6–96 (62 FR 111) as applicable; and 29 CFR part 1911.

2. A new paragraph (f) would be added to § 1915.152, to read as follows:

§ 1915.152 General Requirements.

* * * * *

(f) *Payment for protective equipment.* All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees.

Exception: The employer is not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:

(1) The employer permits such footwear or eyewear to be worn off the job-site;

(2) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and

(3) Such footwear or eyewear is not designed for special use on the job.

Marine Terminals

PART 1917—[AMENDED]

29 CFR Part 1917 is proposed to be amended as follows:

1. The authority citation for Subpart E of 29 CFR part 1917 would continue to read as follows:

Authority: Sec. 41, Longshore and Harbor Workers' Compensation Act (33 U.S.C. 941); Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), or 6–96 (62 FR 111), as applicable; and 29 CFR part 1911. Section 1917.28 also issued under 5 U.S.C. 553.

2. A new § 1917.96 would be added to subpart E, to read as follows:

§ 1917.96 Payment for protective equipment.

All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees. *Exception:* The employer is not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:

(a) The employer permits such footwear or eyewear to be worn off the job-site;

(b) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and

(c) Such footwear or eyewear is not designed for special use on the job.

Longshoring

PART 1918—[AMENDED]

29 CFR part 1918 is proposed to be amended as follows:

1. The authority citation for 29 CFR part 1918 would be revised to read as follows:

Authority: Secs. 4, 6, and 8 of the Occupational Safety and Health Act, 29 U.S.C. 653, 655, 657; Walsh-Healey Act, 41 U.S.C. 35 *et seq.*; Service Contract Act of 1965, 41 U.S.C. 351 *et seq.*; Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act), 40 U.S.C. 333; Sec. 41, Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 941; National Foundation of Arts and Humanities Act, 20 U.S.C. 951 et seq.; Secretary of Labor's Order No. 6–96 (62 FR 111) and 29 CFR part 1911.

2. A new § 1918.106 would be added, to read as follows:

§ 1918.106 Payment for protective equipment.

All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees. *Exception:* The employer is not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:

(a) The employer permits such footwear or eyewear to be worn off the job-site;

(b) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and

(c) Such footwear or eyewear is not designed for special use on the job.

Construction

PART 1926—[AMENDED]

29 CFR part 1926 is proposed to be amended as follows:

1. The authority citation for subpart E of part 1926 would be revised to read as follows:

Authority: Sec. 107, Contract Work Hours and Safety Standards Act (Construction Safety Act) (40 U.S.C. 333); Secs. 4, 6, and 8 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 653, 655, 657); Secretary of Labor's Order No. 12–71 (36 FR 8754), 8–76 (41 FR 25059), 9–83 (48 FR 35736), 1–90 (55 FR 9033), or 6–96 (62 FR 111), as applicable; and 29 CFR part 1911.

2. A new paragraph (d) would be added to § 1926.95, to read as follows:

§ 1926.95 Criteria for personal protective equipment.

* * * * *

(d) *Payment for Protective Equipment.* All protective equipment, including personal protective equipment (PPE), required in this part, shall be provided by the employer at no cost to employees. *Exception:* The employer is not required to pay for safety-toe protective footwear, or for prescription safety eyewear, provided that all three of the following conditions are met:

(1) The employer permits such footwear or eyewear to be worn off the job-site;

(2) The footwear or eyewear is not used at work in a manner that renders it unsafe for use off the job-site (for example, contaminated safety-toe footwear would not be permitted to be worn off a job-site); and

(3) Such footwear or eyewear is not designed for special use on the job.

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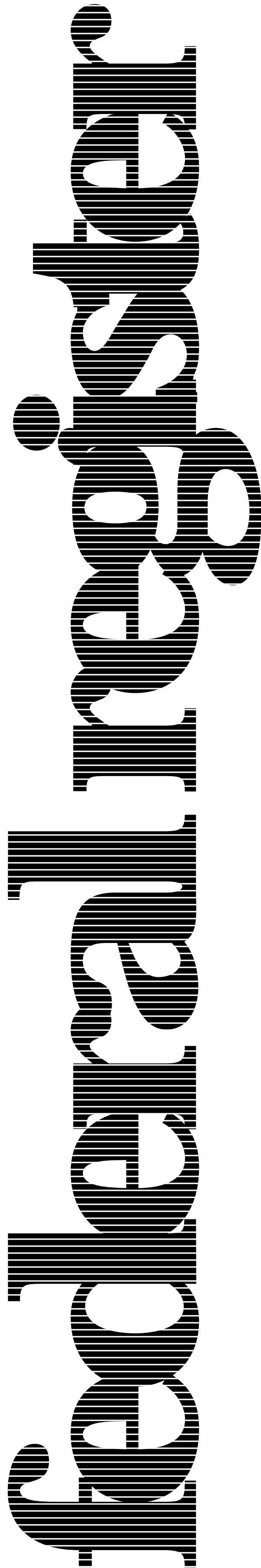

Wednesday
March 31, 1999

Part III

Department of Commerce

International Trade Administration

Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Belgium, Canada, Italy, Korea, South Africa and Taiwan; Notices

DEPARTMENT OF COMMERCE

International Trade Administration

[A–580–831]

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils (''SSPC'') from the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Carrie Blozy or Rick Johnson, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0165 or (202) 482–3818, 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 (''Department'') regulations are to the regulations at 19 CFR part 351 (1998).

Final Determination:

We determine that stainless steel plate in coils (''SSPC'') from the Republic of Korea are being sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Act. The estimated margins are shown in the ''Continuation of Suspension of Liquidation'' section of this notice.

Case History

Since the preliminary determination (*Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils (''SSPC'') from the Republic of Korea* (''*Preliminary Determination*''), 63 FR 59535 (November 4, 1998)), the following events have occurred:

On November 5, 1998, petitioners alleged ''significant ministerial errors'' made in the Department's margin calculation for the preliminary determination. On November 6, 1998, respondent, Pohang Iron & Steel Co., Ltd. (''POSCO''), responded to petitioners'' comments. On November 23, 1998, the Department found that the errors alleged by petitioners were policy decisions and not unintentional errors of the kind covered by the ministerial error provision (*see* 19 CFR 351.224(f)). *See Memorandum to Edward Yang: Stainless Steel Plate in Coils from the Republic of Korea—Analysis of Alleged Ministerial Errors*, dated November 23, 1998. POSCO submitted revisions and corrections to its questionnaire responses during October, November, and December 1998. During November 1998, we conducted the sales verification of POSCO's responses to the antidumping questionnaire. Following verification, we requested that POSCO submit a revised sales database, which POSCO submitted on November 30, 1998. During December 1998, the Department conducted the cost verification of POSCO's responses to the antidumping questionnaire. On December 18, 1998, the Department postponed the final determination to 135 days after publication of the preliminary determination (*see Postponement of Final Antidumping Determinations: Stainless Steel Plate in Coils from Canada, Italy, Republic of Korea, South Africa, and Taiwan*, 63 FR 70101. On January 5, 1999, we issued our sales verification report (*see Memorandum to the File: Report on the Sales Verification of Pohang Iron & Steel Company, Ltd.* (''*Sales Verification Report*''), dated January 5, 1999). Also, on January 12, 1999, we issued our cost verification report (*see Memorandum to the Neal Halper, Acting Director, Office of Accounting: Cost Verification Report—Pohang Iron and Steel Company, Ltd.* (''*Cost Verification Report''*), dated January 12, 1999. Finally, on January 14, 1999, the Department issued its report on the U.S. sales verification of Pohang Steel America (''POSAM'') (*see Memorandum to the File: Report of the U.S. Sales Verification of Pohang Steel America* (''*POSAM Verification Report*''), dated January 14, 1999).

On January 19, 1999, petitioners withdrew their request for a public hearing. Petitioners and POSCO submitted case briefs on January 26, 1999, and rebuttal briefs on February 2, 1999.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.*, cold-rolled, polished, *etc.*) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this petition are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the *Harmonized Tariff Schedule of the United States* (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are 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 January 1, 1997, through December 31, 1997.

Transactions Investigated

As in the preliminary determination, the Department has excluded POSCO's sales to the affiliated service centers and considered the affiliates' resales of the subject merchandise. Also, as discussed in Comment 11, the Department has included POSCO's local letter of credit (''local'') sales in its margin analysis because these sales are consumed in the home market. Additionally, as described in Comment 2, the Department has determined that for U.S. and home market sales the date of invoice is the appropriate date of sale as this is the date on which the material terms of sale are set.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by the respondent, covered by the description in the *Scope of Investigation* section, above, and sold in the home market during the POI, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product

on the basis of the characteristics listed in the antidumping duty questionnaire and the May 27, 1998 reporting instructions.

Fair Value Comparisons

To determine whether sales of SSPC from the Republic of Korea to the United States were made at less than fair value, we compared export price (''EP'') or constructed export price (''CEP'') to the Normal Value (''NV''), as described in the ''Export Price/Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In the preliminary determination, for all sales, we compared EP to NV. However, as discussed in Comment 4, the Department has found that POSCO's U.S. sales through POSAM constitute CEP sales and has compared CEP to NV for those sales. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average EPs or CEPs for comparison to weighted-average NVs.

Level of Trade

In accordance with section 773(a)(1)(B)(i) 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 or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (''SG&A'') and profit. For EP, the LOT is also the level of the starting price sale, which is usually from the exporter to the 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 from EP or CEP sales, 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 a 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 differences in the levels between NV and CEP sales 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).

For the preliminary determination, we concluded that POSCO performed similar selling functions in the U.S. market and HM Channels 1 (sales from POSCO to the unaffiliated customer) and 2 (sales from POSCO Steel Sales & Services Co., Ltd. (''POSTEEL''), POSCO's affiliate responsible for the majority of home market sales and all U.S. sales, to the unaffiliated customer) and that a LOT adjustment was not warranted for comparisons between the U.S. market and HM Channels 1 and 2. No party to this investigation commented on this determination. However, as POSCO's response detailing the type of selling functions performed by the affiliated service centers (HM Channel 3) was not received until October 30, 1998, the Department could not make a determination for the preliminary determination whether the affiliated service centers' resales were sold at a different level of trade than other home market channels or U.S. channels. Additionally, as noted above, for the final determination we have classified POSCO's U.S. sales through POSAM as CEP sales.

In its October 30, 1998 supplemental response, POSCO stated that HM Channel 3 sales were made at the same LOT as the U.S. sales and other HM sales. It reported that the only selling functions performed by the service centers are inventorying the subject merchandise and arranging for freight. Additionally, POSCO indicated that the sales process is the same for both service centers: The customers contact the service centers by fax or phone. If the requested merchandise is in inventory, the service centers issue a shipping order sheet with the merchandise. If the merchandise is not in inventory, the service centers will order the merchandise from POSCO. At verification, the Department confirmed the selling functions performed by the affiliates. *See Sales Verification Report* at pg. 5. Therefore, we determine that selling functions performed in HM Channel 3 are similar to the selling functions performed in HM Channels 1 and 2: Freight and delivery, invoicing, sales negotiation, and limited amounts of market research, warranty services, and technical advice. Consequently, we find that the home market constitutes a single LOT.

In order to determine whether normal value was established at a different LOT than EP or CEP sales, we examined stages in the marketing process and selling functions along the chains of distribution between POSCO and its U.S. customers, and then compared those functions to the single LOT, we previously identified in the HM. In the U.S. we identified three channels of distribution: (1) Sales from POSTEEL directly to the unaffiliated U.S. customer (U.S. Channel 1); (2) sales from POSTEEL to POSAM to the unaffiliated U.S. customer (U.S. Channel 2); and (3) sales from POSTEEL to the unaffiliated Korean trading company (U.S. Channel 3). For the EP sales, U.S. Channels 1 and 3, we verified that POSTEEL arranges freight and delivery, and performs sales negotiation and invoicing. We also found that POSTEEL provides limited amounts of market research, warranties, and technical advice. In examining the LOT of the CEP sales (U.S. Channel 2), after deducting for economic activities which occurred in the United States, pursuant to section 772(d) of the Act, we found that POSTEEL performs the following activities: arranging for freight and delivery to the U.S. port, sales negotiation, and invoicing. Because of the similar selling functions performed between the EP sales (U.S. Channels 1 and 3) and the CEP sales (U.S. Channel 2), we find that all U.S. sales are made at a single LOT. Finally, because of the similarity in the chains of distribution and selling functions performed for sales in the home market and in the U.S., we find that no LOT adjustment or offset is necessary.

Export Price/Constructed Export Price

For those U.S. sales made through POSAM, we calculated CEP based on packed prices to unaffiliated customers in the United States. We made deductions for movement expenses in accordance with section 772 (c)(2)(A) of the Act; these included, where appropriate, foreign inland freight, foreign brokerage and handling, international freight, marine insurance, U.S. inland freight, U.S. Customs Duty, and U.S. brokerage and wharfage charges. In accordance with section 772(d)(1) of the Act, we deducted those selling expenses associated with economic activity occurring in the United States, including direct selling expenses (credit costs, bank charges, and U.S. commissions) and indirect selling expenses. Also, we made an adjustment for CEP profit in accordance with section 772(d)(3) of the Act. Finally, we added to U.S. price an amount for duty drawback pursuant to section 772 (c)(1) (B) of the Act.

We calculated EP based on the same methodology used in the preliminary determination.

Normal Value

After testing home market viability and whether home market sales were at below-cost prices, we calculated NV as noted in the ''Price-to-Price Comparisons'' and ''Price-to-CV Comparison'' sections of this notice.

1. Home Market Viability

As discussed in the preliminary determination, we determined that the home market was viable and no parties have contested that decision. For the final determination, we have based NV on home market sales.

2. Cost of Production Analysis

As discussed in the preliminary determination, we conducted an investigation to determine whether POSCO made sales of the foreign like product in the home market during the POI at prices below their cost of production (''COP''). In accordance with section 773(b)(3) of the Act, we calculated COP based on the sum of POSCO's cost of materials and fabrication for the foreign like product, plus amounts for home market SG&A, interest expenses, and packing costs. We used the information from POSCO's December 17, 1998 supplemental questionnaire response to calculate COP, except in the following instance.

POSCO purchased a significant amount of ferroalloys from an affiliated party during the POI. For each affiliated purchase, we compared the prices paid to affiliates to the average market price and to the affiliated party's cost of production. Where appropriate, we increased POSCO's per unit costs to the higher of transfer price, market price, or cost of production. *See Memorandum to Neal Halper, Acting Director, Office of Accounting: Cost of Production (''COP'') and Constructed Value (''CV'') Calculation Adjustments for the Final Determination of Pohang Iron & Steel Co., Ltd. (''POSCO'')* (''*Cost Analysis Memorandum*''), dated March 19, 1999. *See also*, Comment 5.

3. Test of Home Market Sales Prices

As in our preliminary determination, we compared the weighted-average COP for POSCO, adjusted where appropriate (*see* above), to home market sales of the foreign like product as required under section 773(b) of the Act. In determining whether to disregard home market sales made at prices less than the COP, we examined whether (1) within an extended period of time, such sales were made in substantial quantities, and (2) such sales were made at prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared the COP to home market prices, less any applicable movement charges and direct and indirect selling expenses.

4. Results of the COP Test

Pursuant to section 773(b)(2)(C) of the Act, where less than 20 percent of respondent's sales of a given product were at prices less than the COP, we did not disregard any below-cost sales of that product because we determined that the below-cost sales were not made in ''substantial quantities.'' Where 20 percent or more of a respondent's sales of a given product during the POI were at prices less than the COP, we determined such sales to have been made in ''substantial quantities'', as defined in section 773(b)(2)(C)(i) of the Act, within an extended period of time in accordance with section 773(b)(2)(B) of the Act. In such cases because we compared prices to weighted-average COPs for the POI , we also determined that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time, in accordance with section 773(b)(2)(D) of the Act. Therefore, we disregarded the below-cost sales. Where all sales of a specific product were at prices below the COP, we disregarded all sales of that product.

Calculation of CV

As in our preliminary determination, we calculated CV based on the sum of respondent's cost of materials, fabrication, SG&A, interest expenses and profit. We calculated the COP included in the calculation of CV as noted above, in the ''Calculation of COP'' section of the notice. In accordance with section 773(e)(2)(A) of the Act, we based SG&A and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade, for consumption in the foreign country.

Price-to-Price Comparisons

As in our preliminary determination, for those product comparisons for which there were sales at prices above the COP, we based NV on prices to home market customers. We made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act.

We calculated NV based on the same methodology used in the preliminary determination, with three exceptions. Where appropriate, we deducted from NV the amount of indirect selling expenses capped by the amount of the U.S. commissions. Also, we recalculated POSCO's indirect selling expenses reported for HM Channel 1 sales (sales through POSCO) and HM Channel 2 and U.S. Channel 3 sales (sales through POSTEEL). As discussed in Comment 7, we determined that POSCO incorrectly excluded sales to affiliated parties in its calculation of POSCO's indirect selling expense ration. Also, at verification, the Department found that POSCO had included PSC division figures in its calculation of indirect selling expenses for domestic sales through POSTEEL, based on the fact that, in the flat-rolled cases, PSC had a role in selling the merchandise. However, POSCO acknowledged that these divisional expenses should not have been included in this calculation. *See Sales Verification Report* at pg. 15. Therefore, for the final determination, we have recalculated the indirect selling expense for HM Channel 2 sales and U.S. Channel 3 sales by excluding PSC division figures. Also, we added to NV an amount for duty drawback pursuant to section 772 (c)(1)(B) of the Act, where appropriate.

Price-to-CV Comparisons

For price-to-CV comparisons, we made adjustments to CV in accordance with section 773(a)(8) of the Act. If appropriate, we deducted from CV the amount of indirect selling expenses (adjusted as described in the ''Price-to-Price Comparisons'' section above) capped by the amount of the U.S. commissions.

Currency Conversion

In the preliminary determination, the Department determined that the decline in the won at the end of 1997 was so precipitous and large that the dollar-won exchange rate cannot reasonably be viewed as having simply fluctuated during this time, *i.e.,* as having experienced only a momentary drop in value. Therefore, the Department used daily rates exclusively for currency conversion purposes for HM sales matched to U.S. sales occurring between November 1 and December 31, 1997. *See Preliminary Determination* at 59539. As discussed in Comment 3, the Department continues to find that use of daily exchange rates is warranted during the November/December period.

Verification

As provided in section 782(i) of the Act, we verified the information submitted by the respondent for use in our final determination. We used standard verification procedures, including examination of relevant accounting and production records and

original source documents provided by the respondent.

Interested Party Comments

Comment 1. Sales to a Bankrupt Customer. Petitioners argue that by excluding POSCO's sales to a U.S. customer that later went bankrupt and making no other adjustments to account for these unpaid sales, the Department failed to follow its own precedent. Citing *Color Television Receivers from the Republic of Korea: Final Results of Antidumping Administrative Review,* 61 FR 4408, 4412 (February 6, 1996) (''*Color Televisions*''), petitioners maintain that it is the Department's practice to treat sales to a bankrupt customer as a direct selling expense. They contend that had the Department based its treatment of these sales on *Color Televisions,* the preliminary margin would have been approximately 11 percent, not the 2.77 percent margin POSCO received in the preliminary determination. Furthermore, they allege that the domestic industry continues to suffer from less than fair value sales of SSPC from Korea, notwithstanding the Department's preliminary determination.

Petitioners contend that even if the Department disagrees with their argument that the sales were significant and were not ''atypical'', the Department must consider the cost of these sales to POSCO to be direct selling expenses. Petitioners claim that POSCO mis-characterized its sales to the bankrupt U.S. customer as insignificant. They maintain that these sales represent a significant portion of POSCO's U.S. sales by every measure, and as such, should have been included in the Department's analysis. They cite several cases in support of their contention that these sales are significant, including *Gulf States Tube Div.* v. *United States,* 981 F. Supp. 630 (CIT 1997). They maintain that prior to the URAA changes to the Act, the Department would consider respondent's request to exclude insignificant ''outlier'' sales, if the inclusion of such sales would significantly complicate reporting or calculation aspects of the proceeding. They explain that respondent bore the burden of establishing the necessity of the exclusion and the exclusion acknowledged two salient practices of the time: first, the Department looked at a six-month period of investigation; and second, the Department calculated a transaction-specific margin for each sale. Subsequent to the URAA, the Department uses a twelve month POI and calculates a weighted-average product specific margin. Based on the Department's current calculation methodology in which the Department seeks to capture a complete snapshot of a respondent's selling practices by using an expanded twelve-month period of investigation, petitioners question the Department's decision to exclude these sales due to their ''atypical'' nature.

Petitioners argue that sales to customers who cannot pay for the merchandise are an everyday occurrence, and companies such as POSCO anticipate this fact. Further, they note that POSCO has many accounts and reserves to deal with potential bad debts. *See* POSCO's Section A questionnaire at Exhibit A–12. Petitioners contend that the Department's treatment of these sales is analogous to the Department excluding sales to a home market customer because the customer receives a significantly lower price than other home market customers because it purchases in large quantities. They argue that despite being ''atypical'' of sales made during the 12-month period of investigation, the Department will not exclude these sales because these sales will continue to be weight-averaged with other sales and the customer will, presumably, continue to purchase in large quantities in the future. Citing POSCO's December 7, 1998 Supplemental Questionnaire Response in the investigation of Stainless Steel Sheet and Strip in Coils from Korea at pp. 4–5, petitioners note that POSCO made sales to this customer outside of the investigation. Furthermore, they speculate that POSCO continues to makes sales to this customer. Finally, they note that POSCO has stated that it expects to recoup some amount for the unpaid sales in bankruptcy court. *See Id.* at pg. 4.

Petitioners allege that the Department's classification of unpaid sales in the companion investigation of stainless steel sheet and strip in coils (''SSSS'') from the Republic of Korea was incorrect. Although petitioners agree with the Department's decision to recognize the cost of these unpaid sales, they maintain that there was no basis for the Department to treat the cost of these sales as an indirect selling expense. They argue that the weaknesses in the Department's argument is apparent when one considers the reality under which these sales were made. First, they explain that POSCO classified (incorrectly, in petitioners' judgement) all of its U.S. sales as export price sales. They note that by treating these unpaid sales as an indirect selling expense, there is absolutely no consequence when an importer is not paid for merchandise. Additionally, they charge that POSCO must bear attorney fees, collections fees, court fees, and the cost of producing the merchandise. They maintain that these are clearly direct expenses, for if not for the customer's bankruptcy, POSCO would not incur the aforementioned charges. Petitioners argue that the best analogy for the expenses associated with these unpaid sales is a warranty expense. They explain that if the customer determined that the merchandise was defective, and failed to pay under a warranty agreement, the cost of the merchandise would be deducted as a warranty claim, a direct selling expense, charged against sales. They state that in SSSS from the Republic of Korea, the Department defined direct selling expenses as ''a direct and unavoidable consequence of the sale (*i.e.*, in the absence of the sale these expenses would not be incurred).'' *SSSS* at pg. 140. Petitioners argue that the facts in this case demonstrate that the loss resulting from these unpaid sales are ''a direct and unavoidable consequence of the sale.'' Petitioners maintain that not only is there a clear, factual basis for treating these unpaid sales as a direct selling expense, but it is also the Department's policy to treat sales to a bankrupt customer as such, citing *CTVs from Korea.*

Additionally, petitioners allege that POSCO has failed to demonstrate that the cost of the unpaid sales are indirect selling expenses. Citing several cases, petitioners argue that Department precedent requires respondent to prove that the selling expenses incurred through sales to a bankrupt customer in the U.S. are indirect selling expenses. *See, e.g., Timken Co.* v. *United States,* 18 CIT 486,852 F.Supp. 1122, 1125 (1994); *Torrington Co.* v. *United States,* 17 CIT 672,832 F. Supp. 365,376,378 (1993) aff'd 68 F.3d 1347 (Fed. Cir. 1995); *Tapered Roller Bearings, Finished and Unfinished, and Parts thereof, from Japan: Final Results of Antidumping Duty Administrative Review,* 57 FR 4951, 4955 (Feb. 11, 1992). They maintain that in this case POSCO has only argued that these sales should be ignored.

In conclusion, petitioners argue that based on precedent which directs the Department to treat unpaid sales as direct selling expenses and the fact that POSCO has not demonstrated that the Department should treat these sales as indirect selling expenses, the Department must treat the cost of the unpaid sales as direct selling expenses for the final determination. Moreover, they maintain that the cost of these unpaid sales should be allocated to subject merchandise only. Citing *Smith Corona Group* v. *United States,* 1 Fed. Cir (T) 130, 713 F.2d 1568, 1577 (1983),

they argue that a broader allocation would be inappropriate.

Respondent argues that the Department properly excluded U.S. sales for which no payment was made. They note that because the material terms of sale were finalized when POSCO shipped the merchandise, they properly reported these transactions as U.S. sales, as required under 19 U.S.C. 1677a(a) (1998). They explain that POSCO requested that the Department exclude these sales on the basis that the credit period associated with these sales would distort POSCO's margin. Respondent argues that the Department has the discretion to exclude U.S. sales in an investigation when it finds that the sales are atypical, not part of the respondent's ordinary business practice, and would undermine the fairness of the comparison, citing *Final Determination of Sales at Less than Fair Value: Fresh Cut Roses from Columbia,* 60 FR 6980, 7004 (February 6, 1995); and *Final Determination of Sales at Less Than Fair Value: Professional Electric Cutting and Sanding/Grinding Tools from Japan,* 58 FR 30144, 30146 (May 26, 1993). Respondent adds that the reason for this discretion is that the initial cash deposit rate is intended as an estimate of future behavior, which should not be calculated on extraordinary or unusual circumstances. Finally, respondent alleges that petitioners' suggestion that the Department excluded the bankrupt sales on the basis that the sales were ''insignificant'' was incorrect.

Respondent contends that when it delivers merchandise to a customer, it expects to be paid. Furthermore, respondent adds that the Department verified that POSAM does not have an account for bad debts or unpaid sales and that POSCO officials had never before sold merchandise to the U.S. through U.S. Channel 2 to a customer that did not pay. Respondent claims that petitioners' analogy in which a customer receives a discount for high volume sales is misleading. They note that volume discounts are negotiated and voluntary terms of sale and, as such, represent a type of selling practice. They argue that it is not a selling practice of POSCO's to sell to customers that do not pay. Moreover, respondent notes that although it continues to sell to this customer, it does so on a pre-paid cash basis. *See* POSCO's October 22, 1998 submission at pg. 4. Thus, POSCO argues that under these extraordinary circumstances, the Department correctly exercised its discretion and excluded these sales from its margin analysis.

POSCO argues that the fact that it has not yet been paid for these sales does not alter their character from a sale to a bad debt. Citing several cases, they explain that in administrative reviews, the Department normally leaves unpaid sales in the database and applies a credit expense for the period the sales remain unpaid. *See Brass Sheet and Strip from Sweden, Final Results of Antidumping Administrative Review (''Brass Sheet and Strip''),* 60 FR 3617, 3621 (January 18, 1995); *Polyethylene Terephthalate Film, Sheet and Strip from Korea: Final Results of Administrative Review,* 60 FR 42835, 42839 (August 17, 1995); and *Certain Internal-Combustion, Industrial Forklift Trucks from Japan; Final Results of Antidumping Administrative Review,* 57 FR 3167, 3173 (January 28, 1992). Also, respondent maintains that POSAM is in the process of collecting on unpaid invoices through bankruptcy proceedings and expects to be paid for these sales. *See POSAM Verification Report* at pg. 9. Respondent indicates that because POSCO has not accepted that payment will not be made on these sales, the Department cannot redefine these sales as bad debt.

However, respondent continues, even if these sales could be characterized as bad debt, they could not be treated as a direct selling expense. They argue that petitioners' reliance on *Color Televisions* is inapposite as it was an administrative review and the characterization of the bad debt was never in issue. POSCO contends that it is the Department's policy to treat recognized bad debt as an indirect selling expense, rather than a direct selling expense, citing *Final Determination of Sales at Less Than Fair Value: Certain Fresh Cut Flowers from Colombia,* 52 FR 6842, 6850 (March 5, 1987); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Korea, 63 FR 40,404, 40406 (July 29, 1998);* and *Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China,* 61 FR 19026, 19041 (April 30, 1996). Also, respondent notes that in the companion investigation of SSSS from the Republic of Korea, the Department classified the transfer cost of the unpaid sales as an indirect selling expense. Although respondent disputes the Department's characterization of these sales as bad debt, respondent maintains that the Department's logic was correct. Respondent adds that the cost incurred by POSAM, the transfer price, bears no direct relationship to any other sale, and that the cost would have been incurred even if POSCO made no other U.S. sales. Likewise, respondent maintains that had the sales been paid during the period of investigation, even petitioners would not suggest that the transfer price be deducted as a direct selling expense of those sales.

In conclusion, respondent argues that the Department should continue to exclude the bankrupt sales from its margin analysis as it did in the preliminary determination to avoid distortions to the margin. However, respondent maintains that in the event the Department determines that these unpaid sales should be treated as bad debt, the law mandates that the Department treat the cost of these sales as indirect selling expenses, as the Department did in the preliminary determination in the SSSS investigation.

Department's Position: We agree with petitioners in part. First, we find that the sales to the bankrupt customer for which payment was not received should be included in the margin analysis. In its U.S. sales file, POSCO reported the bankrupt sales as U.S. sales because the material terms of sale were final, as required under the statute. 19 U.S.C. 1677a(a) (1998). However, POSCO requested that the Department exclude these sales based POSCO's stated belief that payment could still be collected, and thus that the extensive credit period associated with the outstanding payment would distort its margin. It has been the Department's recent practice to calculate the credit period for sales not paid during the POI using the last day of verification as the date of payment. *See* Comment 8. We agree with POSCO, however, that employing such a methodology in this instance would be inappropriate, albeit for different reasons. In this case, the Department verified that POSAM had reversed the sales in its books at at year-end by issuing negative invoices to the customer for the unpaid merchandise in question. *See POSAM Verification Report* at pp. 8–9 and POSAM Verification Exhibit 5. Therefore, POSCO has effectively written-off the sales, its statements that it still expects payment notwithstanding. Consequently, the expense should be treated as bad debt.

It is the Department's practice to include sales which incur bad debt in the database and treat the bad debt as a direct selling expense when the expense is incurred on sales of subject merchandise. *See Color Televisions* at 4412. As stated above, at verification, the Department found that POSAM reversed the sales in its books at year-end by issuing negative invoices to the customer for the unpaid merchandise in

question. Thus, although POSAM does not maintain separate bad debt accounts, these sales have been effectively classified as a type of bad debt. Although we disregarded the sales in the preliminary determination, we find that the sales account for such a large percentage of POSCO's U.S. sales that they cannot be dismissed as abnormalities. Moreover, the price of the sales themselves is not necessarily distortive because, at the time they were made, POSCO was not aware that the customer would declare bankruptcy. Therefore, these sales must be included in the database. However, these sales led to a bad debt expense which is directly related to sales of the subject merchandise. *See, AOC International* v. *US,* 721 F. Supp. 314 (CIT 1989) and *Daewoo Electronics* v. *US,* 712 F. Supp. 931 (CIT 1989). For calculation, *see Analysis Memorandum.*

Comment 2. Date of Sale. Petitioners argue that both the Department's regulations and precedent recognize the Department's discretion in determining the appropriate date of sale. Moreover, they maintain that the facts of the record in this case clearly compel the Department to use order confirmation date as the date of sale. Moreover, citing *Budd Co.* v. *United States,* they contend that it would be an egregious error for the Department to convert orders that were agreed to at pre-currency-crisis prices using post-crisis exchange rates.

In its analysis of the sales examined by the Department during the verification, petitioners contend that some of the sales records contain documentation that is incomplete. For example, they cite documentation that is sparse, poorly copied, and either partially translated or not translated at all. They argue that without a complete record documenting the reasons for a material change in the terms of sale, they must assume that the change was part of the initial negotiations between the parties. Moreover, they maintain that it is incumbent upon the respondents to ''prove'' that the material terms of sale changed between the order date and the invoice date. Finally, with respect to changes in quantity, they allege that POSCO knew what the quantity shipped would be well before the actual shipment date. Additionally, petitioners maintain that orders are routinely filled using multiple invoices. In other words, an order for 75 metric tons may be filled with three separate shipments of 25 metric tons each. In any event, petitioners claim that without proof of agreed-upon quantity changes, the Department should examine only changes in price between the order date and invoice date.

Petitioners claim that where POSCO has provided adequate documentation, the record is clear that material terms of sale are set on order date, and that they do not change prior to shipment and invoice. They state that in all eight of the 13 U.S. sales where POSCO purportedly provided adequate documentation, it is clear that order date is the proper date of sale, and in five of the six home market sales with allegedly adequate sales documentation, it is clear that the terms of sale are set at order date.

POSCO responds that consistent with its regulations, the Department used invoice date as date of sale for both the U.S. and home market and thoroughly verified this issue during verification. POSCO maintains that at verification the Department verified that all POSCO's sales were subject to change between order date and shipment, verified the number of instances in which the materials terms of sale change during the POI, and verified that POSCO records invoice date as the date of sale in its records. POSCO explains that the Department's regulations state that ''in identifying the date of sale of the subject merchandise or foreign like product, the Secretary normally will use the date of invoice as recorded in the exporter or producer's records kept in the ordinary course of business.'' 19 CFR 351.401(i) (1998). POSCO acknowledges that the Department may use a date other than invoice date as date of sale if it ''is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'' 19 CFR 351.401(i).

Respondent argues that the facts in this case do not warrant the Department using a date other than invoice date as the date of sale. Furthermore, respondent contends that petitioners' allegation that POSCO used the invoice date as date of sale due to the effect of exchange rates on margins is without merit. Although respondent disputes the fact that use of the invoice date requires that price and/or quantity change frequently between order date and invoice date, it maintains that there were a significant number of changes in the material terms of sale between order date and invoice date during the POI, citing POSCO's Sales Verification Exhibit 10; and *POSCO Sales Verification Report* at pg. 18. Also, with respect to petitioners' dismissal of the changes in quantity, respondent notes that it provided the Department with a breakdown of quantity changes by order, not shipment, as evidenced by the inclusion of contract number, line number, and shipment date for each transaction. POSCO argues that under these circumstances, the Department's rules and precedent support using invoice date as date of sale, citing *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate from Canada,* 64 FR 2173, 2178 (January 13, 1999). With respect to petitioners' allegation concerning the incompleteness of the sales records, POSCO responds that the verification report included no mention of these problems cited by petitioners. Furthermore, POSCO maintains that ''the Department has no statutory obligation to verify why, in every instance, price and/or quantity changed.'' *See* POSCO's Rebuttal Brief at 16. Citing *Silicon Metal from Argentina; Final Results of Antidumping Administrative Review,* 58 FR 65336, 65340 (December 14, 1993), respondent notes that the Department is ''not required to verify every figure reported in the questionnaire response. The process of verification involves spot-checking and cross-checking the information that the Department selects for emphasis in analyzing each specific response.'' POSCO concludes that based on the evidence the Department examined at verification, the Department should continue to use date of invoice as its date of sale for the final determination.

Department's Position: We agree with respondent. At verification, the Department throughly reviewed POSCO's claim that there were a significant number of changes in the material terms of sale (*e.g.,* price, quantity, physical specifications) between invoice date and order date. Moreover, we find petitioners' contention that the record supports use of order confirmation date as date of sale to be without merit.

Under the Department's regulations, we normally use date of invoice as the date of sale. 19 CFR 351.401(i). However, we may use another date, such as date of order confirmation, if that date better reflects the date on which the material terms of the sale were established. In adopting this regulation, we explained that the purpose was, whenever, possible, to establish a uniform event which could be used as the date of sale. *Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27348–49 (May 19, 1997). We further explained that we do not treat an initial agreement as establishing the material terms of sale between the buyer and seller when changes to such an agreement are common, even if, for a particular sale, the terms did not actually change. Consequently, our analysis focuses on whether changes are sufficiently

common to allow us to conclude that initial agreements should not be considered to finally establish the material terms of sale. As discussed in detail in the *Analysis Memorandum* (at pp. 1–3), a review of the sales documentation supports POSCO's contention that certain material terms of sale (*i.e.,* price and quantity) are subject to change until the invoice date. In their analysis of sales documentation, petitioners focus on the price information listed on POSCO's and POSTEEL's order sheet. However, as POSCO explained, when price and/or quantity change subsequent to the date the order sheet is originally generated, POSCO simply changes the price on the order sheet. The date, however, remains the same. *See* POSCO's response to section B and C of the Department's supplemental questionnaire at pp. 6–7, dated August 26, 1998. There is, therefore, at all times just a single order sheet with a single price, giving the impression of no change over time.

Accordingly, due to the limitations of the order sheet, POSCO developed a methodology to determine the percentage of price changes between order date and invoice date. For example, POSCO calculated the number of price changes for U.S. sales of subject merchandise by manually comparing the purchase order to the commercial invoice issued by POSTEEL/POSAM. *See Sales Verification Report* at pg. 18. Also, for home market sales, POSCO calculated price changes subsequent to the original order sheet up to the invoice date by comparing monthly shipping lists (for both plate and sheet). *See, e.g.,* Sales Verification Exhibit 10 at pp. 42–44. Finally, POSCO calculated quantity changes by comparing the quantity ordered to the amount shipped. In instances where the quantity shipped was outside of POSCO's internal tolerances (which are often greater than the industry standard of plus or minus ten percent) or outside of the industry standard, POSCO determined that the quantity ''changed'' between order date and invoice date. The Department verified the methodology employed by POSCO for calculating changes in material terms of sale and noted no discrepancies. *See Sales Verification Report* at pg. 18.

Furthermore, we note that petitioners have not commented on POSCO's methodology. Indeed, petitioners have ignored this part of the Department's verification in its analysis of the appropriate date of sale in this investigation. We find that the record evidence cited by petitioners in their analysis does not support their conclusion that date of order is the appropriate date of sale. A review of the sales documentation supports the Department's finding at verification (for the Department's analysis of the sales documentation on the record of this investigation, *see Analysis Memorandum* at pp. 1–3). Although we agree with petitioners that it is likely that POSCO knew some time before actual shipment date how much would be shipped, we note that petitioners have not proposed an alternative date to order date and invoice date. Also, we disagree with petitioners that respondent's methodology of calculating quantity changes is distortive, because (as we reviewed at verification) the ''changes'' are calculated based on a comparison of the quantity ordered to the total quantity shipped under that specific contract/line number. *See, e.g.,* Sales Verification Exhibit 6.

We also disagree with petitioners' arguments concerning the supposed incompleteness of the sales records. During the course of verification, it is normal for the Department to request additional information or documentation from a respondent. The sales verification of POSCO in this investigation was no exception. Had POSCO not provided the Department with the requested information or had the Department determined that the information provided was insufficient, this fact would have been duly noted in the verification report. In this case, the Department was satisfied as to the sufficiency of the information POSCO provided on the date of sale issue. We also note that because of the large number of documents examined during the course of verification, the Department does not necessarily take all documents viewed as verification ''exhibits''. Rather, the Department only takes copies of representative or particularly significant documents. Finally, we disagree with petitioners' assertion that the Department should have reviewed the reasons why changes in the essential terms of sale occurred. Nowhere in the Department's regulations, the statute, or Departmental practice is the cause of a change to an essential term of sale a relevant factor in determining the date of sale. Therefore, the reason for the change is immaterial to the Department's analysis; it is important that the terms of sale changed, not *why* they changed. Nevertheless, for several sales, the Department did review the cause for the material change in sale. *See, e.g.,* Sales Verification Exhibit 10 at pp. 5–6; POSAM Verification Exhibit 8; POSAM Verification Exhibit 9; and POSAM Verification Exhibit 10.

Therefore, based on the Department's findings at verification and the record evidence, the Department is satisfied that the date of invoice is the most appropriate measure of when POSCO establishes the material terms of sale. Accordingly, we have continued to use invoice date as the date of sale for the final determination.

Comment 3. Devaluation. Petitioners allege that the currency conversion methodology used by the Department in the preliminary determination does not adequately account for the sudden and dramatic drop in the value of the won during November and December 1997. Alternatively, petitioners propose that the Department calculate two, separate weighted-average price comparisons for each product under investigation; one for the first ten months of the POI, and another for the November-December period. Petitioners charge that failure to employ two comparison periods will result in the elimination of pre-existing dumping margins based solely on exchange rate changes, and not in any change in POSCO's pricing practice.

Petitioners argue that the statute and legislative history provide the Department with the authority to rely on multiple averaging periods. They maintain that section 777A (d)(1)(A) of the Act gives the Department the discretion to use varying methods for comparing prices in determining whether sales at less than fair value exist. Furthermore, they state that the SAA provides that in determining sales comparability for purposes of inclusion in a particular average, ''time is a factor which may affect the comparability of sales.'' SAA at 842–843. Finally, petitioners note that in its *Notice of Proposed Rulemaking and Requests for Public Comment,* 61 FR 7308, 7349 (February 27, 1996), the Department stated that it has the discretion to use abbreviated time periods when the NV, EP, or CEP prices included in an averaging group differ significantly over the course of the POI.

In this case, petitioners argue that when NV is converted to U.S. dollars in the first ten months of the POI, the effect of time is nominal. However, when NV is converted during the last two months of the POI, they maintain that NV is dramatically reduced. Petitioners contend that the Department has exercised its authority to rely on multiple averaging periods in prior cases, citing *Notice of Final Determination of Sales at Less Than Fair Value: Polyvinyl Alcohol from Taiwan,* 61 FR 14064, 14069 (March 29, 1996) (''*Polyvinyl Alcohol*''). In *Polyvinyl Alcohol,* the respondent entered into long-term contracts at the

end of the POI which served to drastically lower NV during the last six weeks of the POI. In the instant case, the Department found that "the change in selling practices enhanced the effect of time on price comparability" and used separate averaging periods. *See Id.*

Petitioners maintain that the case for using separate averaging periods in this investigation is even more compelling than the comparison case given that the dramatic decline in NV is solely a result of the currency conversion methodology employed by the Department, not any action undertaken by POSCO. They assert that the influence of time on the margin calculation is further exacerbated by the fact that POSCO's cost for raw materials, which are increasing as the won depreciates, are combined with pre-crisis raw material costs. They speculate that were separate costs available for the two averaging periods, all November/December NV's would be below POSCO's increasing costs, and that dumping would be found on comparisons between POSCO's U.S. prices and constructed value prices for that same period. Furthermore, they note that although POSCO is likely lowering its U.S. prices during this period, no dumping was found under the Department's current conversion methodology.

Citing *Melamine Chem. Inc.* v. *United States,* 732 F.2d 924, 929–932 (Fed. Cir. 1984), petitioners note that the Courts have recognized that dumping margins should not be "artificially" created simply due to unforseen changes in the exchange rate. Likewise, petitioners argue that dumping margins should not be "artificially" eliminated due to unforseen changes in the exchange rate. They maintain that in similar situations the Department adjusted a respondent's costs to account for extraordinary events which occurred during the period of investigation or review. As an example, petitioners cite the case of *Floral Trade Council* v. *United States* in which the Court recognized that the Department could take into account "extraordinary events" that were, among other things, "infrequent in occurrence" (16 CIT 1014, 1016–17 (1992)). They also note that the Department has made adjusts for extraordinary events in cases such as *Newspaper Presses from Japan. See Notice of Final Determination of Sales at Less Than Fair Value: Large Newspaper Presses and Components Thereof, Whether Assembled or Unassembled, from Japan,* 61 FR 38139, 38153 (July 23, 1996). Also, petitioners state that these adjustments have included altering the period of investigation to account for extraordinary events. *See, e.g., Final Determination of Sales at Less Than Fair Value: Fresh Kiwi Fruit from New Zealand,* 57 FR 13695, 13697 (April 17, 1992); *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Antidumping Investigation of Color Negative Photographic Paper and Chemical Components Thereof from the Netherlands,* 59 FR 15,181, 16,192 (April 6, 1994). Finally, petitioners argue that the Department has consistently recognized and attempted to mitigate the effects of severe currency devaluation. They explain that in *Industrial Nitrocellulose from Brazil,* the Department accounted for the hyperinflation present during the period of investigation by calculating a separate foreign market value for each price list period. *See Final Determination of Sales at Less Than Fair Value: Industrial Nitrocellulose from Brazil,* 55 FR 23120 (June 6, 1990). They also note that in *Fresh Cut Flowers from Columbia,* the Department revised its methodology to account for the "devaluation of the Colombian currency." *See Certain Fresh Cut Flowers from Colombia: Final Results and Partial Recission of Antidumping Duty Administrative Review,* 62 FR 53287, 53297 (October 14, 1997). Acknowledging that the facts in this investigation are not identical to the facts in the cases cited, petitioners state that these cases demonstrate the Department's authority, under section 777 A(d)(1)(A) of the Act, to use a variety of methods to compare prices to determine whether sales at less than fair value exist, citing 19 U.S.C. 1677f-1(d)(1)(A).

In closing, petitioners argue that were it not for the rapid and unexpected devaluation of the won, POSCO's level of dumping would have been the same during the November and December 1997. They contend that the Department not only has the authority, but also the obligation, to rely on an alternative method to calculate dumping margins to ensure a fair result. They urge the Department to use two separate averaging periods to calculate dumping margins.

POSCO rebuts petitioners' assertion that the Department incorrectly applied its exchange rate policy in this case. POSCO maintains that petitioners' suggestion of an alternative comparison period is inapposite. POSCO explains that in addition to accounting for large fluctuations in the currency, the policy on currency conversion was also designed to "ensure that all exporters, when they set their U.S. prices and whether under order or not, can know with certainty the daily exchange rate the Department will use in a dumping analysis." See Policy *Bulletin 96–1 Currency Conversions,* 61 FR 9434 (March 8, 1996). Respondent argues that the facts in this case do not warrant the use of an adjusted comparison period. In addition, POSCO contends that the use of an alternative comparison period would eliminate the certainty created under currency conversion policy and result in artificial, exchange-rate based margins. Citing the Department's regulations, respondent maintains that the Department's policy is to establish an average price for all comparable sales across the entire period of investigation. *See Antidumping Duties; Countervailing Duties,* 62 FR 27296, 27473.

POSCO notes that in certain cases it is within the Department's discretion to use shorter comparison periods when prices or costs vary significantly over the twelve-month POI. However, citing the preliminary determination in *Certain Preserved Mushrooms from Indonesia,* respondent argues that the Department does not vary the averaging period due to exchange rate fluctuations alone. *See Notice of Preliminary Determination of Sales at Less Than Fair Value Postponement of Final Determination: Certain Preserved Mushrooms from Indonesia* ("*Mushrooms*"), 63 FR 41783, 41785 (August 5, 1998). POSCO explains that the Department distinguished *Mushrooms* from *Polyvinyl Alcohol* based on the fact that in *Polyvinyl Alcohol,* "the respondent changed the way it conducted business with its principal home market customers, including its price structure, while at the same time, U.S. prices and input cost trends moved in tandem." *See Id.* at 41785. As in *Mushrooms,* POSCO claims that petitioners have provided no evidence for, nor alleged, that POSCO changed its business practice or pricing structure during the POI. Also, POSCO argues that the cases cited by petitioners in their defense are not relevant to this case. For example, in *Kiwi Fruit* and *Color Negative Photographic Paper,* the issue concerned the appropriate period of review to use. Additionally, respondent notes that *Industrial Nitrocellulose from Brazil* was a pre-URAA case and, in any event, the economy was hyper-inflationary and the exchange rate was controlled by the government. Finally, POSCO maintains that in *Flowers from Colombia* there was never an issue of averaging periods. In closing, respondent argues that the Department has already developed a clear policy to address large and precipitous declines in the value of home market currencies and should continue to apply its currency

conversion policy to the facts of this case, using daily exchange rates for the November and December 1997 period.

Department's Position: We have continued to use daily exchange rates in this case, for the reasons explained in the preliminary determination. However, we agree with petitioners that separate averaging periods should be used. Under section 777A(d)(1)(A) of the Act, the Department has wide latitude in calculating the average prices used to determine whether sales at less than fair value exist. More specifically, under 19 CFR 351.414(d)(3), the Department may use averaging periods of less than the POI when normal value, export price, or constructed export price varies significantly over the POI. In the instant case, NV (in dollars) in the last two months of the POI differs significantly from NV earlier in the POI due primarily to a significant change in the underlying dollar value of the won. In this case, the change is evidenced by the precipitous drop in the won's value that began in November 1997 and continued through the end of the POI, without a quick, significant rebound. In the span of two months, the won's value decreased by more than 40 percent in relation to the dollar. Consequently, it is appropriate to use two averaging periods to avoid the possibility of a distortion in the dumping calculation. Moreover, we disagree with respondent's claim that the use of averaging periods is dependent upon a change in a respondent's selling practices. In the final determination of certain preserved mushrooms from Indonesia, the Department stated that ''in addition to changes in selling practices, we believe that we should also consider other factors, such as prolonged large changes in exchange rates, in determining whether it is appropriate to use more than one averaging period.'' *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Indonesia,* 63 FR 72268, 72272 (December 31, 1998). Therefore, we have used two averaging periods for the final determination: January through October and November through December, 1997.

Comment 4 EP vs. CEP. Petitioners argue that Department should re-classify U.S. sales involving POSAM (i.e., U.S. Channel 2 sales) as CEP sales. They contend that it is indisputable that the activities performed by POSAM meet the criteria the Department has used for evaluating whether a U.S. subsidiary's involvement rises to the level of CEP classification for U.S. sales. Petitioners state that the Department has classified sales as CEP sales when the following criteria are met: (1) The U.S. subsidiary was the importer of record and took title to the merchandise; (2) the U.S. subsidiary financed the relevant sales transactions; (3) the U.S. subsidiary arranged and paid for further processing; and (4) the U.S. subsidiary assumed the seller's risk, citing *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea; Preliminary Results of Antidumping Duty Administrative Review,* 61 FR 51882, 51885 (October 4, 1996); and *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products from Korea; Final Results,* 62 FR 18404 (April 15, 1997) (''*Carbon Steel from Korea*''). Additionally, petitioners note that in *Extruded Rubber Thread from Malaysia,* the Department determined that the sales in question were CEP sales, despite not being entered into a U.S. affiliate's inventory, when the U.S. sales force contacted the U.S. customer, negotiated sales terms, arranged for production and shipment, and issued final invoices and collected payment. See *Extruded Rubber Thread from Malaysia: Final Results of Antidumping Duty Administrative Review,* 63 FR 12752 (March 16, 1998). Petitioners also point to several other cases where the Department re-classified respondent's U.S. sales as CEP transactions because significant selling functions were performed in the United States. *See, e.g., Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe from Germany: Preliminary Results of Antidumping Duty Administrative Review,* 62 FR 47446, 47448 (September 9, 1997); *Notice of Preliminary Determinations of Sales at Less Than Fair Value and Postponement of Final Determinations: Brake Drums and Brake Rotors from the People's Republic of China,* 61 FR 53190, 53194 (October 10, 1996); *Certain Cut-to-Length Carbon Steel Plate From Germany: Final Results of Antidumping Duty Administrative Review,* 62 FR 18390, 18392 (April 15, 1997); and *Sebacic Acid From the People's Republic of China; Final Results of Antidumping Duty Administrative Review,* 62 FR 10530, 10532 (March 7, 1997).

Furthermore, petitioners argue that based on the record evidence obtained, the Department should infer that POSAM is involved in setting U.S. prices. They claim that POSTEEL would not provide POSAM with quarterly price guides if POSAM were not meant to have at least some autonomy in day-to-day negotiations with customers, citing *POSAM Verification Report* at pg 7. Moreover, they argue that even if the Department remains unconvinced that POSAM sets prices, involvement in setting prices is not the only criterion for classifying a sale as CEP. Petitioners maintain that such activities as making contact with the U.S. customer, contacting the factory to arrange for production and shipment, and issuing the final invoice to, and collecting payment from, the customer all indicate that sales through POSAM are CEP transactions. Also, petitioners assert that the mere existence of a U.S. based subsidiary is itself a strong indicator that the activity of the sales force must be considered significant. Finally, petitioners propose that the Department adjust POSAM's indirect selling expenses for POSAM's sales to affiliates. Petitioners have provided this calculation on pages 40–41 of their case brief, dated January 26, 1999.

Respondent contends that the Department's classification of POSCO's U.S. sales through POSAM as EP sales in the preliminary determination was correct. Respondent argues that the EP classification is supported by the verified record evidence and is consistent with the Department's recent determination in *Stainless Steel Wire Rod from Korea* that U.S. sales through POSAM were properly classified as EP sales. *See* Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Korea (''*Stainless Steel Wire Rod*''), 63 Fr 40404, 40417–40418 (July 29, 1998). Respondent contends that in Stainless Steel Wire Rod, POSAM's role in sales from Changwon, a POSCO affiliate, was identical to its role in subject sales from POSTEEL. Furthermore, respondent notes that petitioners have failed to distinguish the wire rod determination from this determination.

Respondent argues that it has met the conditions of the three-prong test used by the Department in determining whether U.S. sales made by an affiliated U.S. importer prior to importation should be classified as EP or CEP sales. With respect to the first two criteria, respondent maintains that it is undisputed that POSCO's sales through POSAM were shipped directly from the manufacturer to the unaffiliated U.S. customer and that is the customary channel of distribution for U.S. sales. *Citing Preliminary Determination* at 59538. Finally, with respect to the final criterion, respondent contends that evidence on the record and verified by the Department demonstrates that POSAM's selling functions were limited to that of a processor of sales-related documentation and a communications link with POSCO's unaffiliated U.S. customer.

Respondent states that for U.S. sales through POSAM, POSTEEL determined price and terms of sale and performed all sales-related activities (with the exception of arranging for U.S. freight for certain delivered sales and extending credit for certain transactions). Citing *Groundwood Paper from Belgium,* respondent notes that the fact that an affiliated U.S. company quotes prices to U.S. customers on behalf of its affiliated exporter does not lead to CEP designation of the sale. See *Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from Belgium,* 56 FR 56359, 56362 (November 4, 1991). Respondent also argues that the Department has determined that ''identifying and maintaining contact with customer'' is not sufficient in and of itself to warrant CEP treatment of a sale. *See Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from Finland,* 56 FR 56359, 56363, 56371 (November 4, 1991); *see* also, *Stainless Steel Wire Rod* at 40417–19. Challenging petitioners' argument that the post-importation services performed by POSAM (*i.e.,* collecting payment and arranging for U.S. inland freight) are significant enough to warrant CEP treatment of the sales, respondent states that the Department has found that a branch office whose functions include ''receiving orders, preparing and executing order confirmations, invoices, packing lists, and other sales-related documentation, and receiving and processing payments from customers,'' was not so substantial to conclude that it was more than a processor of documents or communications link. *See Final Determination of Sales at Less Than Fair Value: Extruded Rubber Thread from Malaysia,* 57 FR 38465, 38469 (August 25, 1992); *see* also, *Stainless Steel Wire Rod* at 40417–19. Additionally, respondent asserts that the Department has never classified a sale as CEP based on the U.S. affiliate's status as importer of record, citing *Final Determination of Sales at Less Than Fair Value: Coated Groundwood Paper from France,* 56 FR 56384; *E.I. DuPont de Nemours & Co.* v. *United States,* 841 F. Supp. 1237, 1249–1250 (Ct. Int'l Trade 1994); *Independent Radionic Workers of America,* 19 CIT at pg. 375; and *Stainless Steel Wire Rod* at 40419. Finally, respondent disputes petitioners' contention that existence of a U.S.-based subsidiary is enough to warrant CEP treatment, and states that petitioners have greatly overstated the size and significance of POSAM.

Department's Position: We agree with petitioners that sales through POSAM are more appropriately treated as CEP transactions. Although the facts in this investigation are similar to the facts in the stainless steel wire rod determination cited by respondent, there are several significant differences on the record of the present case which lead the Department to change its decision from the preliminary determination and conclude that POSCO's U.S. sales through POSAM warrant classification as CEP sales.

The Department treats sales through an agent in the United States as CEP sales, unless the activities of the agent are merely ancillary to the sales process. Specifically, where sales are made prior to importation through a U.S. based affiliate to an unaffiliated customer in the United States, the Department examines several factors to determine whether these sales warrant classification as EP sales. These factors are: (1) Whether the merchandise was shipped directly from the manufacturer to the unaffiliated U.S. customer without being introduced into the physical inventory of the affiliated selling agent; (2) whether this sale is the customary commercial channel between the parties involved; and (3) whether the function of the U.S. selling agent is limited to that of a ''processor of sales-related documentation'' and a ''communication link'' with the unrelated U.S. buyer. Where the factors indicate that the activities of the U.S. selling agent are ancillary to the sale (*e.g.,* arranging transportation or customs clearance), we treat the transactions as EP sales. Where the U.S. selling agent is substantially involved in the sales process (*e.g.,* negotiating prices), we treat the transactions as CEP sales. *See Certain Cut-to-Length Carbon Steel Plate from Germany: Final Results of Antidumping Administrative Review,* 62 FR 18389, 18391 (April 15, 1997); *Mitsubishi Heavy Industries* v. *United States,* Slip Op. 98–82 at 6 (CIT, June 23, 1998).

We note that neither party has disputed that POSCO's U.S. sales through POSAM meet the first two criterion of the Department's standard. Therefore, the determining factor in this case is the degree of involvement by POSAM in the sales process. In the preliminary determination, the Department based its EP classification of sales through POSAM on POSCO's statement that POSTEEL determined price and terms of sale. However, in our preliminary determination, we noted that we would conduct an in-depth examination of the most appropriate classification of POSCO's U.S. sales through POSAM (*i.e.,* CEP versus EP) at verification. *See Preliminary Determination* at 59538.

Although it is clear that POSTEEL performs many selling activities for U.S. sales through POSAM, including undertaking business trips to meet with potential U.S. customers of the subject merchandise (*see* Sales Verification Exhibit 17), the record contradicts POSCO's assertion that POSAM is merely a processor of sales-related documentation. First, POSAM is the first and only point of contact for the U.S. unaffiliated customer. POSAM officials explained that because of the time zone difference and the cost of long distance, it would be expensive and inconvenient for the customer to contact POSTEEL directly. *See POSAM Verification Report* at pg. 6. While a U.S. affiliate may act as a communications link without transforming the sales into CEP, POSAM acts as more than a conduit between the unaffiliated U.S. customer and POSTEEL.

Also, as demonstrated by the unpaid sales to the bankrupt customer, POSAM incurs the ''seller's risk'' for U.S. Channel 2 sales. The record indicates that it was POSAM, not POSTEEL, who incurred the cost of the unpaid sales, as POSAM pre-pays POSTEEL. *See POSAM Verification Report* at pg. 9. Moreover, it is POSAM, not POSTEEL, who is responsible for collecting payment from the customer through bankruptcy proceedings. Bearing such financial risk is indicative of a seller, not a mere facilitator. This selling arrangement between POSAM and POSTEEL differs from the one between POSAM and Changwon, addressed in *Stainless Steel Wire Rod,* where the ''U.S. customers remit payment to POSAM, which subsequently transfers the payment to POSTEEL, which, in turn, transfers it to Changwon.'' *See Stainless Steel Wire Rod* at 40419 (emphasis added). In addition, for one of the five sales examined by the Department during the POSAM verification, we found that POSAM was given discretion in adjusting the price of the sale. *See POSAM Verification Report* at pg. 5 and POSAM Verification Exhibit 10. Thus, although POSAM is not independent from POSTEEL, we believe that the record evidence shows that it has sales negotiating authority, at least in some instances.

Therefore, because of the significant risk incurred by POSAM in addition to its other selling activities, we find that POSAM's activities are more than ancillary to the sales process and have classified POSCO's U.S. sales through POSAM as CEP transactions. We note that the Department's classification of

POSCO's U.S. sales through POSAM as CEP transactions is consistent with the Department's decision in the third review of carbon steel flat products from Korea. *See Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 63 FR 13170, 13182–83 (March 18, 1998). Additionally, we disagree with petitioners that the reported indirect selling expenses for POSAM should be adjusted. Petitioners have not stated that POSCO's calculation was incorrect or is in any way distortive. We verified POSCO's calculation of POSAM's indirect selling expense at verification and noted no discrepancies. *See POSAM Verification Report* at pp. 5–6. Thus, for CEP sales, we have deducted an amount for indirect selling expenses incurred in the United States using POSCO's reported indirect selling expense for POSAM.

Comment 5. Affiliated Party Purchases. Petitioners argue that POSCO's purchases from affiliated parties should be valued at the higher of transfer price, the affiliate's COP, or market value. Petitioners listed five specific examples where the affiliate's COP was higher than the transfer price for the particular item purchased. Petitioners cite 19 U.S.C. 1677b(f)(3) as the basis for valuing the major input at the higher COP amount. 19 U.S.C. 1677b(f)(3) states, ''If, in the case of a transaction between affiliated persons involving the production by one of such persons of a major input to the merchandise, the administering authority has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the cost of production of such input, then the administering authority may determine the value of the major input on the basis of the information available regarding such cost of production.''

POSCO argues that the price paid to the affiliated parties represents an arm's length transaction and the purchases do not qualify as major inputs. POSCO contends that prices for alloys are governed by the international market rather than by affiliation. According to POSCO, at verification the Department had the opportunity to compare the transfer price to the market price and concluded that there were minimal or no differences between the prices charged by affiliated and unaffiliated suppliers. Any differences between the price charged by the affiliate and the cost of that affiliate are connected with the world market and not with affiliation. POSCO asserts that no adjustment is necessary because, on average, it paid its affiliated suppliers a higher price than it paid to its unaffiliated suppliers. Furthermore, the impact on the cost of production would be so minor as to have virtually no effect on the final cost of production.

Department's Position: We agree with petitioners in part. In accordance with section 773(f)(3) of the Act, we have treated as major inputs materials that both were purchased from affiliated suppliers in significant quantities and represented a significant portion by value of the per-unit cost of SSPC. Accordingly, we have applied the higher of the materials' transfer price, cost of production or market value. Therefore, we have treated ferroalloys as major inputs and adjusted costs to reflect the higher of the input's cost, market price, or transfer price. In accordance with section 773(f)(2) of the Act, when the materials supplied by affiliated parties were not major inputs, we only compared transfer price to market price, when market price was available and cost was not necessary to establish market price. In this case, the relatively large percentage of purchases from unaffiliated suppliers, the relatively small percentage of the elements' value to the per-unit cost, and the relatively small difference between transfer price and market value, rendered any adjustment to cost insignificant. Moreover, our analysis (*see Cost Analysis Memorandum*) shows that on average the transfer price and market value for purchases from these affiliated and unaffiliated suppliers were comparable.

Comment 6. Credit Expense. Petitioners maintain that POSCO improperly excluded U.S. dollar denominated usance loans from its calculation of the home market interest rate. They argue that the Department should recalculate the home market interest rate. Also, petitioners state that if the Department uses the short-term interest rate provided by POSCO in determining the short-term interest rate for U.S. sales through POSTEEL, the Department should recalculate the interest rate based on the average monthly balance. Petitioners contend that POSCO's method of calculating its interest rate is only reasonable when a loan balance remains fairly constant; however, it will overstate the interest rate when the balance is declining and understate the interest rate when the balance is increasing. In their rebuttal brief, petitioners provide the calculation of POSTEEL's interest rate based on the average monthly loan balance. *See* Petitioners' Rebuttal Brief at pp. 4–6.

Respondent argues that it calculated its short-term interest rates for U.S. and home market sales in accordance with the Department's policy, citing *Import Administration Policy Bulletin 98–2* (February 23, 1998). POSCO notes that the home market interest rates submitted for POSCO (HM Channel 1) and POSTEEL (HM Channel 2) were based on the short-term, Korean won borrowings of each company during the POI. POSCO notes that U.S. market interest rates submitted for POSTEEL (U.S. Channel 1 and 3) and POSAM (U.S. Channel 2) were based on short-term, U.S. dollar denominated loans. Additionally, respondent states that at verification the Department confirmed that the short-term interest rate for U.S. sales through POSTEEL was denominated in U.S. dollars, citing *Sales Verification Report* at pg. 15.

Department's Position: We agree with respondent. The Department's stated policy on imputed credit expenses and interest rates is to ''use a short-term interest rate tied to the currency in which the sales are denominated.'' *See Policy Bulletin 92–2* at pg. 6, dated February 23, 1998, which is an attachment to the *Analysis Memorandum.* During its verification of POSCO, the Department confirmed that the interest rates calculated by POSCO were based on short-term loans denominated in the currency in which the sales were made. *See, e.g., Sales Verification Report* at pp. 14–15 and Sales Verification Exhibit 40 and 41.

Also, we disagree with petitioners' argument that POSCO's calculation of POSTEEL's U.S. interest rate is distortive (*see Analysis Memorandum*). At verification, the Department confirmed that, in its normal course of business, POSCO records the monthly ending balance of its short-term borrowings. *See, e.g.,* Sales Verification Exhibit 39 and 40. Based on this and other information that is business proprietary, we find respondent's methodology of calculating POSTEEL's interest rate to be reasonable and have accepted respondent's reported credit expense for U.S. Channel 1 and 3 sales. For a further discussion of this issue, *see Analysis Memorandum.*

Comment 7. Indirect Selling Expenses. Petitioners argue that the Department should adjust POSCO's reported home market indirect selling expenses by allocating the indirect selling expense over sales both to affiliated and unaffiliated parties. Citing the Department's verification report, petitioners note that POSCO has excluded sales to affiliated parties from the denominator of its calculation of the home market indirect selling expense ratio. *See Sales Verification Report* at pg. 15. They state that if the Department

finds that POSCO misreported its home market indirect selling expense ratio or provided an incomplete record it should recalculate POSCO's indirect selling using information on the record of this investigation.

Respondent states that it reported all domestic selling expenses incurred during the POI, and allocated those expenses over the related sales. Respondent maintains that the domestic sales divisions do not ''sell'' to affiliated customers, but on the contrary, the affiliated customers are used as an extension of POSCO's sales division. As an example, respondent notes that the large majority of sales of the subject merchandise during the POI were made to POSTEEL, and that POSCO's involvement in POSTEEL's sales is limited to receiving the order and producing the merchandise. Thus, respondent continues that the focus of the domestic sales divisions is sales to unaffiliated customers and, by extension, the expenses incurred by those divisions are on sales to unaffiliated customers. Finally, respondent maintains that their allocation methodology is reasonable.

Department's Position: We agree with petitioners. At verification, POSCO provided no material support for its claim that sales to affiliated parties (*e.g.,* POSTEEL) should be excluded from the denominator of its home market indirect selling expense calculation other than to state that it ''would not waste resources'' on sales to affiliates. *See* Sales Verification Exhibit at pg. 15. Moreover, we note that it is standard Departmental practice to allocate indirect selling expenses over all sales. For its U.S. sales, POSCO has calculated the indirect selling expense ratio consistent with this methodology. *See* Sales Verification Exhibit 41 and POSAM Verification Exhibit 6. Additionally, at least some of the selling expenses reported by POSCO as indirect (*i.e.,* payroll) are associated with sales to affiliates and non-affiliates. Therefore, we have recalculated POSCO's reported indirect selling expense for HM Channel 1 sales by including POSCO's sales to affiliates. For calculation, *see Analysis Memorandum.*

Comment 8. Unpaid U.S. Sales. Petitioners argue that POSCO should not be permitted to estimate payment dates when payment has not been made. Citing *Sales Verification Report* at pg. 2. They advocate that the Department apply an adverse inference regarding the payment date for any unpaid sales.

POSCO responds that there is no basis on which to apply adverse inferences. Respondent explains that as it indicated to the Department during verification, it used the first day of verification as the payment date for the small portion of two sales that remained outstanding as of verification. *Citing Sales Verification Report* at pg. 2 and Sales Verification Exhibit 1. POSCO argues that this approach is consistent with the Department's normal treatment of unpaid sales. *Citing Stainless Steel Wire Rod from Japan,* 63 FR 40434, 40448 (July 29, 1998).

Department's Position: We disagree with respondent and petitioners. As noted by respondent, for the two sales which remained partially unpaid, POSCO did not estimate payment dates, but rather used the date of first date of the sales verification. However, the Department's recent practice regarding this issue has been to use the last day of verification as the date of payment for all unpaid sales. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod From Italy,* 62 FR 40422, 40428 (July 29, 1998); *Extruded Rubber Thread from Malaysia; Final Results of Antidumping Duty Administrative Review (''Extruded Rubber Thread from Malaysia''*), 63 FR 12752,12757 (March 16, 1998); and *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From Taiwan,* 63 FR 8909 (February 23, 1998). Therefore, for the final determination, we are applying the last day of the U.S. sales verification (November 20, 1998) as the date of payment for the two unpaid U.S. sales. For the calculation of the credit period for these sales, *see Analysis Memorandum,* dated March 19, 1999.

Comment 9. Sales of Non-Prime Merchandise. Respondent argues that the Department should distinguish between prime and non-prime merchandise for purposes of the cost test and margin analysis in the final determination. Respondent maintains that it is the Department's policy to differentiate between prime and non-prime merchandise in its analysis. Citing *Memorandum from Roland L. MacDonald to Joseph A. Spetrini,* dated April 19, 1995 (''*Carbon Steel Memorandum*'') and *Certain Cold-Rolled Carbon Steel Flat Products from the Netherlands* (''*Carbon Steel from the Netherlands*)'', 61 FR 48465, 48466 (September 13, 1996). A copy of the *Carbon Steel Memorandum* is an attachment to a *Memorandum to the File from Carrie Blozy,* dated March 19, 1999.

Petitioners support the Department's decision to ''collapse'' sales of prime and non-prime merchandise for purposes of the cost test. They note that in *Carbon Steel from the Netherlands*, the Department stated that it continues to follow *IPSCO* and that prime and secondary merchandise incur identical costs. See Id. at 48461–67. Moreover, in *Extruded Rubber Thread from Malaysia*, petitioners note that the Department stated that it is not its practice to distinguish prime and non-prime merchandise for the cost test. *See Extruded Rubber Thread from Malaysia at 12757.*

Department's Position: We agree with respondent. As noted in the *Carbon Steel Memorandum*, ''separating prime and seconds for the cost test has the benefit of facilitating an untainted analysis of the majority of sales (prime merchandise).'' *See Carbon Steel Memorandum* at pg. 4. Consistent with *Carbon Steel from the Netherlands* and *IPSCO*, in this case, POSCO has reported the same cost of production for sales of prime and non-prime merchandise. *See* Cost of Production Sales Listing which is attached to POSCO's December 17, 1999 submission. However, we do not regard prime and non-prime merchandise as identical. Finally, we note that the *Extruded Rubber Thread from Malaysia* case cited by petitioners has been taken out of the context in which it was made. The language quoted by petitioners merely states that the Department, consistent with the IPSCO case, calculated the same costs for prime and non-prime merchandise. However, while using the same costs, consistent with the *Carbon Steel Memorandum*, in *Extruded Rubber Thread from Malaysia*, the Department ran separate cost tests for prime and non-prime merchandise in order to avoid distortions. Thus, for the final determination, we have used POSCO's reported control numbers (which differentiate between prime and non-prime merchandise) in our margin analysis.

Comment 10. Local Letter of Credit Sales. POSCO argues that the Department should include local letter of credit sales (''local sales'') in its calculation of normal value. Also, respondent maintains that its calculation of normal value should be based on the U.S. dollar price at which the local sales were invoiced. Respondent states that local customers pay POSCO in Korean won based on the U.S. dollar invoiced price. Moreover, respondent notes that it reported the U.S. dollar price for local sales consistent with the Department's requirements and practice. Respondent explains that in *Fresh Cut Roses from Colombia*, the respondent also invoiced home market sales in U.S. dollars but like POSCO, received payment from the

customer in the home market currency, pesos in that case. *See Final Determination of Sales at Less Than Fair Value: Fresh Cut Roses from Colombia* (''*Fresh Cut Roses from Colombia*''), 60 FR 6980, 7006 (February 6, 1995). POSCO states that in this case, the Department accepted the U.S. prices for the calculation of normal value. *See Id.* Respondent contends that not using the U.S. dollar value in its calculation of normal value in this investigation could have a potentially significant distortive effect on the margin.

Although petitioners' support the inclusion of local sales in the analysis, they object to POSCO's request to use nominal dollar prices for home market customers. Instead, they recommend that the Department use the won price that the customers actually pay. They argue that it would be bad policy to use nominal prices in the margin analysis. Further, they continue that even if the Department were to find that in some instances use of the nominal price is warranted, the facts in this case do not support such a methodology. Petitioners allege that the *Fresh Cut Roses from Colombia* case cited by POSCO differs from this case in several important aspects. Specifically, in *Fresh Cut Roses from Colombia:* (a) The effect of inflation in Colombia was being taken into account in the Department's cost of production analysis and costs were being converted to dollars; (b) the Department stated that it had verified that the payments in pesos had reflected the prevailing dollar/peso exchange rates at the time of payment; and (c) all home market sales were invoiced in dollars and paid in pesos. *See Fresh Cut Roses from Colombia* at 6980. In contrast, they note that in this case the Department has not accounted for the effects of inflation on POSCO's costs and prices. Also, they state that the Department did not verify whether the exchange rates used were proper. Finally, they note that in this case, home market sales were also quoted in won. Therefore, because the Department has not accounted for inflation and did not verify the dollar won exchange rates used, petitioners argue that POSCO's dollar prices are meaningless because POSCO's customers pay in won.

Department's Position: We agree with both parties that local sales should be included in the margin analysis. At verification, the Department found that local sales were made to end-users and, as such, must be properly considered as home market sales. Accordingly, these sales should be accounted for in our margin analysis. However, we disagree with respondent that the Department should use the U.S. dollar invoiced price for the purposes of calculating normal value. Based upon the facts of the record, as discussed below, we find that it is more appropriate to use the won price in which the customer pays.

For HM sale number 1, POSCO provided an internal document which shows the exchange rates used by POSCO to convert U.S. dollar prices into Korean Won prices for the month of November 1997. *See* Sales Verification Exhibit 6. The record indicates that although customers are invoiced in U.S. dollars (for HM Channel 2 sales the shipping invoice also shows the won price), the customer pays in won, not U.S. dollars, and the sales value of the merchandise is charged to the sales ledger in won, based on the aforementioned exchange rate. See Id. Moreover, a comparison of the internal exchange rate used by POSCO to the market exchange rate used by the Department shows that the two exchange rates are quite dissimilar (*see Analysis Memorandum*). We note that this is in contrast to *Fresh Cut Roses from Colombia* in which the Department verified that the payment in pesos reflected the market exchange rate at the time of payment. See *Fresh Cut Roses from Colombia* at 6980. Therefore, for the final determination, we have used the won price for home market local sales.

Comment 11. Date of Sale—U.S. Channel 2. Petitioners allege that POSCO improperly reported POSTEEL's invoice to POSAM as the date of sale for U.S. Channel 2 sales. They maintain that the use of the date of POSTEEL's invoice to POSAM is incorrect because the price is a transfer price on an intra-company transaction. Conversely, they argue that it is the date on POSAM's invoice to its customer that controls whether a transaction was invoiced during the POI. Finally, they contend that to the extent that any U.S. sales were not reported based on POSCO's reporting of date of sale for U.S. Channel 2 sales, the Department should apply adverse facts available to the unreported quantity.

POSCO maintains that it properly used the date of POSTEEL's invoice to POSAM as the date of sale for U.S. Channel 2 sales because the material terms of sale were finalized upon shipment to the customer. Furthermore, respondent argues that it is the Department's well-established practice that the date of sale must precede or be equal to the date of shipment, citing *Certain Cold-Rolled and Corrosion Resistant Carbon Flat Products from Korea*, 63 FR 13170, 13172–3. POSCO notes that the date of shipment to the unaffiliated customer is the date that the merchandise left the Korean port of exportation for delivery to the unaffiliated U.S. customer. Moreover, respondent alleges that petitioners have ignored the statutory definition of export price and the Department' definition of date of sale.

Department's Position: We agree with petitioners. As noted in Comment 4, the Department has classified POSCO's U.S. sales through POSAM as CEP sales. Therefore, for U.S. Channel 2 sales we have used the date of POSAM's invoice to the unaffiliated customer as the date of sale.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of subject merchandise from the Republic of Korea, that are entered, or withdrawn from warehouse, for consumption on or after November 4, 1998 (the date of publication of the preliminary determination in the **Federal Register**). The Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below. These suspension of liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
Pohang Iron & Steel Co., Ltd. ..	16.26
All others	16.26

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7533 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–122–830]

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Canada

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Helen Kramer or Linda Ludwig, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone: (202) 482–0405 or (202) 482–3833, respectively.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions 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 (''Department'') regulations are to the regulations at 19 CFR part 351 (1998).

Final Determination

We determine that Stainless Steel Plate in Coils (''SSPC'') from Canada is being sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Act. The estimated margins are shown in the Suspension of Liquidation section of this notice.

Case History

The preliminary determination in this investigation was published on November 4, 1998. *See* Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Canada, 63 FR 59527 (November 4, 1998) (''Preliminary Determination''). On November 5, 1998, Atlas Stainless Steels (''Atlas'') requested a postponement of the final determination to 135 days after publication of the preliminary determination and an extension of the provisional measures to no more than six months, pursuant to 19 CFR 351.210(b)(2)(ii) and 351.210(e)(2). Because our preliminary determination was affirmative, and Atlas is a producer/exporter that accounts for a significant proportion of exports from Canada of the subject merchandise, the Department postponed the final determination until March 19, 1999. Notice of postponement was published in the **Federal Register** on December 18, 1998. *See* Postponement of Final Antidumping Determinations: Stainless Steel Plate in Coils from Canada, Italy, Republic of Korea, South Africa and Taiwan, 63 FR 70101.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are 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 January 1 through December 31, 1997.

Facts Available

In the Preliminary Determination, the Department based the margin on facts otherwise available under section 776(a)(2) of the Act because Atlas refused to respond to the Department's cost questionnaire. The Department also used an adverse inference under section 776(b) of the Act and used the highest rate alleged in the petition because Atlas did not cooperate to the best of its ability. Since then, no interested parties have provided comments on the Preliminary Determination and no request for a hearing has been received by the Department. Therefore, we are continuing to use as adverse facts available the highest rate alleged by petitioners.

The All Others Rate

The foreign manufacturer/exporter in this investigation is being assigned a dumping margin on the basis of adverse facts available. Section 735(c)(5) of the Act provides that, where the dumping margins established for all exporters and producers individually investigated are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated All Others rate for exporters and producers not individually investigated. Therefore, consistent with the Statement of Administrative Action (''SAA'') at 873, we are using an alternative method to establish the estimated All Others rate. In the Preliminary Determination, as an alternative, we based the All Others rate on a simple average of the margins in the petition. We received no comments on this issue, and therefore continue to use this basis for the final determination. As a result, the All Others rate is 11.10 percent.

Continuation of Suspension of Liquidation

In accordance with section 733(d)(1) and 735(c)(4)(B) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of SSPC from Canada, that are entered, or withdrawn from warehouse, for consumption on or after November 4, 1998 (the date of publication of the preliminary determination in the **Federal Register**). We will instruct the Customs Service to require a cash deposit equal to the percentage margins, as indicated below. These suspension-of-liquidation instructions will remain in effect until further notice. The dumping margins are as follows:

Exporter/manufacturer	Margin percentage
Atlas Stainless Steel (Sammi Atlas)	15.35
All Others	11.10

The All Others rate, which we derived from the average of the margins calculated in the petition, applies to all entries of subject merchandise other than those exported by the named respondent.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 733(d) and 777(i)(1) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7534 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–475–822]

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Italy

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Lesley Stagliano 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) 482–0190 or (202) 482–3818, respectively.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions 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 (''Department'') regulations are to the regulations at 19 CFR part 351 (1998).

Final Determination

We determine that Stainless Steel Plate in Coils (''SSPC'') from Italy is being sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Act. The estimated margins are shown in the Suspension of Liquidation section of this notice.

Case History

The preliminary determination in this investigation was published on November 4, 1998 (see Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Italy, 63 FR 59530 (November 4, 1998) (''Preliminary Determination'')). On November 16, 1998, Acciai Speciali Terni SpA (''AST'') requested a postponement of the final determination to 135 days after publication of the Preliminary Determination and an extension of the provisional measures to no more than six months, pursuant to section 735(a)(2)(A) of the Act and 19 CFR 351.210(b)(2)(ii) and 351.210(e)(2). Because our Preliminary Determination was affirmative, and AST is a producer/exporter that accounts for a significant proportion of exports from Italy of the subject merchandise, the Department postponed the final determination until March 19, 1999. Notice of postponement was published in the **Federal Register** on December 18, 1998. See Postponement of Final Antidumping Determinations: Stainless Steel Plate in Coils from Canada, Italy, Republic of Korea, South Africa and Taiwan, 63 FR 70101. No interested parties have provided comments on the Preliminary Determination and no request for a hearing has been received by the Department.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are 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 January 1 through December 31, 1997.

Facts Available

Section 776(a)(2) of the Act provides that if an interested party or any other person (A) withholds information that has been requested by the administering authority; (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782 of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified as provided in section 782(i) of the Act, the administering authority shall, subject to section 782(d) of the Act, use the facts otherwise available in reaching the applicable determination. As discussed above, AST failed to respond to the Department's questionnaire. Accordingly, as in the Preliminary Determination, we have determined,

under section 776(a)(2)(A) of the Act, that we must base our determination for that company on the facts available.

Section 776(b) of the Act further provides that adverse inferences may be used for a party that has failed to cooperate by not acting to the best of its ability to comply with a request for information (*see* also the Statement of Administrative Action (''SAA''), accompanying the URAA, H. Doc. No. 316, 103rd Cong., 2d Sess. 870). Given its refusal to comply with the Department's request for information, AST has failed to cooperate to the best of its ability in this investigation. Therefore, the Department has determined that an adverse inference is warranted with respect to AST. As in the Preliminary Determination, the Department selected a margin of 45.09 percent, which was based on the highest margin alleged in the petition for any Italian producer. As discussed in the Preliminary Determination, the Department has, to the extent practicable, corroborated the information used as adverse facts available. Furthermore, no record evidence or argument has been submitted that would cause the Department to call into question the accuracy of the data in the petition. Therefore, we determine that the use of this margin as facts available for AST is appropriate.

For further discussion regarding the Department's use, and selection, of facts available for AST in this investigation, *see* Preliminary Determination, 63 FR at 59531–32.

The All Others Rate

The foreign manufacturer/exporter in this investigation is being assigned a dumping margin entirely on the basis of facts otherwise available. Section 735(c)(5)(B) of the Act provides that, where the dumping margins established for all exporters and producers individually investigated are determined entirely under section 776 of the Act, the Department may use any reasonable method to establish the estimated All Others rate for exporters and producers not individually investigated, including weight averaging zero and de minimis rates with the margins based on facts available. In this case, the margin assigned to the only company investigated is based on adverse facts available. Therefore, as stated in the Preliminary Determination, and consistent with the SAA at 873, we are using an alternative method. As our alternative, we are basing the All Others rate on a simple average of the margins in the petition, based both on price-to-price comparisons and constructed value. As a result, the All Others rate is 39.69 percent.

Continuation of Suspension of Liquidation

In accordance with section 733(d)(1) and 735(c)(4)(A) of the Act, we are directing the U.S. Customs Service (''Customs'') to continue to suspend liquidation of all entries of SSPC from Italy, that are entered, or withdrawn from warehouse, for consumption on or after November 4, 1998 (the date of publication of the Preliminary Determination in the **Federal Register**). We will instruct Customs to require a cash deposit or the posting of a bond equal to the percentage margins, as indicated in the chart below. These suspension-of-liquidation instructions will remain in effect until further notice. The dumping margins are as follows:

Exporter/manufacturer	Margin percentage
Acciai Speciali Terni SpA (AST)	45.09%
All Others	39.69%

The All Others rate, which we derived from the average of the margins calculated in the petition, applies to all entries of subject merchandise other than those exported by the named respondent.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury, does not exist the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7535 Filed 3–30–99; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–791–805]

Notice of Final Determination of Sales at Less Than Fair Value; Stainless Steel Plate in Coils From South Africa

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice of Final Determination of Sales at Less Than Fair Value.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Robert James at (202) 482–5222 or John Kugelman at (202) 482–0649, Antidumping and Countervailing Duty Enforcement Group III, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230.

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (the Tariff Act), are to the provisions effective January 1, 1995, the effective date of the amendments made to the Tariff Act by the Uruguay Round Agreements Act (URAA). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR part 351 (April 1, 1998).

Final Determination

We determine that stainless steel plate in coil (stainless coil) from South Africa is being, or is likely to be, sold in the United States at less than fair value (LTFV), as provided in section 735 of the Tariff Act. The estimated margins of sales at LTFV are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

We published in the **Federal Register** the preliminary determination in this investigation on November 4, 1998. See Notice of Preliminary Determination of Sales at Less Than Fair Value; Stainless Steel Plate in Coils From South Africa, 63 FR 59540 (Preliminary Determination). Since the publication of the Preliminary Determination the following events have occurred:

On November 5, 1998, the sole respondent in this investigation, Columbus Stainless (Columbus), requested postponement of the final determination, agreeing to the extension of preliminary measures, as required under section 735(a)(2) of the Tariff Act. Accordingly, we postponed the final

determination in this investigation on December 11, 1998. See Postponement of Final Antidumping Determinations: Stainless Steel Plate in Coils From Canada, Italy, Republic of Korea, South Africa and Taiwan, 63 FR 70101 (December 18, 1998).

The Department verified Columbus's section D (Cost of Production) questionnaire response between November 9 and 13, 1998 at Columbus's headquarters in Middelburg, South Africa; we then verified sections A (General Information), B (Home Market Sales) and C (U.S. Sales) of Columbus's responses on November 16 through 20, 1998. See Memorandum to Neal Halper, Acting Director, Office of Accounting; ''Verification Report on the Cost of Production and Constructed Value Data Submitted by Columbus Stainless,'' January 15, 1999 (Cost Verification Report) and Memorandum For the File; ''Verification of Columbus Stainless,'' January 14, 1999 (Sales Verification Report). Public versions of these, and all other Departmental memoranda referred to herein, are on file in room B–099 of the main Commerce building.

On December 4, 1998, Armco, Inc., J&L Specialty Steel, Inc., Lukens, Inc., North American Stainless, the United Steelworkers of America, AFL–CIO/CLC, Butler Armco Independent Union and Zanesville Armco Independent Organization, Inc. (petitioners) requested a public hearing in this case. However, on December 18, 1998, petitioners withdrew their request for a hearing and, as Columbus had not requested a hearing, none was held. On January 25, 1999, petitioners and Columbus filed case briefs in this matter; we received rebuttal briefs from petitioners and Columbus on February 1, 1999.

Scope of the Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are 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 January 1, 1997 through December 31, 1997.

Fair Value Comparisons

To determine whether sales of stainless coil from South Africa to the United States were made at less than fair value, we compared export price (EP) to the normal value (NV), as described in the ''Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Tariff Act, we calculated weighted-average EPs for comparison to weighted-average NVs or constructed values (CVs).

Transactions Investigated

For its home market and U.S. sales Columbus reported the date of invoice as the date of sale, in keeping with the Department's stated preference for using the invoice date as the date of sale. As explained in response to *Comment 2,* below, for this final determination we have continued to rely upon Columbus's invoice dates in the home and U.S. markets as the date of sale. However, should this investigation result in an antidumping duty order, we intend to scrutinize further this issue in any subsequent segment of this proceeding involving Columbus.

Product Comparisons

In accordance with section 771(16) of the Tariff Act, we considered all products produced by the respondent covered by the description in the ''Scope of the Investigation'' section, above, and sold in the home market during the POI, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics and reporting instructions listed in Appendix V of the Department's May 27, 1998 antidumping questionnaire.

Level of Trade

In our preliminary determination we agreed with Columbus that one level of trade (LOT) existed for Columbus in the home market. Furthermore, we agreed with Columbus that its EP sales in the United States were at a single LOT, and that sales in both markets were at the same LOT. No party to this investigation commented on this issue and the Department has no new evidence to alter its conclusion. Therefore, as in the preliminary determination, we find that sales within or between the markets were made at the same LOT and, therefore, a LOT adjustment pursuant to section 773(a)(7)(A) of the Tariff Act is not appropriate.

Export Price

We calculated the price of United States sales based on EP, in accordance with section 772(a) of the Tariff Act, because the subject merchandise was sold to the first unaffiliated purchasers in the United States prior to the date of importation and because record evidence did not support basing price on constructed export price (CEP). We calculated EP using the same methodology employed in the preliminary determination with the following exceptions:

Based on information discovered at verification we made deductions from EP for unreported credit memos issued on certain U.S. sales of subject merchandise; we have disregarded any such credit memos issued for home market sales. *See Comment 3,* below.

We also recalculated Columbus's inventory carrying costs (ICC) based upon revisions to Columbus's reported cost of manufacture (COM) arising from verification. See Memorandum to Neal Halper, ''Cost of production ('COP') and constructed value ('CV') Calculation Memorandum for Final Determination,'' March 19, 1999 (Cost Calculation Memorandum (Final)).

Normal Value

Home Market Viability

As discussed in the *Preliminary Determination,* in order to determine

whether the home market was viable for purposes of calculating NV (*i.e.,* the aggregate volume of home market sales of the foreign like product was equal to or greater than five percent of the aggregate volume of U.S. sales), we compared the respondent's volume of home market sales of the foreign like product to the volume of U.S. sales of the subject merchandise, in accordance with section 773(a)(1)(C) of the Tariff Act. As Columbus's aggregate volume of home market sales of the foreign like product was greater than five percent of its aggregate volume of U.S. sales of the subject merchandise, we determined that the home market was viable. Therefore, we based NV on home market sales in the usual commercial quantities and in the ordinary course of trade.

Cost of Production Analysis

In response to a timely allegation by petitioners we conducted an investigation to determine whether Columbus made sales of the foreign like product during the POI at prices below its COP. In accordance with section 773(b)(3) of the Tariff Act we calculated the weighted-average COP based on the sum of Columbus's cost of materials, fabrication, general expenses, and packing costs. We relied on Columbus's submitted COP except in the following specific instances where the submitted costs were not appropriately quantified or valued:

We added depreciation expense to the reported COP and CV based on the ratio of depreciation expense to Columbus's variable overhead expenses. Likewise, we added certain additional depreciation expense to the reported COP and CV based on the ratio of this depreciation expense to variable overhead expenses. *See Comments 13* and *14,* below.

We increased the cost of Columbus's affiliated-party purchases of the raw material input ferrochrome. *See Comment 15.*

We increased Columbus's COP by adding the variances Columbus excluded from its reported costs. *See Comment 16.*

We reallocated variable overhead expenses based on differences in the cost of producing the subject merchandise arising from the differences in physical characteristics of specific plate products. *See Comment 17.*

We calculated a single COP for each product sold (*i.e.,* each CONNUM), weighted by quantity produced during the POI, rather than quantities sold, as originally reported by Columbus. *See Comment 18.*

Finally, we excluded certain selling expenses from the submitted general and administrative (G&A) expense ratio.

We compared the weighted-average COP for Columbus to home market sales prices of the foreign like product, as required under section 773(b) of the Tariff Act. In determining whether to disregard home market sales made at prices less than the COP we examined whether such sales were made (i) in substantial quantities within an extended period of time and (ii) at prices which permitted the recovery of all costs within a reasonable period of time. On a product-specific basis, we compared COP to home market prices, less any applicable movement charges, early payment and other discounts, and direct and indirect selling expenses.

Pursuant to section 773(b)(2)(C)(i) of the Tariff Act, where less than twenty percent of a respondent's sales of a given product were at prices less than the COP, we do not disregard any below-cost sales of that product because we determine that the below-cost sales were not made in ''substantial quantities.'' Where twenty percent or more of a respondent's sales of a given product during the POI were at prices less than the COP, we determine such sales to have been made in substantial quantities, in accordance with section 773(b)(2)(C)(i) of the Tariff Act. In addition, we determine that such below-cost sales were made within an extended period of time, in accordance with section 773(b)(2)(B) of the Tariff Act. In such cases, pursuant to section 773(b)(2)(D) of the Tariff Act, we also determine that such sales were not made at prices which would permit recovery of all costs within a reasonable period of time. Therefore, we disregard the below-cost sales. Where all sales of a specific product were at prices below the COP we disregard all sales of that product.

Our cost test for Columbus revealed that for certain products less than twenty percent of Columbus's home market sales were at prices below Columbus's COP. We retained all sales of those products in our analysis. For other products more than twenty percent of Columbus's sales were at prices below COP. In such cases we disregarded the below-cost sales, while retaining the above-cost sales for our analysis. See Memorandum For the File, ''Antidumping Duty Investigation on Stainless Steel Plate in Coils from the Republic of South Africa—Final Determination Analysis for Columbus Stainless,'' March 19, 1999 (Final Determination Analysis Memorandum).

Price-to-Price Comparisons

For those products with home market prices at or above the COP, we based NV on Columbus's sales to unaffiliated home market customers. We made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Tariff Act. We continued to make circumstance-of-sale (COS) adjustments in accordance with section 773(a)(6)(c)(iii) of the Tariff Act, with the following exceptions.

As Columbus had no short-term rand-denominated borrowings, we recalculated home market credit expenses (and ICC) using publicly-available interest rates released by the South African Reserve Bank, as confirmed in the International Monetary Fund's International Financial Statistics series. *See Comment 5.*

We have reclassified certain home market advertising expenses as indirect selling expenses and, with the exception of direct advertising expenses incurred on sales of 3CR12 steel, are not deducting Columbus's advertising expenses from NV as a COS adjustment. *See Comment 7.*

Finally, we removed computer programming language calculating a ''commission offset'' to NV for commissions on U.S. sales based upon the conclusions outlined in response to *Comment 4.*

Price-to-CV Comparisons

In accordance with section 773(a)(4) of the Tariff Act, we based NV on CV if we were unable to find a home market match of identical or similar merchandise. We calculated CV based on the costs of materials and fabrication employed in producing the subject merchandise, SG&A, and profit. See section 773(e)(1). In accordance with section 773(e)(2)(A) of the Tariff Act, we based SG&A expense and profit on the amounts incurred and realized by the respondent in connection with the production and sale of the foreign like product in the ordinary course of trade for consumption in South Africa. We calculated the cost of materials, fabrication, and general expenses based upon the methodology described in the *''Cost of Production Analysis''* section, above. For selling expenses, we used the weighted-average home market selling expenses. Where appropriate, we made adjustments to CV in accordance with section 773(a)(8) of the Tariff Act. For comparisons to EP, we made COS adjustments by deducting home market direct selling expenses from NV and adding U.S. direct selling expenses.

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 773A(a) of the Tariff Act.

Analysis of Interested Party Comments

Issues Relating to Sales

Comment 1: Use of Facts Available. Petitioners press for the use of partial adverse facts available in calculating Columbus's antidumping margin for this final determination, insisting that Columbus ''failed to provide material information requested by the Department,'' and that much of the information Columbus did provide could not be verified. According to petitioners, these failures taint a broad range of both the sales and cost data submitted by Columbus during the course of this investigation. As examples petitioners charge Columbus with, *inter alia:*

- Failing to report properly home market and U.S. post-sale price adjustments;
- Failing to provide a verifiable short-term interest rate for rand-denominated loans for calculating home market credit and ICC and, further, failing to inform the Department of the nature of its actual borrowing during the POI;
- Improperly omitting certain expenses in its reported COP and CV data [1];
- For one raw material input, ferrochrome, reporting prices paid to an affiliated party which do not reflect arm's-length prices, and refusing to provide either the affiliate's COP for ferrochrome or its prices to unaffiliated customers for comparison purposes;
- Failing to account for the different work stations and processing times required in the production of each specific stainless steel plate product;
- Calculating weighted-average COP and CV data on the basis of sales quantity rather than production quantity, as required by the Department; and
- Failing to reconcile reported COP and CV to Columbus's audited financial statements.

See Petitioners' Case Brief, January 25, 1999, at 2 and 3.

Considered together, petitioners aver, these deficiencies necessitate the use of adverse facts available for all missing or unverifiable data. Further militating for the use of facts available, petitioners continue, is that each of these deficiencies was only disclosed during the Department's sales and cost verifications, in spite of numerous opportunities afforded Columbus by the Department to submit correct data in the form required. *Id.* at 4.

According to petitioners, ''Columbus's behavior in this investigation cannot be characterized as a good faith effort to comply with the Department's investigation.'' Petitioners' Case Brief at 5. For example, petitioners contend that despite the Department's initial and supplemental requests for information on post-sale price adjustments in the home and U.S. markets, Columbus submitted no such data; however, petitioners note, at verification Columbus ''was able to provide . . . 'a complete listing of all credit and debit notes issued during calendar 1997.' '' *Id.* at 5, quoting the Department's Sales Verification Report at 35. Similarly, petitioners insist, the Department repeatedly requested that Columbus submit its average COP and CV data weighted on the basis of production quantities, as required by the Department. Instead, petitioners charge, Columbus used sales quantity as the weighting factor, withholding the production quantity until Columbus provided it in the course of the Department's cost verification (*i.e.,* over a month after the Department's preliminary determination). Petitioners charge Columbus with repeatedly failing to supply requested information in a timely manner, only to produce the information ''with no apparent difficulty'' once the Department uncovered the omissions during the sales and cost verifications. *Id.* at 6.

In light of what petitioners characterize as incomplete, untimely, and unverifiable sales and cost information, petitioners urge the Department to find that Columbus ''failed to satisfy the requirements of section 782(e) of the (Tariff) Act.'' [2] *Id.* Following the statutory language, petitioners detail these alleged failings: first, according to petitioners, Columbus untimely submitted its COM. Second, petitioners charge Columbus with failing to provide cost data which could be reconciled with Columbus's audited financial statements. Third, petitioners allege, Columbus's responses are so incomplete they cannot reliably serve as a basis for reaching the final determination in this investigation. Fourth, petitioners suggest that the sales and cost verifications proved that Columbus failed to act to the best of its ability in responding to the Department's requests for information. Finally, petitioners aver, the Department cannot use the data as submitted by Columbus without undue difficulty, arguing, for example, that it would be ''unduly burdensome'' for the Department to search out appropriate arm's-length short-term interest rates as surrogates for the rates reported by Columbus. Petitioners' Case Brief at 6 and 7.

According to petitioners, the numerous material discrepancies in Columbus's questionnaire responses require the Department to make the adverse inferences called for in section 776(b) of the Tariff Act. Petitioners view these deficiencies, affecting such ''core'' issues as the cost test, calculation of CV, differences-in-merchandise (difmer) adjustments, and other sales adjustments, as clear demonstration that Columbus failed to act to the best of its ability by cooperating with the Department's requests for information. Citing the Statement of Administrative Action (SAA) accompanying the URAA, petitioners note that the Department ''may employ adverse inferences about missing information to ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' Petitioners' Case Brief at 8, quoting the SAA, as reprinted in H.R. Doc. No. 103–316 (1994). Therefore, petitioners conclude, the Department must apply adverse facts available ''to situations where Columbus was unable to provide any evidence in support of its response.'' *Id.*

Columbus objects to these characterizations of its behavior in this proceeding, accusing petitioners of ''occasional lapses of reason.'' Columbus's Rebuttal Brief at 1. Petitioners' sole end, Columbus maintains, is to persuade the Department to disregard verified information and to ''punish'' Columbus through the use of ''unreasonable adverse inferences.'' Columbus rejects petitioners' efforts to ''paint Columbus in the blackest of colors, making wild claims of 'non-cooperation' that have absolutely no basis in fact.'' This proceeding, Columbus suggests, is an investigation, not ''a math test, for which the student is taken to task for every mistake.'' *Id.*

Columbus denies each of petitioners' contentions that it acted in bad faith, submitted untimely or incomplete information, or failed to cooperate by acting to the best of its ability in this proceeding. Petitioners' charges, Columbus maintains, ''are either

[1] The precise nature of these expenses necessitates reference to business proprietary information. For a full discussion of these issues, see the Cost Verification Report.

[2] Briefly, section 782(e) of the Tariff Act provides that the Department ''shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by (the Department) '' if the information is timely, can be verified, is not so incomplete that it cannot be used, and if the interested party acted to the best of its ability in providing the information, and the Department can use the information without undue difficulties.

demonstrably false or are so distorted as to be unreconcilable with the facts.'' Columbus's Rebuttal Brief at 2.

Each claim of verification ''failures'' posited by petitioners, Columbus insists, is either untrue or represents an ''inadvertent omission.'' *Id.* at 3. However unfortunate, Columbus submits, Columbus corrected these omissions immediately upon discovery. In Columbus's view there is no justification for disregarding Columbus's submitted and verified information in favor of facts available. In fact, Columbus maintains, petitioners attempt to use Columbus's responsiveness in identifying and correcting problems at verification as evidence that Columbus was uncooperative. Such a view, Columbus argues, ''perversely twists'' Columbus's cooperation, especially when considering that Columbus was undergoing a simultaneous countervailing duty investigation before the Department and a separate antidumping proceeding brought by the European Union. *Id.* at 4.

Columbus maintains that under the terms of sections 776 and 782 of the Tariff Act the Department must clear several statutory hurdles prior to resorting to facts available. Section 776(a), Columbus notes, limits the use of facts available to those situations where (i) necessary information is not on the record, (ii) an interested party withheld or refused to provide requested information, (iii) an interested party significantly impeded the proceeding, or (iv) the submitted information cannot be verified. Further, section 776(b) allows the use of adverse inferences only where ''an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information.'' Columbus's Rebuttal Brief at 5 and 6. Finally, Columbus argues, even in cases where a respondent's submitted information fails to meet all of the Department's requirements section 782(e) of the Tariff Act provides that the Department will ''not decline'' to use that information if:

(1) The information is submitted by the deadline established for its submission,

(2) The information can be verified,

(3) The information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,

(4) The interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and,

(5) The information can be used without undue difficulties.

Columbus's Rebuttal Brief at 6, quoting section 782(e) of the Tariff Act.

The use of adverse facts available in the instant case, Columbus avers, would meet none of these statutory requirements. According to Columbus, the record demonstrates that all necessary information was on the record, that Columbus responded in a timely manner by providing requested information, that Columbus did not impede the investigation, and that the Department was able to verify the submitted information. Any use of facts available, let alone adverse facts available, Columbus argues, would be ''illegal.'' *Id.*

Columbus contends that the ''punitive'' use of facts available has been rejected by the courts. *Id.* at 7, citing *Magnesium Corporation of America* v. *United States,* 938 F. Supp. 835, 903 (CIT 1996), and *Taiwan International Standard Electronics, Ltd.* v. *United States,* 899 F.2d 1185, 1190 (Fed. Cir. 1990). Further, Columbus maintains, the use of adverse inferences is especially unwarranted here, as Columbus ''*never* refused to cooperate.'' *Id.* (original emphasis). The use of adverse facts available in this case, Columbus continues, would also be contrary to Departmental practice in cases where a cooperative respondent nevertheless provided a deficient response. Columbus's Rebuttal Brief at 9, citing *Final Determination of Sales at Less Than Fair Value: Certain Pasta From Italy,* 61 FR 30326, 30329 (June 14, 1996). Columbus also cites *Circular Welded Non-Alloy Steel Pipe From South Africa,* (61 FR 24271, 24272, May 14, 1996), where the Department found a respondent's questionnaire response ''unusable for purposes of margin calculations,'' yet did not draw adverse inferences in assigning facts available. *Id.*

Columbus concludes by asserting that ''there is no justification or support whatsoever for the use of 'facts available' against Columbus,'' and urges the Department to incorporate Columbus's verified data into this final determination. Columbus's Rebuttal Brief at 11.

Department's Position: While the Department uncovered several deficiencies in Columbus's sales and cost data during the two verifications conducted at Middelburg, we believe petitioners' characterization of Columbus's cooperation throughout this proceeding is overdrawn. We agree with petitioners that Columbus, as described in the comments that follow, committed a number of errors in compiling its responses and in certain cases failed to follow the instructions provided in the Department's questionnaires. We have addressed each of these alleged shortcomings below and have, where appropriate, resorted to facts otherwise available, including adverse facts available, when faced with irreparable shortcomings in Columbus's responses. Overall, however, we find that Columbus attempted to cooperate in this proceeding and that the deficiencies in its responses, considered either singly or collectively, do not merit the application of adverse facts available in every instance.

Petitioners appear to portray Columbus's alacrity at verification in identifying and correcting problems at verification as evincing bad faith as, in petitioners' telling, Columbus had the correct information in its possession all along yet withheld it from the Department. We agree that Columbus clearly failed to respond completely to each item in the Department's questionnaire (by not reporting credit memos, for example) and we have treated these shortcomings appropriately. However, Columbus, a first-time respondent to our questionnaires, attempted to comply with our requests for information. The record indicates that for the most part the errors and omissions in Columbus's responses were inadvertent in nature. In certain instances Columbus readily conceded errors in its response, such as its failure to include depreciation costs in its COP and CV data.

For the purpose of this final determination, therefore, we have continued to rely upon Columbus's submitted sales and cost data, adjusted appropriately for any errors or omissions on Columbus's part.

Comment 2: Date of Sale. Both petitioners and Columbus offer arguments concerning the proper date of sale for this investigation. In the Preliminary Determination the Department relied upon the invoice date as the date of sale, in keeping with the Department's regulatory preference for using the invoice date as the date of sale absent evidence ''that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'' 19 CFR 351.401(i).

Petitioners argue that in this case all material terms of sale are set at the time Columbus issues its order acceptance, a document confirming the quantity, price, grade, dimensions, and payment and sale terms of each order, to its customer. Petitioners further note that nothing in the regulations requires the Department to accept the invoice date as the date of sale in all cases. Citing

Certain Welded Carbon Steel Pipes and Tubes From Thailand, 63 FR 55578 (October 16, 1998) (Carbon Steel Pipes From Thailand), petitioners argue that the Department accepts the invoice date as date of sale ''unless the record evidence demonstrates that the material terms of sale, i.e., price and quantity, are established on a different date.'' Petitioners' Case Brief at 10, quoting Carbon Steel Pipes From Thailand at 63 FR 55587 and 55588. Even more on point, petitioners suggest, is the Department's ruling in Circular Welded Non-Alloy Steel Pipe From the Republic of Korea, 63 FR 32833 (June 16, 1998) (Korean Non-Alloy Steel Pipe) which cites the Department's discretion to ''abandon the use of invoice date'' if doing so prevents ''inappropriate comparisons via the strict use of invoice date as the date of sale.'' *Id.,* quoting Korean Non-Alloy Steel Pipe at 63 FR 32835.

According to petitioners, the situation with respect to Columbus closely mirrors that found by the Department in Korean Non-Alloy Steel Pipe. Referring to the Department's findings during the sales verification of Columbus, petitioners note that upon receipt of an order Columbus conducts certain internal technical and credit checks and then issues an order acceptance reflecting the customer's purchase order number, customer information, payment and sales terms, quantities and prices. This demonstrates clearly, petitioners maintain, that the essential terms of sale are established upon issuance of the order acceptance. Such a conclusion, petitioners continue, is supported by Columbus's technical manager, who opined during a plant tour conducted as part of verification that changes to a production order are extremely rare once the order acceptance has been issued.

Columbus in its Case Brief argues, contra petitioners, that the invoice date represents the only appropriate date of sale for purposes of the final determination because ''there can be changes to the price, volumes, specifications, or delivery terms (including partial non-delivery) up until that date.'' Columbus's Case Brief at 17. Further, Columbus avers, use of the invoice date is consistent both with Columbus's internal records kept in its ordinary course of business, and also with generally-accepted accounting principles (GAAP) in South Africa. Columbus suggests that, contrary to petitioners' assertions, the Department's sales verification found specific examples during the POI of changes to the material terms of sale occurring at points between the order acceptance date and the invoice date. Columbus's Case Brief at 18, citing the Sales Verification Report at 7 through 9. ''This discussion,'' Columbus insists, ''should settle the matter.'' *Id.*

With respect to the comments of Columbus's Technical Manager, Columbus dismisses the importance of these statements. According to Columbus the key to this passage in the Sales Verification Report is the qualifying phrase ''to (his) knowledge . . .'' Columbus insists that ''many changes to the order . . . have nothing to do with the technical specifications of the product ordered. The technical manager would have no way of knowing about—and would not care about—such changes.'' Columbus's Case Brief at 18. Furthermore, Columbus avers, a customer's change in technical specifications could be satisfied by drawing merchandise from another order or from stock on hand; clearly, such changes in the material terms of sale would have no effect whatever upon Columbus's production schedule. *Id.* Columbus suggests that the resolution to this controversy over date of sale lies in Columbus's sales documentation and the Department's discussions with sales rather than production personnel. Accordingly, Columbus concludes, the Department should continue to use the date of invoice as the date of sale.

Department's Position: Petitioners have presented cogent arguments in this case in support of using the order confirmation date as the date of sale. They have pointed out that the respondent is a mill which largely produces the merchandise under investigation to fill specific orders. Therefore, as petitioners see it, once the mill has scheduled the casting of a specific stainless slab for rolling to a given stainless coil, little room remains for altering the essential terms of sale.

Columbus, for its part, has presented arguments that the material terms of sale are subject to change at any time between the order acceptance and invoice dates and has indicated that not all such changes would be reflected in the production department's order acceptance (for example, in cases where Columbus satisfied a changed order by either drawing merchandise from a different order already in production or from inventory, or in any cases involving price changes). Further, Columbus has noted that changes in prices ''may be influenced by a number of factors, such as a change in market circumstances, a delay in production and therefore delivery, a non-conformance to quality, or a change in the circumstances of the buyer.'' Columbus's November 2, 1998 supplemental response at 3. Indeed, we observed evidence of each of these types of changes during the Department's sales verification. When pressed at verification Columbus was able to produce specific examples involving both subject stainless coil and non-subject cut-to-length stainless steel where the material terms of sale did, in fact, change after the order acceptance date and before final shipping and invoicing. See, e.g., the Sales Verification Report at 7 through 9 and Appendix III.

The Department's regulations establish a rebuttable presumption that the invoice date will serve as the date of sale unless record evidence demonstrates ''that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.'' 19 CFR 351.401(i). ''Our current practice, in a nutshell, is to use the date of invoice as the date of sale unless there is a compelling reason to do otherwise.'' Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea, 63 FR 13170, 13194 (March 18, 1998) (Korean Cold-Rolled Flat Products). After reviewing the evidence of record in this proceeding we have reached several conclusions. First, we agree with Columbus's assertion, borne out at verification, that its internal records and financial statements do not recognize a sale until dispatch and invoicing. For example, in an exchange with the Department over this issue Columbus noted that no merchandise leaves the mill (and, hence, no invoice will be issued) until Columbus has in hand a guarantee of payment, be it an irrevocable letter of credit or the extension of credit backed by an insurance policy against non-payment. Columbus stressed that ''[i]t is that clear—no payment, no sale.'' Columbus's November 2, 1998 supplemental response at 4. Second, we find that Columbus has presented evidence that the material terms of sale are, in fact, subject to change after the order confirmation date. As noted, Columbus presented examples from the POI where either quantity or price or both changed after the order acceptance had been issued, but prior to the invoice date, including one reported U.S. transaction selected at random by the Department for a ''surprise'' sales trace. Thus, as we concluded in Korean Cold-Rolled Flat Products, ''there is no record evidence indicating that a date other than the invoice date is the date after which the essential terms of sale could

not be changed.'' Id. at 13195 (emphasis added).

Petitioners' citation to Carbon Steel Pipes From Thailand is instructive in this matter. In that case petitioners argued for use of the respondent's contract date as the date of sale noting that by using the invoice date ''(1) a different set of sales will be evaluated, (2) in a country subject to currency devaluation or inflation, the sales value may be distorted, and (3) incorrect dates lead to incorrect matching, all of which ultimately distorts the antidumping duty margin.'' Id. at 55587. The Department disagreed with petitioners in that case concluding that ''[p]etitioners'' claim that the contract date fixes prices and quantities is not supported by record evidence.'' Id. at 55588. As to the specific objections raised in Carbon Steel Pipes From Thailand to relying upon the invoice date as opposed to the order confirmation date, Columbus has adduced evidence that shifting to one or the other date of sale will not effect a substantive change in the Department's analysis. While a change to order acceptance date would mean that some transactions currently listed as taking place early in the POI would be omitted from our analysis, whereas other transactions presently considered as falling after the POI would be included, the resultant overall volumes under either scenario are comparable. See Columbus's November 2, 1998 supplemental response at 6 and Appendix 1. Furthermore, the relative lag between order acceptance and invoice dates on home market and U.S. sales do not differ to a significant degree.[3] Thus, the universe of sales subject to our analysis would not change substantially were we to opt for the order date as the date of sale. As for the second point noted in Carbon Steel Pipes From Thailand, the South African rand was stable against the U.S. dollar throughout our POI, as were interest rates in South Africa. Thus, concerns about devaluation and inflation are not at issue. As for the third point concerning model matching, the evidence of record indicates that Columbus sold the same limited number of grades of stainless steel in both the home and U.S. markets, thus attenuating fears that our model matches have been skewed by reliance on invoice date. As we concluded in Stainless Steel Wire Rod From Italy, ''(g)iven the circumstances and the fact that we compared POI-average NVs to POI-average EPs, we find that no material distortion exists in our price-to-price comparisons.'' Notice of Final Determination of Sales At Less Than Fair Value: Stainless Steel Wire Rod From Italy, 63 FR 40422, 40425 (July 29, 1998).[4]

The record does not indicate that changes in the essential terms of sale between order acceptance and invoice dates occur with high frequency. However, there is sufficient evidence of record that changes can and do occur to militate against petitioners' contention that we must abandon the presumptive date of sale identified in the Department's regulations in favor of using Columbus's order acceptance date. Therefore, because Columbus's internal records kept in its normal course of business do not recognize any sale until the invoice is issued, and because Columbus has presented evidence that the essential terms of sale can and do change between issuance of the order acceptance and subsequent invoicing, we have continued to rely upon Columbus's reported invoice dates as the dates of sale for this final determination. In the event this investigation should result in the publication of an antidumping duty order, however, we intend to re-examine this issue thoroughly in any subsequent review involving Columbus.

Comment 3: Post-Sale Price Adjustments. Columbus and petitioners both comment in their case and rebuttal briefs upon the Department's findings at verification concerning certain unreported post-sale price adjustments. During the POI Columbus issued credit notes (i.e., credit memos) adjusting prices on certain transactions either as a result of price discrepancies or quality complaints. However, Columbus's questionnaire responses did not include a claim for home market credit notes, nor did Columbus report any credit notes for its U.S. sales. At verification the Department discovered a limited number of these credit notes relating to Columbus's home market and U.S. sales of stainless coil.

Columbus insists that the failure to report credit notes on sales of subject stainless coil stemmed from an inadvertent oversight. In Columbus's view, these omissions ''were minor, were not to the benefit of Columbus, did not impede the investigation, and were remedied as soon as they were discovered.'' Columbus's Case Brief, Executive Summary at page i. Columbus attributes its failure to include these credit notes in its sales database to an absence of any direct link in Columbus's accounting system between the credit notes and the applicable invoice.

Columbus urges the Department to consider these credit notes in reaching its final determination in this case. However, Columbus asserts that the credit notes warrant differing treatment depending upon the market in which they were issued. Credit notes issued for home market sales, Columbus insists, should be treated as direct adjustments to price, as these represent corrections to incorrect price surcharges. In contrast, Columbus argues that credit notes issued for U.S. sales of subject coil should be afforded treatment as indirect selling expenses, as they represent voluntary ''goodwill payments'' arising from quality complaints. According to Columbus, credit notes on U.S. sales do not represent price adjustments, as the original price had been agreed upon and paid. Further, they do not arise from warranty payments since, Columbus insists, subject plate is not sold under warranty. Columbus's Case Brief at 2. Therefore, Columbus notes, it is under no legal obligation to issue these credits. Id. at 3. Citing Dry Cleaning Equipment From West Germany; Preliminary Results of Antidumping Duty Administrative Review, 52 FR 2124 (January 20, 1987), Columbus maintains that it is the Department's practice to treat voluntary goodwill payments as indirect selling expenses.

Petitioners argue to the contrary that Columbus did, in fact, have a means of linking all credit notes issued during the POI to the original sales invoices. Petitioners assert that Columbus ''admitted'' that it could tie these credit notes to their applicable invoices through the Mill Production Order (MPO), a document generated for each order in Columbus's normal course of business. Petitioners' Case Brief at 13, citing the Sales Verification Report at 35. Petitioners argue that Columbus ''was aware that it had debit and credit notes that could and should have been reported to the Department in its home and U.S. market sales files.'' However, petitioners continue, Columbus ''unilaterally decided not to report these data to the Department.'' *Id.* Accordingly, petitioners suggest that as partial facts available the Department should make adjustments only for debit notes issued in the home market and for credit notes issued on U.S. sales.

In its rebuttal brief petitioners reject Columbus's characterization of this omission as ''minor and inadvertent.'' The Department's analysis, petitioners

[3] The exact numbers of days for the respective markets is business proprietary information. See Columbus's November 2, 1998 submission.

[4] It must be noted that in making this argument the Department agreed with petitioners that the customer's purchase order date, rather than respondent CAS's invoice date, represented the appropriate date of sale; that said, the point is no less relevant to the instant proceeding.

argue, hinges on determining the prices actually paid for the merchandise in the respective markets. According to petitioners, Columbus cannot rely upon the ''excuse'' that it has no direct link between its credit notes and the original invoices, suggesting that this is ''true of many adjustments to price required by the statute.'' Petitioners'' Rebuttal Brief at 13. Petitioners renew their proposal that the Department as adverse facts available consider only credit notes issued on U.S. sales and disregard those reported on home market sales. Further, in adjusting for the U.S. credit notes, petitioners urge the Department to disregard Columbus's ''invitation'' to treat these as indirect selling expenses: ''[c]redit and debit notes are properly regarded as adjustments to gross price.'' Id. Petitioners also dismiss Columbus's suggestion that its U.S. credit notes were not price adjustments ''since the price had been agreed to and paid.'' *Id.* at 14, quoting Columbus's Case Brief at 2 and 3. Rather, petitioners continue, by issuing a credit note Columbus was agreeing to a modification of the original price in response to customer complaints; in keeping with the Department's practice, petitioners conclude, these credit notes must be applied to particular sales.

Department's Position We agree with petitioners. The Department routinely asks respondents for information concerning billing adjustments and post-sale price adjustments during antidumping proceedings. For example, the Department's original antidumping questionnaire in this investigation asked Columbus to ''[r]eport any price adjustments made for reasons other than discounts or rebates. State whether these billing adjustments are reflected in your gross unit price.'' Antidumping Questionnaire, May 27, 1998, at page B–20 (home market) and C–18 (United States). Columbus's response for the home market: ''This field is not applicable. No price adjustments were done after invoicing. The price as reflected on the invoice is the price paid by the customer.'' Columbus's July 20, 1998 questionnaire response at B–27. Likewise for its U.S. sales Columbus reported that ''(n)o price adjustments were made after invoicing.'' Id. at C–27. For both markets Columbus stated that it did not offer any discounts other than home market early payment and distributor discounts. Columbus also reported that it granted no rebates and incurred no warranty or technical service expenses in either market. Id. at B–30, B–41, B–42, and C–29 and C–46.

The Department's supplemental questionnaire asked several follow-up questions concerning both discounts and rebates in the home market. In its September 8, 1998 supplemental questionnaire response Columbus reiterated that it granted no rebates during the POI and noted that its export-promotion discounts did not apply to POI sales of subject merchandise. See Columbus's September 8, 1998 response at 26 and 27; see also the Department's Sales Verification Report at 51 (''Columbus did not include technical or warranty expenses in its home market or U.S. sales listings.'').

At commencement of the Department's sales verification on November 16, 1998, consistent with our standard practice, we provided Columbus with the opportunity to submit any corrections of minor errors discovered while preparing for verification. Columbus submitted a single correction pertaining to its indirect selling expenses; Columbus again did not report any credit notes or price adjustments on either U.S. or HM sales. However, several days into the verification, during a lengthy discussion of quantity and value, Columbus produced a list of home market and U.S. credit notes. Columbus acknowledged that it ''had made no provisions for credit or debit notes or returns,'' and further allowed that it could link any such credit or debit notes to the original invoices through the MPO, a document generated in its ordinary course of business. See Sales Verification Report at 35.

The findings at verification amply demonstrate that Columbus not only issued credit notes pertaining to sales of subject plate in coil during the POI, but had the means to link each credit note to the appropriate invoice through the MPO. The record is also clear that Columbus reported none of these notes in spite of our manifest instructions that it do so. In view of the evidence of record we find that Columbus failed to act to the best of its ability in responding to this portion of the Department's original antidumping questionnaire. Section 776(a)(2) of the Tariff Act holds that if an interested party withholds information that has been requested by the Department or fails to provide such information by the deadlines for submission, the Department shall use the facts otherwise available in reaching its final determination. See Section 776(a)(2)(A) and (B). Further, pursuant to section 776(b) of the Tariff Act, if the Department finds that an interested party failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department ''may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.''

Furthermore, we find that the caveats set forth in section 782 governing the use of facts otherwise available are inapplicable in the instant case. In response to our direct requests that Columbus report home market and U.S. billing adjustments, rebates, and technical and warranty expenses, Columbus answered specifically that none of these applied to Columbus's sales during the POI. At no time prior to verification did Columbus acknowledge that it did, in fact, issue credit notes pertaining to quality complaints involving subject merchandise, nor did Columbus ever plead that it was unable to submit information regarding these ''inapplicable'' price adjustments. Furthermore, subsection 782(e) is inapposite as the Department is not ''declin[ing] to consider information that is submitted'' by Columbus. Columbus failed to submit this information in response to our requests. However, the information was belatedly provided by Columbus during the November 1998 verification and verified by the Department at that time.

Accordingly, as facts available in the instant case we have allocated each U.S. credit note to its applicable invoice and have deducted a transaction-specific per-ton amount for those credit notes. Furthermore, as an adverse inference, we are disallowing all credit notes claimed by Columbus for sales in the home market. As the SAA makes clear, the Department ''may employ adverse inferences about missing information to ensure that a party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.'' SAA, as reprinted in H.R. Doc. No. 103–316 (1994). Columbus ignored our specific instructions that it report billing adjustments, including ''any price adjustments made for reasons other than discounts or rebates.'' Thus, to insure that Columbus does not ''obtain a more favorable result,'' we are allowing the U.S. credit notes while adopting the adverse inference that Columbus issued no credit notes in the home market. *See, e.g., Gray Portland Cement and Cement Clinker From Mexico,* 62 FR 17148, 17166, (April 9, 1997) (home market freight expenses disallowed because respondent's ''reported data (were) inconsistent with the Department's explicit instructions'').

Comment 4: U.S. Commissions. Claiming that it pays commissions in the U.S. market but none in the home market, Columbus notes that the Department's practice in such situations is to make an adjustment to NV—the

''commission offset''—to account for the U.S. commission. Columbus's Case Brief at 1, citing section 19 CFR 351.410(e) of the Department's regulations. The Department, in fact, described this offset in its October 27, 1998 Preliminary Analysis Memorandum. However, Columbus maintains, Columbus's reported gross unit prices for its U.S. sales do not include the commission amounts. Accordingly, Columbus asks that the Department add U.S. commissions to the gross unit U.S. prices before making price-to-price comparisons. Columbus notes that although the Department discovered at verification that Columbus had made ''a small overstatement'' of the commissions, nevertheless, Columbus concludes, ''the Department was able to verify the correct calculation of this commission.'' *Id.* at 2 and n. 1.

Petitioners ''do not disagree with Columbus's suggestion'' to add U.S. commissions to the gross unit U.S. price. Petitioners' Rebuttal Brief at 1. However, petitioners assert that if the Department does so, it must also add U.S. commissions to the calculation of NV and CV to ensure the proper consideration of U.S. commissions in the Department's final determination.

Department's Position: We disagree with both Columbus and petitioners. Columbus's position notwithstanding, we do not find the adjustments claimed as U.S. commissions are commissions at all for purposes of an antidumping analysis. As instructed in the Department's questionnaire, Columbus reported in its U.S. sales listing its first sales to unaffiliated customers in the United States. See, e.g., Columbus's June 24, 1998 section A response at 17 through 19. In its supplemental response Columbus, noting that it considers these unaffiliated customers as its agents, nonetheless stated that it invoices and sells the merchandise to these customers and receives payment from them. These companies then resell the product to their unaffiliated customers. See Columbus's September 8, 1998 supplemental response at 47 and 48. Thus, throughout this investigation the U.S. sales prices which have been subject to our analysis have been those reported by Columbus to its named EP customers.

The amounts claimed as ''commissions'' for these transactions are not related in any way to the reported sales to Columbus's EP customers. Columbus has not reported any commissions paid in connection with its first sale to an unaffiliated party in the United States. Regardless of whether the amounts claimed by Columbus are commissions, or simply mark-ups passed on to the subsequent end-user customer, they are related to the resales by Columbus's EP customers, not the sales upon which our dumping analysis is based. We have accordingly limited our analysis of Columbus's EP transactions to those involving Columbus's first sales in the United States to unaffiliated parties and have not considered further the additional amounts claimed as commissions by Columbus.

Comment 5: Home Market Short-Term Interest Rates. Petitioners urge the Department to treat Columbus's home market short-term interest rate as ''unverified'' and to disallow entirely Columbus's claimed adjustments for home market credit expenses and ICC. Petitioners point to statements made by Columbus officials at verification that it had no short-term rand-denominated borrowing; Columbus claimed, therefore, to have used ''call'' rates, or interest rate quotes supplied by Columbus's banks, in calculating home market credit expenses and ICC. Petitioners' Case Brief at 15, quoting Columbus's Section B response at pages 38 and 46. Petitioners note Columbus's admission at verification that it solicits these ''call'' rates via telephone and maintains no documentation to support these numbers. ''Without independent verification,'' petitioners insist, ''the Department is not in a position to confirm the accuracy of the submitted data.'' As a result, petitioners conclude, the Department must treat Columbus's home market interest rates as ''unverified'' and deny the claimed adjustments for credit expenses and ICC.

Columbus argues in its case brief that rather than disregarding its claimed credit expense and ICC adjustments, the Department should rely upon the verified prime overdraft rates available in South Africa in the absence of any short-term rand-denominated borrowing by Columbus. Columbus insists that the Department verified fully that Columbus had no short-term borrowing in the home market currency; the Department's practice in such instances, Columbus maintains, is to base home market credit and ICC calculations upon the short-term interest rates generally available in the home market. Columbus's Case Brief at 6, citing Final Determination of Sales at Less Than Fair Value; Certain Pasta From Turkey, 61 FR 30309, 30324 (June 14, 1996), and Final Determination of Sales at Less Than Fair Value: Canned Pineapple Fruit From Thailand (Canned Pineapple Fruit), 60 FR 29553, 29557 (June 5, 1995). Therefore, Columbus concludes, the Department should rely upon the verified prime overdraft rates submitted by Columbus at verification. Id.

In rebuttal petitioners assert that the sales verification report clearly states that ''no existing documentation supports these numbers.'' Petitioners' rebuttal brief at 2, quoting the Sales Verification Report at 46. Petitioners likewise describe as unavailing Columbus's attempts during verification to substantiate its prime overdraft rates, insisting that Columbus's short-term interest rates were not verified.

Columbus, in turn, argues in its rebuttal brief that its short-term interest rates were fully verified. Columbus acknowledges that its original response used ''call'' rates obtained by telephone by the Columbus official responsible for preparing Columbus's response. However, Columbus asserts, that official left the company and Columbus could not subsequently locate the underlying documentation for these rates. Therefore, in responding to the Department's October 15, 1998 supplemental questionnaire, and well prior to verification, Columbus provided prime overdraft rates ''which represent the available short-term rand interest rates in South Africa.'' Columbus's Rebuttal Brief at 17. Columbus insists that these prime overdraft rates were documented and verified. Therefore, Columbus avers, these rates should be used in calculating home market credit expenses and ICC.

Department's Position: We agree with Columbus that the short-term prime overdraft rates available in South Africa should serve as the basis of Columbus's credit and ICC calculations in the absence of short-term borrowing in the home market. While petitioners note correctly that the Department could not verify the ''call'' rates used to calculate Columbus's credit and ICCs, as we will explain below, we do not believe this ''failure'' warrants application of adverse facts available. Columbus claimed at verification that the official responsible for compiling the ''call'' rates had since left Columbus's employ and that this individual's interest rate worksheets were no longer available. Thus, in response to our specific request, Columbus collected and presented information to substantiate the prime overdraft rates available to commercial borrowers in South Africa. We were able to document and verify these rates through records Columbus keeps in its normal course of business. Furthermore, we confirmed these rates using publicly-available data on interest rates in South Africa as published by the International Monetary Fund (the IMF) in its International Financial Statistics for September 1997, January

1998 and June 1998 (we selected all three volumes to capture monthly prime overdraft rates for each of the twelve months of calendar 1997).

According to Columbus, it originally obtained the ''call'' rates used in calculating credit and ICC expenses by telephoning its leading commercial bank and inquiring about the interest rates that would be available to Columbus if it were seeking short-term rand-denominated loans. The bank, after considering prevailing interest rates and Columbus's history with the institution, responded with the ''call'' rates originally submitted by Columbus on July 20, 1998. Thus, these ''call'' rates represented the interest rates available on rand-denominated loans specifically to Columbus from this bank. These were the rates we referred to in our verification report when we noted that ''no existing documentation supports these numbers.'' Sales Verification Report at 46.

Once Columbus admitted during verification that it could not substantiate its credit expenses as reported using the ''call'' rates, it presented documentation on interest rates drawn from its internal cash management system. These rates coincide with those released by both the South African Reserve Bank and the IMF's International Financial Statistics. As discussed in the Sales Verification Report at pages 46 and 47, Columbus operates an internal system to manage daily cash flows which tracks the various interest rates available from certain commercial banks. This prime overdraft rate was constant from November 1996[5] through October 20, 1997, at which point it changed once for the duration of the POI. See the Sales Verification Report and Exhibit 15 thereto.

The record establishes that Columbus had no short-term rand-denominated loans from unaffiliated lenders. The Department's antidumping duty questionnaire at page B–27 asked Columbus for information on its short-term interest expenses and instructed Columbus to ''use a published commercial short-term lending rate'' if it had no short-term borrowings during the POI. With no actual home-market short-term loans to serve as a basis for its interest rate, Columbus attempted to respond to this question by telephoning its bank and, in effect, asking this bank what interest rates would have been available to Columbus had it borrowed during the POI. In our October 15, 1998 supplemental questionnaire the Department subsequently asked Columbus to substantiate the rates quoted by this bank and to ''provide South African interest rates for the POI obtained from publicly-available sources (such as those published on a monthly basis in business publications or released by the South African Reserve Bank).'' October 15, 1998 supplemental questionnaire at 2. Columbus's response, while failing to indicate that its original interest rates could not be substantiated, nevertheless complied with our request for information on short-term interest rates available from the South African Reserve Bank.[6]

While it is true that we could not verify the ''call'' rates used in Columbus's original and revised home market sales listings, we must point out that these ''call'' rates bear no relationship to any actual short-term loans taken by Columbus, nor did Columbus fail to disclose any home market borrowing or otherwise misstate its short-term interest expenses. This is not a case where Columbus had short-term loans in the home market, incurred actual short-term interest expenses, and then was unable to substantiate these expenses at verification. Rather, in response to a direct question from the Department, Columbus attempted to respond to the best of its ability by determining precisely what rates it could have obtained had it actually borrowed money in the home market. Petitioners' suggested response would have the Department penalize Columbus for failing to provide substantiation for interest rates which, in effect, never existed outside of an informal inquiry from Columbus to its bank.

The Department has over time developed a policy to address specifically situations such as the instant case where a respondent has no short-term borrowing from unaffiliated parties in the currency of either the export market or the United States. On February 23, 1998, the Department promulgated Import Administration Policy Bulletin 98.2, ''Imputed Credit Expenses and Interest Rates.'' As we explain in this document, the Department at one time calculated imputed interest expenses to reflect the ''opportunity cost of money'' incurred in extending credit by using the actual short-term interest rates incurred in the home market to calculate both home market and U.S. credit and ICC (except in exporter's sales price (now, CEP) situations, where we would use the short-term dollar-denominated interest rates for transactions in the United States). However, in 1990 the Court of Appeals for the Federal Circuit overturned this practice, stating that the cost of credit ''must be imputed on the basis of usual and reasonable commercial behavior,'' and that the short-term interest rates used should conform with ''commercial reality.'' *LMI-La Metalli Industriale S.p.A.* v. *United States,* 912 F.2d 455, 460 (Fed. Cir. 1990). Our policy bulletin concluded that ''[i]n cases where a respondent has no short-term borrowings in the currency of the transaction, we will use publicly available information to establish a short-term interest rate applicable to the transaction.'' The bulletin further noted that in the rare cases where a respondent has no short-term loans from unaffiliated parties in the home market currency we will establish interest rates on a case-by-case basis ''with a preference for published average short-term lending rates.'' Policy Bulletin 98.2 at 6.

As Columbus had no short-term rand-denominated loans from unaffiliated parties, the alternative, and the Department's stated preferences in such cases, is to use publicly-available interest rate information. Thus, for purposes of this final determination we have recalculated Columbus's home market credit expenses and ICC using the publicly-available rates of the South African Reserve Bank as confirmed by the IMF's International Financial Statistics.

Comment 6: Marketing and Market Development Costs. Petitioners urge the Department to recalculate Columbus's indirect selling expenses by deducting those expenses relating to ''sales and marketing'' and general market development. Petitioners note that the Department's Sales Verification Report described the cost centers identified by Columbus to determine the pool of expenses for use in calculating its indirect selling expenses. According to petitioners, Columbus added to its indirect selling expenses those costs relating to ''general expenses and salaries pertaining to its market development cost centers.'' Petitioners' Case Brief at 14, quoting the Sales Verification Report at 53 and 54. However, petitioners insist that general expenses not related to sales of such or similar merchandise do not qualify for treatment as indirect selling expenses.

[5] The reference to ''November 1997'' at page 47 of the Sales Verification Report is a typographical error.

[6] Columbus submitted information on prime overdraft rates drawn from the South African Reserve Bank's Worldwide Web site (*www.resbank.co.za*) at Exhibit 3 of its November 2, 1998 supplemental response. Columbus did not indicate that its reported short-term interest rates could no longer withstand verification, however, stating cryptically that ''[t]he final credit expenses may have to be calculated based on the attached.'' Id. at 8.

Id. and n. 58, citing Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, *et al.,* 58 FR 39729, 39749 (July 26, 1993) (Antifriction Bearings). Rather, petitioners assert, the marketing and market development expenses at issue are by definition ''general expenses,'' which should be included in the general and administrative (G&A) expenses used to adjust COP and CV. Id. Petitioners further accuse Columbus of including in its G&A calculation certain costs and revenue they characterize as ''non-operating items.'' Petitioners' Case Brief at 25. Columbus's G&A ratio, petitioners insists, must be adjusted by excluding all such items.

Columbus argues that all expenses incurred by its sales department in ''marketing, selling and promoting sales of subject merchandise are plainly selling expenses'' which, Columbus maintains, should not be considered part of its G&A. Columbus's Rebuttal Brief at 15. Further, Columbus avers, in the sole case cited by petitioners to support the reclassification of its sales and marketing expenses, Antifriction Bearings, the Department concluded just the opposite, that the marketing and market development expenses at issue were, in fact, indirect selling expenses. ''Expenses incurred to market and to expand and develop the market for Columbus's products,'' Columbus insists, ''are plainly associated with sales of those products.'' Columbus's Rebuttal Brief at 16.

Treating these expenses as indirect selling expenses, Columbus argues, is consistent with the Department's own antidumping questionnaire. Further, Columbus asserts, petitioners' claim that these expenses should be classified as general expenses related to cost of production runs contrary to the Department's section D questionnaire, which defines ''general expenses'' as ''period expenses which relate indirectly to the general production operations of the company.'' Columbus's Rebuttal Brief at 16, quoting the Department's questionnaire at D–25. According to Columbus, marketing and market development expenses intended to promote sales ''do not belong in this category of expenses.'' Id. at 17.

Department's Position: We agree with Columbus. We reviewed the expenses at issue during both the sales and cost verifications in this case (see, e.g., the Sales Verification Report at 53 and 54—''we examined the various expenses and noted no discrepancies''). As noted in the Sales Verification Report, Columbus has established cost centers for its export marketing and for each of its local sales offices. In addition, Columbus relies on a separate cost center to accrue expenses relating to its market development efforts in South Africa. Because these costs are related, albeit indirectly, to promoting sales in the home market, as opposed to Columbus's general operation or its production of stainless steel, we have continued to treat these costs as indirect selling expenses for this final determination.

With respect to the amounts claimed by petitioners to be ''non-operating items,'' our review of the relevant expenses and revenues indicates that these items relate to the general operations of the company as a whole and, therefore, are properly considered as part of Columbus's G&A.

Comment 7: Home Market Advertising Expenses. Columbus reported adjustments for home market advertising expenses claiming these were ''assumed'' on behalf of the buyer, thus warranting treatment as direct selling expenses pursuant to the COS provision of 19 CFR 351.410(d). These expenses fell into three categories: print advertising expenses, maintenance of a stadium box at the Ellis Park Stadium, and expenses arising from Columbus's sponsorship of an annual ''3CR12 Squash Tourney.''

Petitioners maintain that Columbus's various claimed advertising expenses qualify as indirect rather than direct selling expenses. According to petitioners, Columbus has failed to demonstrate that any of the expenses relating to its magazine advertisements, as well as those stemming from the publication of Contact, an in-house newsletter, qualify as direct selling expenses. Further, petitioners argue, Columbus uses the hospitality suite at Ellis Park Stadium to entertain Columbus's customers, including distributors, at rugby matches, not to entertain its customers' customers. Similarly, the 3CR12 Squash Tourney fails to qualify as a direct advertising expense because the tourney was open to users of stainless steel generally, and not limited to specifiers of the specialty 3CR12 product (or, for that matter, subject stainless steel plate in coil). Petitioners' Case Brief at 17. Therefore, petitioners conclude, the Department must disallow any adjustment for advertising as a direct selling expense and instead treat the expenses as indirect selling expenses in their entirety.

In their rebuttal brief petitioners note that to qualify for an adjustment as a direct selling expense, 19 CFR 351.410(d) requires advertising expenses to ''bear a direct relationship to (a) particular sale'' or to be ''assumed by the seller on behalf of the buyer.'' Petitioners' Rebuttal Brief at 3, quoting 19 CFR 351.410(d). Petitioners point to the findings in the Department's Sales Verification Report as demonstrating that ''all of Columbus'(s) claimed direct advertising expenses are general in nature, and fail to meet the criteria for consideration as an assumed selling expense.'' Id. at 4.

Columbus argues that its advertising expenses incurred in the home market are assumed on behalf of the buyer and merit adjustment under the COS provision. For example, Columbus asserts, expenses relating to the corporate box at the Ellis Park Stadium and those connected to the squash tournament sponsored by Columbus qualify as direct advertising expenses. Conceding that ''some portion'' of the magazine advertising purchased by Columbus, as well as an unspecified portion of the Ellis Park Stadium expenses, may appropriately be considered indirect in nature, Columbus nonetheless urges the Department to either treat advertising costs as direct expenses in their entirety or to ''apportion them reasonably between 'assumed' and 'indirect' expenses.'' Columbus's Case Brief at 7.

In addition, Columbus notes that during the sales verification the Department discovered that some of the reported advertising expenses had been based upon budgeted, rather than actual, costs. Columbus urges the Department, therefore, to base any adjustment for advertising expenses upon the actual verified expenses in lieu of the incorrect budgeted amounts originally reported.

Finally, Columbus disagrees with petitioners' contention that these advertising expenses cannot be considered as direct selling expenses because the advertising at issue may reach a broader audience than purchasers of subject stainless steel plate in coil; Columbus asserts that in many cases the customers of Columbus's customers are purchasing merchandise which has been further processed so as to no longer constitute the foreign like product. Columbus's Rebuttal Brief at 18. Columbus maintains that whether the downstream sale comprises subject or non-subject merchandise has no bearing on the proper treatment of the advertising expenses assumed by Columbus on behalf of the buyer (i.e., Columbus's customers).

Department's Position: We agree in part with petitioners. We reviewed Columbus's claimed advertising expenses exhaustively at verification and found that most, if not all, of these

promotional expenses were incurred either in marketing to Columbus's customers, as in the case of the Ellis Park Stadium box, or as general corporate promotion in the case of Columbus's print advertising.

With respect to this last category of expenses, we reviewed numerous samples of Columbus's print advertising which reflected high-quality glossy art and copy suitable for publication as full-page advertisements. These advertisements are intended to promote either the benefits of stainless steel generally, or Columbus's image as a reliable supplier of high-quality stainless steel; by Columbus's own admission, most of these advertisements, including advertisements promoting sales of coiled hot-bands, are aimed at distributors; ''Columbus acknowledged that end-users are not purchasing stainless coils, or large quantities of cut stainless sheet.'' Sales Verification Report at 49. Likewise, as petitioners note, Columbus's in-house publication Contact is addressed ''to you, our valued customers.'' Columbus's September 8, 1998 supplemental response at Exhibit K. Thus, we conclude that Columbus's print advertising expenses are aimed primarily at Columbus's customers, with the remaining expenses promoting Columbus's general corporate image. As such, these expenses do not represent expenses assumed by Columbus on behalf of its customers, and do not merit treatment as a COS adjustment.

Similarly, the record indicates that the Ellis Park Stadium box is used primarily to entertain Columbus' customers at rugby matches. As Columbus noted, 13 of the 15 seats in the box are devoted to use by the local sales department. ''Columbus claims that employees of catalytic converter companies, tanktainer manufacturers, and Columbus' distributors were the most common recipients of passes to the box.'' Sales Verification Report at 49. Thus, we find that these expenses represent indirect selling expenses incurred by Columbus in marketing stainless steel products to its customers, not direct selling expenses assumed by Columbus on behalf of its customers.

Finally, as regards the 3CR12 Squash Tourney, we discussed this tournament at verification with the public relations officials at Columbus and reviewed the list of participants included in the tourney's brochure. We confirmed that virtually all of the contestant teams represented mining companies or other end users of 3CR12 steel products. While Columbus acknowledged that ''the scope of the tourney extended beyond end users of 3CR12,'' the very name of the tournament coupled with the makeup of the tournament's competitors makes it clear that these expenses were incurred to promote sales of 3CR12 stainless to end-user customers. The Court of International Trade addressed a similar issue in *Smith Corona Group* v. *United States,* 540 F. Supp. 1341 (CIT 1982), aff'd 713 F.2d 1568 (Fed. Cir. 1983). There, the Court found that

> [w]hile the challenged ads were not exclusively directed to the relevant merchandise, a portion of each advertising effort was. In a purely metaphysical sense, Smith Corona is correct in that the ad expense cannot be directly correlated with specific sales. Yet, the statute does not deal in imponderables.

In a later case involving the same parties, *Smith Corona* v. *United States,* 771 F. Supp. (CIT 1991), the Court likewise concluded that ''(e)ven if the evidence that the advertisements contained institutional or corporate themes were substantial, it would still not undermine the agency's determination, for the existence of such themes does not necessarily diminish direct promotion therein of particular products.''

As with Smith Corona's advertisements, so too Columbus' 3CR12 Squash Tourney is directed towards end users of 3CR12 steel, i.e., the customers of Columbus' customers. That Columbus realizes some measure of general corporate promotion at the same time ''does not necessarily diminish direct promotion therein of particular products.'' Accordingly, while we have disallowed the balance of Columbus' claimed advertising expenses as COS adjustments, treating these instead as indirect selling expenses, we have treated the actual costs of sponsoring the 3CR12 Squash Tourney as direct selling expenses assumed by Columbus on behalf of its customers and have allocated these expenses over home market sales of 3CR12 steel only.

Comment 8: Other Direct Selling Expenses for 3CR12 Steel. Petitioners, noting that Columbus incurs certain expenses in the United States in selling 3CR12 stainless steel, argue that the Department must calculate an amount for ''other direct'' selling expenses for sales of this product. Petitioners' Case Brief at 17. These expenses, petitioners argue, include those relating to sales visits paid by employees of a wholly-owned Columbus subsidiary to its customer's customers. As such, petitioners insist, the costs relating to these visits represent direct expenses Columbus has assumed on behalf of its customer, an unaffiliated distributor.

In response Columbus avers that its expenses relating to U.S. sales of 3CR12 steel are indirect in nature, arising primarily from general market promotion for this specialty product. ''[T]here is no indication,'' Columbus insists, ''that the visits to the customers were an 'assumed' expense.'' Columbus' Rebuttal Brief at 18 and 19. Further, Columbus argues, the customer visits were just one of a range of activities of these employees. Even if the attendant expenses qualify as 'assumed' expenses, Columbus submits, the resulting adjustment ''would plainly be de minimis,'' and could not support treating all fixed expenses in the U.S. as direct selling expenses. Id.

Department's Position. During our verification in Middelburg we reviewed the activities of personnel stationed in the United States and agree with Columbus that the expenses arising from these activities represent indirect selling expenses. Columbus maintains a wholly-owned subsidiary in the United Kingdom whose ''sole function is the sale and distribution of 3CR12 and the development of the market for 3CR12, primarily in Europe.'' Columbus' September 8, 1998 supplemental response at 9. As Columbus explained at verification, the personnel maintained by Columbus' subsidiary have technical expertise necessary to develop the market for 3CR12, a unique, corrosion-resistant ''utility'' steel ''which is used extensively in the mining, sugar, and coal industries, and in the manufacture of railway wagons, bus bodies and automobile frames.'' Columbus' June 24, 1998 section A response at 8, n.1. According to Columbus, it developed this grade of steel and currently holds patents and trademarks on it.

After successfully introducing the steel in South Africa, Columbus noted, it is now attempting to promote this grade in the export market, focusing on the same industry sectors. However, Columbus maintains, because of 3CR12's unique properties, for example, its weldability, it required individuals with specific technical expertise to promote sales of Columbus' 3CR12 products to its customers. See, e.g., Columbus' September 8, 1998 supplemental response at 9. At verification we confirmed that all sales and distribution of 3CR12 steel in the United States are the responsibility of an unaffiliated distributor which purchases the material from Columbus' wholly-owned subsidiary in the United Kingdom. The individuals stationed in the United States, on the other hand, act only to distribute technical information about 3CR12's characteristics to potential customers and to promote new

applications for a grade of steel that is relatively little-known in the United States.

Because there is no evidence of record that the expenses associated with the personnel stationed in the United States by Columbus' U.K. subsidiary are direct in nature or that these expenses were assumed by Columbus on behalf of its U.S. customers the expenses are properly considered indirect selling expenses, and have been so reported by Columbus. We have continued to treat these expenses as such for this final determination.

Comment 9: Inland Insurance Expenses Incurred In South Africa for U.S. Sales. According to petitioners, the Department should apply partial facts available to calculate inland insurance expenses incurred in South Africa for sales to the United States. Petitioners note that Columbus reported these insurance premiums using the policies' formula of multiplying a stated premium factor by 110 percent of the invoice value. However, petitioners accuse Columbus of: (i) Reporting an incorrect amount for inland insurance, (ii) reporting the premiums in the wrong currency, and (iii) failing to offset its premium expenses with a rebate Columbus received for overpayments of its premiums. Further clouding the issue, petitioners maintain, is that Columbus's insurance broker ''was originally founded specifically to provide insurance underwriting for Columbus Joint Venture.'' Petitioners' Case Brief at 18, quoting the Sales Verification Report at 44. For these reasons petitioners insist that the Department should disregard Columbus' reported inland insurance, applying instead the highest reported insurance expense to all U.S. sales whose terms were either CFR or FOB.

Columbus accuses petitioners of distorting the Department's findings at verification with respect to its foreign inland insurance, asserting that it is ''flatly wrong'' that Columbus misreported this expense, used the inappropriate currency, or failed to account for a substantial rebate. According to Columbus, the company reported this expense ''exactly as it is incurred,'' multiplying the premium rate by 110 percent of the invoice price. The reason Columbus is unable to trace specific insurance payments for specific shipments, Columbus explains, is that it pays these premiums in advance against anticipated shipments. The exact amount is adjusted after the fact to reconcile the pre-paid premiums based upon estimated shipments to those based upon actual shipments during the period. ''It is absurd,'' Columbus complains, ''to claim that this is a verification failure.'' Columbus' Rebuttal Brief at 19. Columbus also dismisses petitioners' insinuations that its insurance provider is affiliated with Columbus. The insurance brokerage's name was chosen, Columbus maintains, when the company was founded to provide insurance underwriting for Columbus Joint Venture and the name was thought to lend status to the new concern. There is no relationship, Columbus insists, between Columbus and its insurance broker. Id. at 20.

Department's Position. Petitioners' objections to Columbus' inland insurance expenses appear to arise from a misreading of the Department's Sales Verification Report. We verified fully Columbus' inland insurance expenses and noted no discrepancies in these expenses or the reporting methodology employed by Columbus. Calculating this insurance is simply a matter of multiplying the invoice value by 1.1 and multiplying that product by the premium rate specified in Columbus' insurance policy. As to petitioners' contention that Columbus reported this expense in the ''wrong'' currency, although Columbus remits its prospective payments in rand, the insurance premiums are based upon the value in U.S. dollars of each shipment and are properly reported in U.S. dollars. Further, as this expense is calculated as a fixed percentage of value multiplied by a fixed premium rate, whether Columbus reports it in dollars or in rand converted to dollars has no effect on our calculations. Finally, with respect to the rebate for overpayments of premiums, the Sales Verification Report failed to make clear that this represented monies paid in advance by Columbus but subsequently refunded by the insurance brokerage when Columbus' prospective payment based upon anticipated shipments exceeded the premium charges based upon actual shipments. This refund did not reflect a price concession by the insurance broker. Thus, the refund had no effect upon the inland insurance expenses reported by Columbus in its sales listings. Therefore, we have accepted Columbus' reported inland insurance amounts for this final determination.

Comment 10: Recalculation of Inventory Carrying Costs. Columbus points out that the COM used as the basis for calculating Columbus's ICC in its home market and U.S. databases has been subjected to several revisions as a result of supplemental cost questionnaires and the Department's cost verification. These ''various adjustments to COM,'' Columbus asserts, explain why ''Columbus was unable to reconstruct the reported ICC'' at verification. Columbus's Case Brief at 5, quoting the Sales Verification Report at 53. Reconstructing the original ICC would not be helpful, Columbus insists, because changes resulting from the supplemental cost questionnaires and verification would necessitate a recalculation in any event. The only outstanding verification issue relating to ICC, Columbus maintains, is a discrepancy of one day between the weighted-average days in inventory. ''Such a small difference does not mean,'' Columbus avers, ''that Columbus'' inventory carrying costs could not be verified.'' Id.

Department's Position: We agree with Columbus, and have used the revised COM calculated for this final determination as the basis for calculating Columbus's ICC. As explained in the comments under ''Cost Issues,'' below, we have made a number of adjustments to Columbus's COP data as a result of either findings at the Department's cost verification or comments by the interested parties or both. See the Cost Verification Report and the Cost Calculation Memorandum (Final). Just as we have determined that it would be inappropriate to use Columbus's reported COM as the basis for its COP and CV data, it would likewise be inappropriate to use demonstrably inaccurate COM data as the basis for Columbus's ICC expenses. Accordingly, we are using Columbus's COM, as adjusted for this final determination, in calculating ICCs.

Comment 11: Other Corrections. Columbus, noting that the Department conducted separate sales and cost verifications, requests that any changes in Columbus's data arising from one verification be reflected in the data verified at the other. This is necessary, Columbus insists, to avoid double-counting any expenses. For example, Columbus continues, the Department found that certain public relations expenses had been included both as a general overhead cost in Columbus's COP data and as a direct selling expense in Columbus's home market sales data. Similarly, certain marketing expenses were reported as G&A in both the sections B and D responses. When adding these expenses to Columbus's indirect selling expenses, Columbus urges the Department to make an offsetting deduction from G&A in Columbus's reported COP to avoid double-counting.

Petitioners suggest without further elaboration that the Department correct a number of errors in Columbus's response, referring to various points in the Department's Sales Verification

Report. Petitioners' Case Brief at 19, citing pages 34 and 42, and Appendices IV, II and III of the Sales Verification Report.

Department's Position: As noted in the comments herein, we have attempted to adjust expenses appropriately to reflect any revaluations or recalculations performed on Columbus's sales and cost data. Wherever a recalculation has affected one set of data we have, as appropriate, made the corresponding adjustments to Columbus's other data.

As to petitioners' contentions, we are unable to find any specific errors needing remedy in the first two cites offered. The third citation involved installment payments for one home market sale; we have continued to rely upon the reported date of payment, as this represented the date of receipt of the customer's final payment. The fourth item related to wharfage expenses incurred on U.S. sales and we have adjusted this expense to reflect the actual verified amount. The final item concerns the reported date of payment for one U.S. transaction; we find that Columbus reported properly the payment date and no correction is necessary for this transaction.

Issues Relating to Cost of Production

Comment 12: Revaluation of Raw Material Costs. Columbus explains that its accounting system kept in its normal course of business records raw material costs as of the date the finished product is sold. These costs, in turn, form Columbus's cost of sales. Columbus will then adjust its raw material costs back to their ''cost as purchased'' by means of a revaluation adjustment. Columbus's Case Brief at 8. Columbus claims that the Department erred in its Cost Verification Report when it stated that Columbus's internal system for accounting for variances in raw material costs has no impact on Columbus's reported COP. Id., citing the Cost Verification Report at 8. It would be wrong, Columbus insists, for the Department to disregard the revaluation adjustment when calculating Columbus's COP.

Columbus notes that section 773(f)(1)(A) of the Tariff Act calls for the Department normally to calculate COP on the basis of the records of the exporter or producer, provided these records i) are kept in accordance with GAAP in exporting country, and ii) ''reasonably reflect the costs associated with the production and sale of the merchandise.'' Columbus's Case Brief at 8, quoting section 773 of the Tariff Act. The company's records are kept in accordance with GAAP, Columbus submits, and include the provision for revaluation of raw material costs as part of its COP for sales made during the POI. By means of the revaluation adjustment, Columbus argues, Columbus's records ''precisely track the actual costs incurred with respect to the subject merchandise.'' Id. at 9. Columbus asserts that stainless steel sold in, e.g., January would have been produced from raw materials purchased in a prior month; thus, valuing the raw material costs based upon the date of sale has the effect of distorting these costs. ''It would be wrong,'' Columbus submits, ''to assert that a sale is below cost because its price fails to cover, not the actual raw material cost of the product, but the cost of raw materials being purchased in January for production later in the year.'' Id. at 9.

Even if the Department concludes that only costs incurred during the POI (calendar 1997) should serve as the basis for COP for sales during the POI, disregarding the revaluation adjustment will not accomplish this end. As reported, Columbus argues, Columbus's revaluation adjustment includes not only adjustments between the last quarter of 1996 and the first quarter of 1997, but also the adjustments applied for each quarter of 1997 (i.e., during the POI). Thus, such a calculation would inappropriately include in Columbus's COP costs it did not incur with respect to producing the subject merchandise. Columbus's Case Brief at 10.

Petitioners suggest that Columbus has incorrectly included an accounting adjustment made to its cost of sales in its reported cost of production. ''As we understand it,'' petitioners submit, Columbus's revaluation adjustments are applied to its finished goods inventory and its cost of goods sold (COGS), but not to its COP. The COP, petitioners aver, is ''unaffected by this revaluation process.'' Petitioners' Rebuttal Brief at 7. Therefore, petitioners conclude, Columbus's revaluation adjustments must be excluded from Columbus's reported COP.

Department's Position: We disagree with Columbus that the revaluation adjustment should be included in reported COP and CV. The Department's long-standing practice is to calculate COP and CV based on the COM of the subject merchandise produced during the POI, rather than on the COGS during the POI, because the COM represents the costs incurred in manufacturing the product during the relevant period. The Department does not use the COGS because it includes the value of merchandise held in inventory at the beginning of the period and excludes the value of merchandise produced but not sold during the period. The value of the merchandise sold from beginning inventory reflects the COM of the previous period. Additionally, COGS may include inventory values that have been adjusted (e.g., through inventory write-down) to the lower of cost or market value and, therefore, do not reflect the actual production costs. This methodology is supported by section 773(b)(2)(D) of the Tariff Act, which states that the recovery of costs is provided for ''(i)f prices which are below the per unit cost of production at the time of sale are above the weighted average per unit cost of production *for the period of investigation or review.*'' (emphasis added). Sections 773(b)(2)(D) and 773(e)(1) of the Tariff Act state that the cost of the products shall be determined ''during a period which would ordinarily permit the production of the merchandise in the ordinary course of business.'' In the instant case using the COM during the POI covers the period needed to produce the subject merchandise just prior to export and excludes the changes in inventory. See Notice of Final Determination of Sales at less Than Fair Value: Certain Preserved Mushrooms from Indonesia, 63 FR 72268, 72273 (December 31, 1998).

We have used the reported COM incurred during the POI to calculate COP and CV because it was never revalued to current prices, and therefore does not need to be adjusted back to the original cost. The revaluation adjustment proposed by Columbus does not affect the reported COPs and CVs which are based on COM because, as Columbus notes, the revaluation adjustment is recorded as part of the COGS, not the COM. Therefore, we have not considered the revaluation adjustment in calculating COP and CV.

Comment 13: Inclusion of Depreciation Expenses in Cost of Production. Petitioners aver that Columbus's reported costs of manufacture must be adjusted to account for certain depreciation expenses excluded from the original COP data.[7] Petitioners note Columbus's suggestion at the cost verification that this amount be added to G&A expenses; however, petitioners argue, ''depreciation expense is one component of COM,'' which in turn serves as the basis for calculating G&A

[7] Petitioners bracketed the word ''depreciation'' as business proprietary information subject to protection from disclosure under administrative protective order. However, Columbus in its Rebuttal Brief publicly disclosed the specific nature of the expenses; therefore, we are free to discuss the expense in this public forum. See Columbus's Rebuttal Brief at 20.

and interest expenses. Petitioners' Case Brief at 19 (original bracketing omitted). If the calculation of COM is flawed, petitioners note, any subsequent calculations based on that number will suffer the same defect. Petitioners recommend that the Department correct the error by including the omitted depreciation in Columbus's COM, thereby increasing the total costs.

Columbus acknowledges that it inadvertently excluded depreciation from its reported COP. Columbus attributed the oversight to a misunderstanding between Columbus officials as to the proper classification of the expense. Accordingly, Columbus points out, it presented its correction of this error at the start of the Department's cost verification. As to its suggestion that depreciation be included in the pool of G&A expenses, Columbus insists it offered this proposal ''for simplicity's sake;'' Columbus has no objection to including depreciation in COM as long as G&A and other adjustments to COP are calculated using the corrected COM. Columbus's Rebuttal Brief at 21.

Department's Position: We agree with petitioners and Columbus and have included Columbus's depreciation expenses in its COP and CV. See Comment 14, immediately below.

Comment 14: Inclusion of Additional Depreciation Expenses. Petitioners insist that Columbus's COP and CV data must also include additional depreciation expenses omitted by Columbus.[8] Petitioners insist that these expenses, attributable to a new production facility, are properly included in COP, arguing that Columbus's internal accounting system so treats these costs. Therefore, in accordance with Columbus's own accounting policies, the depreciation expenses at issue must be factored into the calculation of Columbus's COP.

Columbus notes that the Department's Cost Verification Report implies that the Department will add this depreciation to COP, and argues that it would be incorrect to include expenses not recognized by either Columbus's audited financial statements or South African GAAP. Citing section 773(f)(1)(a) of the Tariff Act, Columbus notes that COP will normally be calculated using the records kept by the exporter or producer if the records are kept in accordance with local GAAP and ''reasonably reflect the costs associated with the production and sale of the merchandise.'' Further, the Department

> shall consider all available evidence on the proper allocation of costs * * * if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

Columbus's Case Brief at 13, quoting section 773 of the Tariff Act.

Columbus avers that its cost accounting system, in full accordance with South African GAAP, does not consider the depreciation at issue a cost of production, but instead allocates the depreciation of assets over their average useful life. Accordingly, Columbus notes, it did not take the full charge for depreciation during its build-up to full design production capacity, but instead has spread its depreciation over the span of the useful life of the facility. Further, Columbus has historically treated these expenses in precisely this fashion. Consistent with the Department's determinations in Certain Preserved Mushrooms From Chile (63 FR 56613, 56620, October 22, 1998) and Static Random Access Memory Semiconductors From the Republic of Korea, (63 FR 8934, February 23, 1998), Columbus suggests, the Department must not adjust for these depreciation expenses.

In its rebuttal Columbus suggests that petitioners ''completely misconstrue Columbus's financial statements'' in arguing that Columbus's internal accounting policies support petitioners' proposed treatment of these expenses. Columbus's Rebuttal Brief at 21. Columbus accuses petitioners of quoting from the incorrect and irrelevant passage from Columbus's accounting policies and asserts that the depreciation expenses at issue are not properly considered part of Columbus's COP.

Petitioners reject Columbus's contention that its accounting for these expenses is either in accordance with South African GAAP or ''reasonably reflect[s] the cost of producing the subject merchandise,'' citing Final Determination of Sales at Less Than Fair Value: Steel Wire Rod From Canada, 63 FR 9182, 9187 (February 24, 1998), and Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From South Africa, 60 FR 22520, 22526 (May 8, 1995). Petitioners note that Columbus stated in its section A questionnaire response that it employs a straight-line method for depreciating assets. This, petitioners assert, is consistent with South African GAAP, which provides for the depreciation of plant and equipment ''on a systematic basis over its useful life.'' Petitioners' Rebuttal Brief at 8, quoting South African GAAP, AC 123.44 (December 1994). The problem, petitioners maintain, is that South African GAAP defines ''useful life'' as either a specified period of time or the number of production units expected to be obtained. ''Thus, the useful life can either be a period of time or a number of production or similar units, not a hybrid of the two.'' Id. at 9. Further, petitioners insist, under South African GAAP ''straight-line depreciation results in a constant charge over the useful life of the asset.'' Id., quoting South African GAAP at AC 123.51 (petitioners' emphasis omitted). Petitioners suggest that U.S. GAAP further stipulates that straight-line depreciation ''is a function of the passage of time and * * * is not affected by asset productivity, efficiency, or degree of use.'' Id., quoting Seidler, Lee J., and D.R. Carmichael, Accountant's Handbook, (New York, Ronald Press, 1981) (petitioners' emphasis omitted).

Petitioners conclude that Columbus's chosen method of accounting for its depreciation expenses significantly understates Columbus's COM. This ''distortive'' methodology, petitioners aver, should be rejected by including the additional depreciation in Columbus's costs.

Department's Position: We agree with petitioners that these depreciation amounts should be included in Columbus's cost of producing merchandise during the POI. In accordance with section 773(f)(1)(A) of the Tariff Act, the Department normally relies on data from a respondent's books and records if those records are prepared in accordance with the home country's GAAP, and where they reasonably reflect the costs of producing the merchandise. Typically, GAAP provides both respondents and the Department with a reasonably objective and predictable basis by which to compute costs for the merchandise under investigation. However, in those instances where the Department finds that a company's normal accounting practices result in a mis-allocation of production costs, the Department will adjust the respondent's costs or use alternative calculation methodologies that more accurately capture the actual costs incurred to produce the merchandise. See, e.g., New Minivans from Japan: Final Determination of Sales at Less Than Fair Value, 57 FR 21937, 21952 (May 26, 1992) (adjusting a respondent's U.S. further manufacturing costs because the company's normal accounting methodology did not result in an accurate measure of production costs).

[8] The precise nature of these expenses involves discussion of business proprietary information. See Cost Calculation Memorandum (Final).

In the instant case we have determined that the exclusion of this depreciation expense would result in an understatement of the actual costs of producing the subject merchandise. We have therefore included this item in Columbus's COP. Further discussion of the precise nature of these depreciation expenses necessitates reference to business proprietary information. For a full discussion of this depreciation adjustment see the Department's Cost Calculation Memorandum (Final).

Comment 15: Columbus's Costs for Ferrochrome. Both petitioners and Columbus make affirmative arguments on Columbus's reported costs for input ferrochrome used in producing stainless steel. Petitioners, noting that Columbus purchases ferrochrome from an affiliated party, submit that Columbus should have reported the supplier's cost of production for ferrochrome and the supplier's prices for ferrochrome sold to unaffiliated customers. Despite the Department's specific requests (and petitioners' comments on this specific issue), petitioners maintain that Columbus failed to provide this information, relying instead upon the transfer prices between the affiliated supplier and Columbus to value its ferrochrome inputs. Petitioners argue that, consistent with the findings of the Department's cost verification, the Department must disregard the transfer prices between Columbus and its affiliated supplier and instead use market prices as quoted in the Metal Bulletin to value ferrochrome.

Conversely, Columbus argues that the Department should rely upon the ferrochrome prices it reported in its COP response. Columbus maintains that the reason it did not submit the cost and price data of its affiliated supplier is because it does not have access to the affiliated supplier's cost data, not due to any lack of willingness or diligence on its part. In any event, Columbus asserts, verification demonstrated that the prices Columbus paid the affiliate for ferrochrome were at arm's length, as required by the terms of the joint venture agreement. Columbus insists that the international benchmark price data it provided at verification further attest to the reasonableness of its reported ferrochrome costs. While claiming that Columbus has no access to its affiliated supplier's cost data, Columbus avers that it is clear that the supplier is a profitable concern. The supplier's financial statements, reviewed at the cost verification, reveal that ferrochrome production is a major business activity for the supplier and that Columbus was one of the supplier's largest purchasers of ferrochrome. According to Columbus, the supplier "is a profitable, successful supplier of ferrochrome, and it could not be so if it were selling ferrochrome below its cost of production." Columbus's Case Brief at 17. Further, Columbus charges, the suggestion that the supplier would sell ferrochrome at below-cost prices to an affiliate in which it has only a one-third share is "contrary to all evidence and to logic," as any such below-cost sales would redound to the benefit primarily of the other shareholders, and not to the supplier. Columbus closes by asserting that there is no evidence that the ferrochrome prices are not at arm's length or that these prices are below the supplier's cost of production. Therefore, Columbus insists, there are no grounds for disregarding the affiliated supplier's prices in valuing this input.

In rebuttal petitioners suggest Columbus's direct presentation "makes no new arguments, only repeat[ing] the ones the Department has rejected in the past." Petitioner's Rebuttal Brief at 10. In fact, petitioners continue, Columbus admits in its case brief that the so-called arm's-length prices it pays are then adjusted for certain expenses. Id. at 11 and n.38. "These adjustments," petitioners aver, "are exactly the kinds of things the Department wants and needs to scrutinize but could not because Columbus has not provided the necessary information." Further, in petitioners' view Columbus failed to demonstrate that it had no access to its affiliated supplier's cost data, and "totally disregarded petitioners' suggestion" that the affiliated supplier provide its cost data directly to the Department (thus bypassing its customer Columbus and protecting these data from disclosure). Petitioners also reject Columbus's argument that it would be neither reasonable nor logical for its affiliated supplier to provide Columbus ferrochrome at less than its cost of production. Rather, petitioners insist, "these intertwining relationships are exactly the reason the Department has requested the information" on the affiliate's cost and pricing to unaffiliated customers. Id. at 12 (original emphasis). Petitioners point to Columbus's "nebulous" price adjustments, inconsistent statements, and lack of documentation as bases for disregarding Columbus's acquisition prices for ferrochrome. As petitioners frame it, "Columbus has said, in effect, 'trust us.'" Id. The Department cannot do so, petitioners argue, and must therefore base ferrochrome costs on published market prices.

Columbus, in turn, claims it provided "everything it could" to support its contention that its ferrochrome costs reflected arm's-length and above-cost prices. The sole reason Columbus failed to provide the affiliated supplier's cost of production, Columbus avers, is that it simply did not have access to the information. Thus, Columbus insists, Columbus did not "choose not to, but could not supply" the requested data. Columbus's Rebuttal Brief at 23 (original emphasis). Columbus characterizes petitioners' comparison of its ferrochrome costs to international prices as spurious, accusing petitioners of comparing Columbus's ex-works price per metric ton of ferrochrome to the published delivered price per pound of chrome (ferrochrome is 52 percent chrome). If one converts Columbus's price appropriately and adjusts for commissions, international freight and delivery expenses, Columbus suggests, one arrives at a price "entirely in line with international prices." Id. Columbus reiterates that there is no evidentiary basis for the Department to believe or suspect that the affiliated supplier's prices for ferrochrome are below either its cost of production or arm's-length prices. The Department, therefore, must use Columbus's reported ferrochrome prices in calculating COP.

Department's Position: We agree with petitioners that, in accordance with section 776 of the Tariff Act, we should use the facts available to determine Columbus's ferrochrome costs. Sections 773(f)(2) and (3) of the Tariff Act specify the treatment of transactions between affiliated parties for purposes of reporting cost data (used in determining both COP and CV) to the Department. Section 773(f)(2) states that the Department may disregard such transactions if the amount representing that element (the transfer price) does not fairly reflect the amount usually reflected (typically the market price) in the market under consideration. Under these circumstances the Department may rely on the market price to value inputs purchased from affiliated parties.

Section 773(f)(3) states that if transactions between affiliated parties involve a major input, then the Department may value the major input based on its COP if the cost is greater than the amount that would be determined under 773(f)(2) (i.e., the higher of the transfer or market price). Additionally, section 773(f)(3) applies if the Department "has reasonable grounds to believe or suspect that an amount represented as the value of such input is less than the COP of such input," the Department may disregard that price. See also, 19 CFR 351.407(b) (the Department will determine the value of a major input purchased from an affiliate based upon the higher of

transfer price, market price, or the affiliate's cost of producing the input). The Department generally finds that such ''reasonable grounds'' exist where it has initiated a COP investigation of the subject merchandise (see, e.g., Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Germany: Final Results of Antidumping Duty Administrative Review, 63 FR 13217, 13218 (March 18, 1998), and Silicomanganese from Brazil; Final Results of Antidumping Duty Administrative Review, 62 FR 37869, 37871 (July 15, 1997).

Because petitioners timely filed an allegation of sales below cost providing ''reasonable grounds to believe or suspect'' that Columbus made sales of the foreign like product in South Africa at prices below its COP, on August 24, 1998, we directed Columbus to respond to section D of our original antidumping questionnaire. See Letter from Richard Weible to Columbus, August 24, 1998. That questionnaire explicitly instructed Columbus to report the unit COP incurred to produce the major inputs obtained from affiliated suppliers. Our October 7 and October 23, 1998, supplemental questionnaires reiterated this instruction specifically for the affiliated purchases of ferrochrome (see questions 13 and 8, respectively). Columbus asserted that it did not have access to the affiliate's COP of ferrochrome and argued that it was sufficient that the affiliated party transactions were at arm's length. However, Columbus failed to provide evidence that the prices it paid the affiliate for ferrochrome were at arm's length. Moreover, Columbus's argument that its purchases of ferrochrome from its affiliate were at arms's length prices does not satisfy the requirement that the transfer price be above the affiliated supplier's actual COP.

In the absence of COP for the major input ferrochrome, the Department was unable to perform an analysis to determine whether the transfer prices were at or above the affiliated supplier's COP. Section 776(a) of the Act requires that the Department use the facts otherwise available when necessary information is not on the record or an interested party withholds requested information, fails to provide such information in a timely manner, significantly impedes a proceeding, or provides information that cannot be verified.

Due to Columbus's failure to provide the affiliated party's ferrochrome COP we cannot determine whether the reported transfer prices are at or above COP. As a result we find that we must rely upon the facts otherwise available for the cost of ferrochrome purchased from the affiliate. In this case Columbus did not provide any evidence indicating that it even attempted to obtain the affiliate's COP data, or otherwise supporting its claim that it could not obtain the requested data. Therefore, we determine that Columbus failed to act to the best of its ability to comply with these requests for information; accordingly we are making an adverse inference in selecting among the facts otherwise available, as provided in section 776(b) of the Tariff Act.

Columbus's ferrochrome transfer price is below the international market price as published in the Metals Bulletin submitted by Columbus for the record of this investigation. We have therefore increased Columbus's prices for ferrochrome by adding the difference between Columbus's transfer price plus estimated freight and the market price (delivered, customer's works, major European destination) as published in the Metals Bulletin. We have not included the other adjustments proposed by Columbus (e.g., commissions) since it is not clear from the record to what extent these other items are included in the Metals Bulletin price. Finally, we note that, contrary to Columbus's assertion, a net profit reflected in the affiliated supplier's financial statements does not provide evidence that its transfer prices were above COP, since such aggregated revenue and cost-of-sales data would include all products sold by the affiliated supplier to all customers.

Comment 16: Allocation of Variances. Petitioners accuse Columbus of failing to allocate properly two specific variances by including these variances in its reported COP. ''Since the amount should be included in Columbus's costs, and since the amount is known, the Department should adjust Columbus's COM by adding the (specific) variance(s) to it.'' Petitioners' Case Brief at 22 and 23.

Columbus agrees that it inadvertently omitted one variance and slightly understated another when preparing its COP response, and that both variances should be accounted for in correcting Columbus's COP. Columbus's Rebuttal Brief at 24.

Department's Position: We agree with Columbus and petitioner that these variances should be applied to the reported COM. Therefore, we have included both variances in the COM for this final determination.

Comment 17: Allocation of Costs Based on Product Characteristics. According to petitioners, Columbus failed to account for differing physical characteristics of its products in allocating its costs of production. Petitioners maintain that factors such as the processing steps (e.g., the number of passes through a given rolling mill) and processing times [9] will vary for different stainless steel products with these differences reflected in the costs of manufacture. Petitioners suggest that the Department can recalculate Columbus' COP by backing out certain costs associated with the different production cost centers (roughing mill, Steckel mill, annealing and pickling) and allocating them back on the basis of product specifications. For example, roughing and Steckel mill costs could be allocated on the basis of production quantities and either the number of passes, processing time, or both. It would be clearly wrong, petitioners insist, for merchandise with different specifications to have the same COP; the Department, therefore, must recalculate Columbus' COM to account for these differences.

Columbus argues that any significant cost differences attributable to physical differences have been captured by its normal cost accounting system. As for differences which are not captured, Columbus insists these differences are both insignificant and unquantifiable. Columbus' Rebuttal Brief at 25. For example, the number of passes required at the Steckel mill depends on such factors as the temperature and condition of the steel, and not just the final physical characteristics as the product passes to the next work station. Thus, Columbus submits, ''[t]here is no straight correlation'' between the product's physical characteristics and the processing time required at each station. Columbus maintains that it quite properly did not report cost differences which could not be substantiated through empirical observation or through Columbus' normal cost accounting system. Id. at 26.

Department's Position: We agree with petitioners that differences in the cost of producing the subject merchandise due to differences in physical characteristics should be accounted for in the reported COP and CV. While we have determined in this case that the cost differences due to certain physical characteristics are either insignificant or are adequately taken into account by Columbus' reporting methodology, we have adjusted the reported costs for certain other physical characteristics. A full

[9] Petitioners bracketed this information in keeping with the draft copy of the Cost Verification Report they had at the time they prepared their case and rebuttal briefs. Columbus, however, discusses this issue publicly. See, e.g., Columbus' Rebuttal Brief at 25.

discussion of this issue necessarily involves a discussion of business proprietary information; see the Cost Calculation Memorandum (Final).

Comment 18: COP Allocated on the Basis of Sales Volumes Rather than Production Volumes. Petitioners note that Columbus reported its weighted-average costs based on sales quantities rather than production quantities, as requested by the Department. Since the Department has data on Columbus' production quantities, petitioners insist, the Department should recalculate Columbus' weighted-average COP on that basis.

Columbus counters that its records kept in the normal course of business track costs based on tons sold, not tons produced. Further, Columbus avers, the Department is investigating sales during the POI, not production during the POI. To avoid distorting Columbus' costs, Columbus argues, the Department should calculate COP on the same basis as does Columbus in its ordinary course of business. Columbus' Rebuttal Brief at 26.

Department's Position: We agree with petitioners that costs should be weight-averaged using production quantities. As noted in Comment 12, above, it is the Department's long-standing practice to calculate COP and CV based on the cost of manufacturing the subject merchandise produced during the POI, rather than on a COGS figure and its associated sales quantity, which includes inventory changes during the POI. Moreover, since the costs the Department is relying upon only include the costs for products produced during the POI, the corresponding production quantities must also serve as the appropriate base for allocation. Therefore, we have used the quantities produced during the POI (i.e., the quantities corresponding to the submitted COM) rather than quantities sold to calculate weighted-average COP and CVs.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Tariff 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 November 4, 1998, the date of publication of the Preliminary Determination in the **Federal Register**.

Article VI.5 of the General Agreement on Tariffs and Trade (GATT 1994) provides that ''[n]o product . . . shall be subject to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization.'' This provision is implemented in section 772(c)(1)(C) of the Tariff Act. Since antidumping duties cannot be assessed on the portion of the margin attributed to export subsidies there is no reason to require a cash deposit or bond for that amount. The Department has determined in its Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils From South Africa that the product under investigation benefitted from export subsidies. Normally, where the product under investigation is also subject to a concurrent countervailing duty investigation, we instruct the Customs Service to require a cash deposit or posting of a bond equal to the weighted-average amount by which the NV exceeds the EP, as indicated below, minus the amount determined to constitute an export subsidy. See, e.g. Notice of Antidumping Duty Order: Stainless Steel Wire Rod From Italy, 63 FR 49327 (September 15, 1998). Accordingly, for cash deposit purposes we are subtracting from Columbus' cash deposit rate that portion of the rate attributable to the export subsidies found in the countervailing duty investigation involving Columbus (i.e., 3.84 percent). We have made the same adjustment to the ''All Others'' cash deposit rate by subtracting the rate attributable to export subsidies found in the countervailing duty investigation of Columbus.

We will instruct the Customs Service to require a cash deposit or the posting of a bond for each entry equal to the weighted-average amount by which the NV exceeds the EP, adjusted for the export subsidy rate, as indicated below. These suspension-of-liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-Average Margin	Bonding/Cash Deposit Rate (percent)
Columbus Stainless	41.63%	37.79
All Others	41.63%	37.79

International Trade Commission Notification

In accordance with section 735(d) of the Tariff Act, we have notified the International Trade Commission (the Commission) of our determination. As our final determination is affirmative, the Commission will determine within 45 days after our final determination whether imports of stainless steel plate in coils are materially injuring, or threaten material injury to, the U.S. industry. If the Commission determines that material injury, or threat thereof, does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the Commission determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Tariff Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7536 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–423–808]

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Belgium

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Abdelali Elouaradia or Steve Bezirganian, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202)

482–2243 or (202) 482–0162, 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 (''Department'') regulations are to the regulations at 19 CFR part 351, 62 FR 27296 (May 19, 1997).

Final Determination

We determine that stainless steel plate in coils (''SSPC'') from Belgium is being sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Act. The estimated margins are shown in the ''Continuation of Suspension of Liquidation'' section of this notice.

Case History

Since the preliminary determination (*Notice of Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Belgium*, 63 FR 59532, November 4, 1998) (''*Preliminary Determination*''), the following events have occurred:

During November 1998, ALZ submitted responses to the sales and cost supplemental questionnaires issued by the Department. On November 20, 1998, petitioners submitted comments regarding the issue of date of sale and the Department's Belgium sales verification. On November 23, 1998, ALZ submitted corrections presumably discovered while preparing for the sales verification in Belgium. On November 30, 1998, ALZ submitted pre-verification changes and new factual information to supplement its cost of production (''COP'') and constructed value (''CV'') information. On December 3, 1998, petitioners submitted comments on ALZ's November 23, 1998, revised section B and C submission, and on ALZ's November 23 and 30, 1998 supplemental section D questionnaire responses. On January 6, 1999, ALZ submitted certain ''corrections'' to the U.S. sales database discovered while preparing for the U.S. sales verification of its U.S. sales affiliate, TrefilARBED, Inc. (''TrefilARBED''). On January 11, 1999, petitioners submitted comments regarding the Department's U.S. sales verification of TrefilARBED. Finally, on January 21, 1999, ALZ submitted new computer U.S. sales listings, which included data changes identified at the outset of the U.S. sales verification.

During December 1998 and January 1999, we conducted sales and cost verifications of ALZ's responses to the antidumping questionnaire. On January 13, 1999, we issued our cost verification report (see Memorandum to Neal Halper, Acting Director, Office of Accounting: Verification of Cost of Production and Constructed Value Data—ALZ, N.V.) (''*ALZ Cost Verification Report*''). On January 27, 1999, we issued our sales verifications reports (*see Memorandum to the File: Verification of ALZ, N.V.*) (''*ALZ Sales Verification Report*'') and Memorandum to the File: U.S. Sales Verification Report (*TrefilARBED/ALZ*) (''*TrefilARBED Sales Verification Report*'').

Petitioners and ALZ submitted case briefs on February 8, 1999, and rebuttal briefs on February 16, 1999. On February 12, 1999, petitioners withdrew their request for a public hearing.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this petition are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are 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 January 1, 1997, through December 31, 1997.

Product Comparisons

In accordance with section 771(16) of the Act, we considered all products produced by the respondent, covered by the description in the ''Scope of Investigation'' section, above, and sold in the home market during the POI, to be foreign like products for purposes of determining appropriate product comparisons to U.S. sales. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we compared U.S. sales to the next most similar foreign like product on the basis of the characteristics listed in the Department's May 27, 1998 antidumping duty questionnaire and reporting instructions (''*Original Questionnaire*'').

Fair Value Comparisons

To determine whether sales of SSPC from Belgium to the United States were made at LTFV, we compared constructed export price (''CEP'') to the Normal Value (''NV''), as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice, below. In accordance with section 777A(d)(1)(A)(i) of the Act, we calculated weighted-average CEPs for comparison to weighted-average NVs .

Level of Trade

In accordance with section 773(a)(1)(B)(i) 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 CEP transaction. The NV LOT is that of the starting price sales in the comparison market or, when NV is based on CV, that of the sales from which we derive selling, general and administrative expenses (''SG&A'') and profit. 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 CEP sales, 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 a

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 differences in the levels between NV and CEP sales affect 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 applied the aforementioned criteria in our preliminary results, and indicated that the information on the record does not reveal meaningful differences between selling functions performed in the U.S. and Belgian markets (*Preliminary Determination* at 59533–34). As we further explain this issue in response to Comment 2, below, we continue to find that there is no basis for determining different levels of trade in the two markets and, therefore, we have continued to treat all of ALZ's home market and U.S. sales at a single level of trade. Accordingly, we have not made a LOT adjustment or CEP offset in this final determination.

Constructed Export Price

We calculated CEP in accordance with section 772(b) of the Act because sales to the first unaffiliated purchaser took place after importation into the United States.

We calculated CEP based on the same methodology used in the preliminary determination, except as noted below in ''Comments'' and in the Final Sales Analysis Memorandum from Abdelali Elouaradia to Steven Presing, dated March 19, 1999 (''*Final Sales Analysis Memorandum*'').

Normal Value

After testing home market viability and whether home market sales were at below-cost prices, we calculated NV as noted in the ''Price-to-Price Comparisons'' and ''Price-to-CV Comparisons'' sections of this notice, below.

1. Home Market Viability

As discussed in the preliminary determination, we determined that the home market was viable. *See Preliminary Determination* at 59532. The parties did not contest the viability of the home market. Consequently, for the final determination, we have based NV on home market sales.

2. Cost of Production

In accordance with section 773(b)(3) of the Act, we calculated the weighted-average COP, by grade, based on the sum of ALZ's cost of materials, fabrication, general expenses, and packing costs. We relied on ALZ's submitted COPs, except in the following specific instances where the submitted costs were not appropriately quantified or valued.

(a) As facts available (''FA'') for ALZ's undisclosed purchases of scrap and alloys from affiliated suppliers, we applied the highest cost reported for these materials within each grade, to the control numbers (''CONNUMs'') which represent that particular grade. We address this issue further in our response to comment 13 in the ''Interested Party Comments'' section of the notice.

(b) We revised ALZ's general and administrative (''G&A'') expenses to exclude an offset for net exchange gains. We also included exchange gains and losses related to purchases and accounts payable, consistent with our general practice in the calculation of G&A expenses. *See* Memorandum from Taija Slaughter to Neal Halper: Final Cost Analysis, dated March 19, 1999 (''*Final Cost Analysis Memorandum*'').

(c) We revised ALZ's financial expense ratio using the parent company's consolidated financial statements. *See Final Cost Analysis Memorandum* at 1.

We conducted our sales below cost test in the same manner as that described in our *Preliminary Determination* at 59534. As with the preliminary determination, we found that for certain models of SSPC, more than 20 percent of ALZ's home market sales were at prices less than the COP within an extended period of time. *See* section 773(b)(1)(A) of the Act. Further, the prices did not provide for the recovery of costs within a reasonable period of time. We therefore disregarded the below-cost sales and used the remaining above cost sales as the basis for determining NV, in accordance with section 773(b) (1) of the Act.

3. Calculation of Constructed Value

In accordance with section 773(e) of the Act, we calculated CV based on the sum of ALZ's cost of materials, fabrication, SG&A expenses, profit, and U.S. packing costs. We relied on the submitted CVs, except for the specific instances noted in the ''Cost of Production'' section, above.

Price-to-Price Comparisons

For those product comparisons for which there were sales at prices above the COP, we based NV on prices to home market customers, none of which we found to be affiliated with ALZ. We made adjustments, where appropriate, for physical differences in the merchandise in accordance with section 773(a)(6)(C)(ii) of the Act. We made deductions for billing adjustments (*i.e.,* adjustment for transportation, when customer picks up the merchandise, invoice correction, and alloy surcharge), early payment discounts, inland freight, and inland insurance. In addition, we made circumstance-of-sale adjustments for credit, where appropriate. In accordance with section 773(a)(6), we deducted home market packing costs and added U.S. packing costs.

Price-to-CV Comparisons

For price-to-CV comparisons, we made adjustments to CV in accordance with section 773(a)(8) of the Act. We deducted from CV the amount of indirect selling expenses capped by the amount of the U.S. commissions.

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 773A of the Act.

Verification

As provided in section 782(i) of the Act, we verified the information submitted by the respondent for use in our final determination. We used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by ALZ.

Interested Party Comments

Comment 1: Date of Sale. Citing *Certain Welded Carbon Steel Pipes and Tubes from Thailand: Final Results of Administrative Review,* 63 FR 55578, 55587 (October 16, 1998) (''*Pipes and Tubes from Thailand*''), petitioners argue that the Department considers date of sale to be a factual issue, decided on a case-by-case basis. According to petitioners, the Department utilizes invoice date as date of sale only if the material terms of sale, i.e., price and quantity, are not established on a different date. Petitioners note that in *Circular Welded Non-Alloy Steel Pipe From the Republic of Korea,* 63 FR 32833, 32836 (June 16, 1998) (''*Steel Pipe from Korea*''), the Department found that the use of a date other than invoice date as date of sale is appropriate due to prior setting of terms of sale, even if that may involve basing date of sale differently in different markets, where the sales processes are quite different.

Petitioners note that, in ALZ's February 8, 1999, brief at 2, ALZ acknowledged that the invoice date is the correct date of sale for U.S. sales unless a different date *better* reflects the sale. Petitioners point out that ALZ's references to the Department's *TrefilARBED Sales Verification Report,* as evidence that terms of sale frequently change subsequent to the submission of the purchase order, are actually references to statements made by the respondent at verification and recorded in the report, rather than conclusions made by the verifiers.

Petitioners point to *ALZ Sales Verification Report* at 6, referring to ALZ's comment made during verification, as confirmation of the overriding significance of order date in the context of date of sale: (1) ALZ production is always order driven; (2) customers' order information is closely reviewed by the sales and production planning departments before production and order confirmation; and (3) order confirmation is always sent to the customer. Petitioners reject, as unverified and contrary to industry practice, TrefilARBED's assertion that, in some instances, rather than submitting a purchase order, U.S. customers might have entered into a verbal agreement with respect to terms of sale with TrefilARBED. Petitioners also note that the respondent failed to provide purchase order numbers for most of the sales in the U.S. sales database, despite the Department's request for that information. Furthermore, petitioners state that *TrefilARBED Sales Verification Report,* at 11, indicates that ALZ made efforts to limit the fluctuation of prices for the U.S. market.

Petitioners next indicate that a long time lag exists between order and invoice date across all U.S. sales, and that this time lag is considerably greater, on average, for U.S. sales than for home market sales. Petitioners note that, for U.S. further-manufactured sales, an even longer time elapses between order date and invoice date because of the additional processing involved; thus, the use of invoice date as date of sale for such transactions would be especially distortive.

Petitioners point to the absence of changes in price and quantity between the final order date (whether it be the original one or the final change order), and assert, citing *Final Determinations of Sales at Less Than Fair Value: Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Belgium,* 58 FR 37083, 37090 (July 9, 1993), that the Department considers invoice date to be inappropriate as date of sale if the order confirmation date, or in some instances, the change order date, was the time during which the terms of sale were set. Petitioners state that the sales trace documentation provided by ALZ was incomplete and insufficient. Moreover, when a specific sale record only shows the final ALZ/TrefilARBED invoice, the petitioners assert that the Department must assume that the material terms of sale remained the same from order to invoice. Petitioners note that TrefilARBED acknowledged that multiple invoices are routinely used to fill orders, which explains why ordered and invoiced quantities may vary. Petitioners also note that ALZ's mill test certificates indicate quantities, so quantities shipped would clearly be known prior to actual shipment.

Petitioners further argue that the record does not demonstrate that there was a change in material terms between order date and invoice date for a number of verified U.S. sales. Regarding several other U.S. sales, mentioned by ALZ in its brief as examples of changes between order and invoicing, petitioners argue that, for U.S. sale observations #734 and #735, the changes in quantity and price occurred soon after the original order, but long before the final invoicing. For U.S. sale observations #532 and #537, the change in quantity is handwritten on the order itself, which is dated several months before the invoice. Finally, petitioners note that the change in unit price from the purchase order to the invoice for U.S. sale #329 did not reflect a change in a material term but, rather, as noted in *TrefilARBED Sales Verification Report* at 37, TrefilARBED happened to record in its gross unit price a change in delivery terms that occurred subsequent to the purchase order. Petitioners indicate that such a change would normally have been recorded as a billing adjustment and, as such, it should not be considered a change in the material terms (*i.e.,* in price and quantity) of this sale. Petitioners conclude that all of the U.S. sales cited by ALZ in support of invoice date as date of sale actually support use of order date/change order date as the proper date of sale.

Petitioners argue that the information in the record does not demonstrate that, for various verified home market sales, any changes to the terms of sale have actually occurred between order date and invoice date. Rather, in those instances, the time lag between order and invoice date is very short, often only a few days. Regarding several other home market sales, mentioned by ALZ in its brief as examples of changes between order and invoicing, petitioners argue that for home market sale observations #77 and #78, although nominal changes were observed in the manner of calculating the alloy surcharge, the final alloy surcharge was consistent with that anticipated by the original order. Also, for home market sale #77 and #78, petitioners argue that the addition of specifications to which the product should be made, up through the day of invoicing, constitutes a change in ALZ's grade and clarifies the unusually long lag period between original order date and invoice date for the above-referenced home market sale observations, even if these changes do not change the classification of the product for Department purposes. Likewise, for home market sale observation #225, petitioners argue that the change in the number of standards to which the product should be made constitutes a change in the product itself, which explains the long lag between original order date and invoice date. For home market sale observation #232, petitioners note that the alloy surcharge was changed the day of invoicing, so that the invoice serves as the change of order and explains the lag of a few months between the order date and the invoice date.

Petitioners also discuss possible changes from the order date that are not mentioned by the respondent. Petitioners note that home market sale observation #50 appears to reflect a change in product dimension from the original order to the invoiced product which, while not referenced in the report and not significant enough to change the CONNUM for the sale, would constitute an actual change in terms, which helps explain the long time lag between the original order date and the invoice date. Petitioners add that home market sale observations #227 and #228 appear to be sales destined for export through trading companies, with ALZ's knowledge. Therefore, these sales are irrelevant in the context of home market date of sale because they are properly categorized as export sales. According to petitioners, this confusion demonstrates the unreliability of the database and is grounds for use of adverse FA across the entire home market database. Petitioners note that ALZ's statement at verification that there are quantity tolerances for sales is in stark contrast with ALZ's repeated assertions, prior to verification, that there were no quantity tolerances. Petitioners also note that ALZ's characterization of BILLAD2U as a field containing adjustments related to customer claims. Petitioners also assert

that another reported billing adjustment, BILLAD1U, must relate to errors in invoicing, even though it was characterized by ALZ as freight revenue obtained from U.S. customers and that, contrary to ALZ's assertion that it reported this value as a negative number because it increases sales revenue, they in fact reported this value as a positive number in some instances. Moreover, petitioners characterize ALZ's claim at verification (see *ALZ Sales Verification Report* at 21) that it ''may even agree to renegotiate the {alloy} surcharge if it had agreed to ship and invoice the merchandise in one month, but ended up doing so in the following month,'' as an unproven assertion.

Petitioners conclude that ALZ failed to (1) provide order confirmation numbers for U.S. sales; (2) report the change order information when terms changed after the original order; (3) admit, until verification, that quantity tolerances were used; (4) provide the general terms of its U.S. and home market order confirmations (on the un-copied back of documents it copied for submission); (5) limit its home market sales database to exclude export sales; (6) provide correct home market order/invoicing time lags in various ways (such as false classification changes); (7) explain its change to home market billing adjustment BILLAD1U; and (8) fully translate documentation prepared for verification.

Citing the Department's regulations at 19 CFR 351.401(i) (1998), ALZ argues that the invoice date should be used as date of sale unless the Department is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale. ALZ notes that the preamble to the Department's final regulations explains that the reason for normally using invoice date as date of sale is to simplify the reporting and verification of information. ALZ further indicates that, as a matter of commercial reality, the date on which the terms of a sale are first agreed to is not necessarily the date on which those terms are finally established. ALZ also points out that, in *Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 63 FR 13170, 13194 (March 18, 1998), the Department confirmed its general practice of using the date of invoice as the date of sale unless there is a compelling reason to do otherwise. ALZ argues that such compelling reasons exist only for more complex sales processes (*e.g.,* sales involving long-term contracts, or sales of large, custom-made merchandise), rather than simple submissions of purchase orders and issuances of invoices, as in this investigation. ALZ notes that the *Original Questionnaire* indicated that the Department ''will normally use the date of invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business,'' as the date of sale. ALZ asserts that the invoice date ties easily to the financial records and thus simplifies verification. Moreover, ALZ claims that the record of this investigation shows that the invoice date is the only date that establishes the material terms of sale for ALZ's sales in Belgium and TrefilARBED's sales in the United States. ALZ argues that, in *Certain Corrosion-Resistant Carbon Steel Flat Products and Certain Cut-to-Length Carbon Steel Plate From Canada,* 64 FR 2173, 2178 (January 13, 1999), the Department used invoice date as date of sale, where the respondent demonstrated at verification that there were changes in quantity between the order date and the invoice date. ALZ further notes that petitioners incorrectly cite to *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Belgium,* 58 FR 37083 (July 9, 1993), to demonstrate that the Department found in previous cases that the terms of sale were established on the order confirmation or the change order date. This determination, ALZ notes, was made prior to the Department's change in regulations regarding date of sale, and, thus, is irrelevant to this case.

ALZ observes that the Department acknowledged in *ALZ Sales Verification Report,* at 24, that the company official made statements regarding changes in terms of sale involving quantity, base price, alloy surcharge price, delivery terms, or changes in grade. ALZ states that these changes were obvious in the sales traces selected by the Department: two sales observations with changes involving specification and alloy surcharge, one involving changes in specification, and one involving changes in delivery terms.

ALZ also notes that *TrefilARBED Sales Verification Report* at 15 notes that ''there are often changes in price'' and that ''it is not unusual for there to be changes in quantities from the original amount ordered, that fall outside of the tolerances of the original ordered quantity.'' ALZ asserts that the verification report alludes to two U.S. sales observations with distinct changes to ordered quantity and to ordered unit price (#734 & #735), two with changes only in quantity (#532 & #537), and one with a change in unit price (reflecting a change in delivery terms which TrefilARBED recorded in a revised unit price).

ALZ asserts that the record shows, and petitioners acknowledge, that the material terms of ALZ's Belgian sales and TrefilARBED's U.S. sales frequently change after the initial purchase order. ALZ argues that petitioners' attempts to establish the date of sale as the date of the final purchase order (*i.e.,* the initial one, if unchanged until invoice, or otherwise the final change order) are meaningless, as evidenced by U.S. sales observations #734 & #735. According to ALZ, although one change order for those sales resulted in new terms, they were not the final terms, because there was another change subsequent to that. ALZ asserts that, even though in this instance the final change order was approximately three months before the invoice date, the fact remains that the terms of sale could have changed at any time until the invoice date. ALZ states that the Department observed at the home market verification that an entire order may be cancelled while the shipment is on the ocean en route to the customer.

ALZ further argues that, in *Steel Pipe from Korea,* the Department determined, on the basis of verified information, that the material terms of sale in the U.S. were set on contract date and any subsequent changes were usually immaterial in nature (or, if material, they rarely occurred). According to ALZ, *Steel Pipe from Korea* differs from this case, where the Department verified that changes were of material nature and occurred on many U.S. sales.

ALZ also disagrees with petitioners' argument that purchase order date should be used as date of sale for U.S. sales simply because there was a longer time lags between the purchase order date and the invoice date, as compared to home market sales where this time lag was shorter. ALZ notes that, in *Steel Pipe from Korea,* the Department used the purchase order date because of a long time lag. However, ALZ notes that, in that case, the respondent's sales process in the home market was to sell out of inventory. ALZ's sales in the home market, on the other hand, are made to order and, therefore, according to ALZ, the gap between the purchase order date and invoice date was longer in *Steel Pipe from Korea* than the gap between order date and invoice date for ALZ's home market and U.S. sales. Furthermore, ALZ argues that petitioners' calculations of the average differences in time lags between purchase order and invoice dates between U.S. and home market sales are

flawed because they employ weight-averaging, which gives more weight to back-to-back sales than inventory sales, thereby producing a longer overall average difference.

ALZ also questions petitioners' claim that certain ALZ home market time lags are ''aberrationally long,'' and thus not representative, without considering certain U.S. sale time lags as similarly long. ALZ proposes to eliminate sales with aberrtionally long time lags from both the U.S. and home market sales data base, noting that the difference in average time lags for U.S. sales versus home market sales is reduced even further if sales with aberrationally long time lags are eliminated from the calculations.

Further, ALZ notes that *Steel Pipe from Korea* was an administrative review, in which the Department is more concerned with time lags than in investigations. In reviews, the Department makes weight-averaged comparisons on a monthly basis, but in an investigation it does so on an annual basis. According to ALZ, in *Steel Pipe from Korea,* at 32836, the Department explicitly noted the importance of monthly comparison in reviews, stating that ''{i}f we were to use invoice date as the date of sale for both markets, we would effectively be comparing home market sales in any given month to U.S. sales whose material terms were set months earlier.'' Citing *Pipes and Tubes from Thailand,* ALZ notes that, even in reviews, the Department has used invoice date as date of sale when respondents are able to demonstrate that changes to the material terms of sale occur between the order date and the invoice date. ALZ states that, in that case, as in this investigation, the respondent's U.S. sales were made to order, indicating a longer time lag between purchase order and invoice for U.S. sales than home market sales for the Thai respondent.

Finally, ALZ disagrees with petitioners' assertion that it systematically refused to provide the purchase order numbers for certain U.S. sale observations. ALZ alleges that the Department never asked ALZ and TrefilARBED to submit purchase order numbers for U.S. sales but; rather, the Department simply requested that the company add a field to the sales databases to report the purchase order date. ALZ states that it voluntarily submitted the purchase order numbers for home market sales, but was unable to do so for U.S. sales as a result of the tremendous burden placed on TrefilARBED to respond to the Department's October 8, 1998, request for additional information. ALZ asserts that the exclusion of the order number did not impede or hinder the Department's verification at TrefilARBED.

Department's Position: We agree with both petitioners and ALZ that invoice date is the correct date of sale for ALZ's home market sales. However, we disagree with petitioners that the appropriate date of sale for the U.S. market is order date.

Under our current practice, as codified in the Department's Final Regulations at § 351.401(i), in identifying the date of sale of the subject merchandise, the Department will normally use the date of invoice, as recorded in the producer's records kept in the ordinary course of business. *See Pipes and Tubes from Thailand* at 55587. However, in some instances, it may not be appropriate to rely on the date of invoice as the date of sale, where the evidence indicates that the material terms of sale were established on some date other than invoice date. See Preamble to the Department's final regulations at 19 CFR part 351, 62 FR 27296 (May 19, 1997). Thus, despite the general presumption that the invoice date constitutes the date of sale, the Department may determine that this is not an appropriate date of sale, where the evidence of the respondent's selling practice points to a different date on which the material terms of sale were set.

In this investigation, in response to the *Original Questionnaire,* ALZ reported invoice date as the date of sale. To ascertain whether ALZ accurately reported the date of sale, the Department included in its October 8, 1998 supplemental questionnaire, a request for additional information regarding changes in terms of sale subsequent to order date. In its October 23, 1998 response, ALZ indicated that there were numerous instances in which terms such as price, quantity, product specification, and/or alloy surcharges changed subsequent to the original orders in the U.S. and home markets. ALZ cited specific figures for each type of change. For purposes of our preliminary determination, we accepted the date of invoice as the date of sale subject to verification. *See Preliminary Determination* at 59535.

At verification, we carefully examined ALZ's selling practices, namely, the manner in which ALZ records the sales in its financial records by date of invoice. For the home market, we reviewed several sales observations for which the product specifications (*i.e.,* later requests that the steel meet additional standard specifications) changed subsequent to the original order (*see ALZ Sales Verification Report* at 22–23 and at Verification Exhibit 27), and one sale observation for which there was a change in price at the time of invoicing (*id.* at 33–34). For many of the other home market sales we reviewed, the time lag between the order date and the invoice was just a few days, and, consequently, for those transactions there is no substantive difference between those dates for analytical purposes.

For the U.S. market, we reviewed several instances in which terms of sale changed subsequent to the original order. For two sale observations, for example, there were two changes—one to quantity (outside the standard tolerance), and one to price—spanning a period of several weeks after the original order (*see TrefilARBED Sales Verification Report* at 34). For several other sale observations, we noted two distinct changes to quantity subsequent to the original order (*id.* at 37), while for other sale observations there was a single change to quantity (*id.* at 36). For two additional sale observations, there was a change in price incorporated in the invoice, although this simply reflected a late change in delivery terms (*id.* at 37). Based on ALZ's representations, and as a result of our examination of ALZ's selling records kept in the ordinary course of business, we are satisfied that the date of invoice should be used as the date of sale because it best reflects the date on which material terms of sale were established for ALZ's U.S. and home market sales.

Consequently, we disagree with the petitioners' claim that the order date (or the final change order date) is the most appropriate date of sale for ALZ's U.S. sales because the terms would not change after that date. The fact that terms were often changing subsequent to the original order, and even after an initial change order, suggests that terms may continue to change, in some instances as late as the invoice date. For sales that we reviewed, we found this to be true for basic terms of sale such as price, quantity, and product specification. See *TrefilARBED Sales Verification Report* at 32–37.

The Department has indicated that time lags between order date and invoice date may be a factor used in its analysis of the appropriateness of invoice date as date of sale. *See Steel Pipe from Korea,* at 32835. However, the circumstances in *Steel Pipe from Korea* differ markedly from those in this case. In *Steel Pipe from Korea,* ''{t}he material terms of sale in the United States are set on the contract date and any subsequent changes are usually

immaterial in nature or, if material, rarely occur.'' *Id.* at 32836. In this case, ALZ reported that there were numerous instances of changes in terms of sale after the initial order date, and, as noted above, we observed many such instances at verification.

We further disagree with the petitioners' reliance on *Steel Pipe from Korea* to support its argument that the longer time lag between the date of purchase order and the date of invoice for U.S. market, as compared to the time lag on the home market, justifies the use of order date as the date of sale. First, as noted above, in *Steel Pipe from Korea,* the Department verified that the changes to terms of sale were infrequent and not material in nature. Second, unlike this case, *Steel Pipe from Korea* involved an administrative review, where the Department makes monthly (rather than annual) weighted-average comparisons. Consequently, the differences in time lags between the markets were significant for comparison purposes. *Id.* In this case, the main impact of using a different date of sale would be on the number of U.S. sales analyzed.

Finally, we disagree with petitioners' assertion that ALZ's reported sales information was inaccurate and incomplete. During the course of sales verifications, the Department requested specific documentation from ALZ in support of its claim that the date of invoice should be used as the date of sale. ALZ complied with the verifiers' request for sales trace documentation (*see, e.g., TrefilARBED Sales Verification Report* at 15 and 32–37), and the Department utilized the purchase order, change order, and invoice information provided by ALZ as part of the basis for its decision on this issue. It is true that the use of quantity tolerances was only clarified at verification, but the lateness of this clarification did not in this instance hinder the Department's analysis with respect to date of sale. Furthermore, we do not observe any remaining ambiguities pertaining to ALZ descriptions of time lags between home market orders and invoices that would hinder our analysis in any way.

Regarding missing U.S. order confirmation numbers, the Department did not request such information in its October 8, 1998 supplemental questionnaire and, thus, it would not be reasonable to expect that ALZ must report it. As to the reporting of change order information, the record evidence indicates that ALZ did report the finalized order in its U.S. sales database (see *TrefilARBED Sales Verification Report* at 34, which indicates that for a sale involving a change order, the company reported the date of this final purchase order in the field ORDERDTE).

Regarding certain third country sales that respondent mistakenly reported in its home market sales database, we reject petitioners' assertion that this minor overreporting by ALZ constitutes grounds for adverse FA across the entire home market database. Neither the *ALZ Sales Verification Report* nor Verification Exhibit 6 suggests that more than a small portion of ALZ's total sales involved such arrangements, and we did not observe any indication at verification that other such third country sales had been included in the home market sales database. We have thus excluded home market sale observations #227 and #228 from the home market sales database.

Finally, no significant ambiguities remain with respect to U.S. billing adjustments reported by ALZ, and the Department has fully accounted for those adjustments in its calculations. *See, e.g., Final Sales Analysis Memorandum* at 4.

Comment 2: Level of Trade/CEP Offset. ALZ argues that the Department should reverse its preliminary decision to deny ALZ's claim for a CEP offset. ALZ notes that, pursuant to section 773(a), the Department will, to the extent practicable, base NV at the same level of trade as the EP and CEP. ALZ claims that in the case of CEP sales, the level of trade is based on the sale from the exporter to the affiliated importer, and that when U.S. sales and home market sales are not made at the same level of trade, an adjustment may be made to account for price differences between the levels of trade. ALZ notes that, because this difference cannot be quantified based on data on the record, the Department should grant ALZ a CEP offset.

ALZ states that, to evaluate differences in level of trade, the Department examines selling functions and the stages in the marketing process at each level of trade. ALZ asserts that the record of this investigation confirms that ALZ performs more selling functions on sales to its home market customers than to TrefilARBED (see ALZ's June 24, 1998, Section A response (''Section A Response'') at A–14, A–15, and Exhibit A/3.c, and its October 7, 1998, supplemental questionnaire response (''*October Supplemental Response*'') at Exhibit S2/17.a.). ALZ asserts that the Department was mistaken to conclude that ALZ's selling functions performed in connection with its sales to TrefilARBED are similar to functions performed by ALZ in connection with its sales to home market customers. ALZ also argues that its sales to its home market customers were at a more advanced stage of the marketing process than its sales to TrefilARBED, and that its indirect selling expenses for the former are higher than for the latter.

ALZ argues that page 6 of *ALZ Sales Verification Report* establishes that the most resource-intensive selling function, namely, sales negotiation with the final customer, is performed by ALZ for home market sales but not for U.S. sales. ALZ notes that page 11 of *TrefilARBED Sales Verification Report* indicates that ALZ and TrefilARBED agree on a certain aspect of the sales to the final customer, and this aspect is revised occasionally based on discussions between TrefilARBED and ALZ. ALZ states that Exhibit 12 from the *ALZ Sales Verification Report* demonstrates that ALZ's domestic sales department is larger and costlier than its non-EU export sales department.

ALZ further contends that it is responsible for handling customer claims for sales to home market customers, but generally it is not responsible for sales to TrefilARBED. ALZ states that, although its *Section A Response* at A–14 and Exhibit A/3.c indicate that ALZ handles all aspects of customer claims by Belgian customers, including the physical inspection of the merchandise and the negotiation and resolution of the claim, the *TrefilARBED Sales Verification Report* at 5 indicates that on U.S. sales, customer claims handled by TrefilARBED are negotiated with the customer by TrefilARBED.

Pointing to its *Section A Response* at A–14, A–15 and Exhibit A/3.c, ALZ also contends that it provides its home market customers with technical assistance and product instruction, which it does not provide to TrefilARBED. ALZ claims that, for U.S. sales, TrefilARBED assumes this function.

ALZ argues that the Department's preliminary analysis was based, in part, on an erroneous assumption that ALZ's selling expenses on sales to TrefilARBED were higher, on a per-kilogram basis, than its selling expenses on home market sales. ALZ asserts that this erroneous assumption was based on two factors. First, the Department's calculation was made on a per-kilogram basis rather than on a value basis. ALZ notes that it reported its indirect selling expenses on the value basis, and information on the record indicates that the expenses incurred by ALZ on home market sales were 22 percent higher than those incurred on U.S. sales. Second, ALZ argues that the Department's calculations incorporated

an error in ALZ's questionnaire responses, which the Department noted at verification; namely that the transfer price between ALZ and TrefilARBED, the value on which the expense was calculated in the earlier submissions, was actually stated in U.S. dollars per hundred weight rather than in Belgian francs per kilogram. ALZ states that, when this error is corrected, the average indirect selling expenses for ALZ's home market sales is higher than that for its U.S. sales, even when employing the Department's aforementioned flawed per-kilogram basis methodology.

Petitioners argue that ALZ did not demonstrate that the Department should reverse its preliminary decision that different LOTs do not exist in the home and U.S. markets. Petitioners state that, as the Department concluded prior to the preliminary determination, no meaningful differences in selling functions performed in the U.S. and Belgium exist and, therefore, no LOT adjustment is warranted.

Petitioners note that *TrefilARBED Sales Verification Report* at 7 contains ALZ's admission that ''[f]or TrefilARBED, very much the same process as for Belgian customers occurs through the invoicing stage* * *.'' Petitioners contend that ALZ conducts oversight of TrefilARBED's negotiations with U.S. customers, and TrefilARBED provides information about its pricing to ALZ. ALZ, petitioners argue, has U.S. selling functions in its fulfillment of TrefilARBED's orders to ALZ, its continuous communications with TrefilARBED, and its monitoring of intra-company marketing agreements. Petitioners challenge ALZ's assertion that it has fully transferred to TrefilARBED responsibility for handling claims on U.S. sales, noting that when a quality claim is filed by U.S. customers, although the process is initiated at TrefilARBED, it is ALZ that must trace the particular shipment, skid and heat that resulted in the problems that U.S. customers report, and it is ALZ that must account for the validity of a given claim and take corrective measures where its production is found to be at fault.

Petitioners further state that ALZ failed to provide the requested level of detail with respect to the extent of differences among various selling functions, such as a designation of ''high,'' ''medium,'' or ''low'' levels as well as explanation and support for such designations. Petitioners add that ALZ, in its case brief, has misleadingly attempted to re-characterize undocumented assertions by its case officials at verification to make a pretense that new material evidence of significantly different selling functions was verified by the Department at verification.

Regarding ALZ's quantitative analysis of the relative levels of indirect selling expenses incurred by ALZ with respect to both markets, petitioners categorize respondent's methodology as flawed. First, petitioners argue that absolute values do not constitute an appropriate basis for this comparison because at issue in this case is the relationship between expenses and the activities. Second, petitioners argue that the values cited by ALZ for the respective home market and U.S. sales are incorrect. Petitioners contend that ALZ limited the U.S. value to the general wages element of indirect selling expenses, while ALZ derived the home market value by including such items as cars and other expenses that are applicable to U.S. sales, in whole or in part. Petitioners also note that the total invoice value used in the denominator of the calculation of the indirect selling expense factor for home market sales includes values for unreported transactions (*i.e.,* those invoiced to parties in Belgium, but shipped outside of Belgium). Petitioners also state that ALZ's calculations of the indirect selling expense factors were based on inconsistent numerators and denominators: ALZ divided SSPC-specific expenses by all-product invoice values, when it should have divided all-product expenses by all-product invoice values. The lack of verified, accurate SSPC-specific numerators and denominators, petitioners note, prevents an SSPC-specific calculation of the factors in question. Petitioners state that when value-based ratios are re-calculated based on total expenses over total turnover, the indirect selling expense ratio for U.S. sales is greater than that for home market sales.

Finally, with respect to ALZ's indirect selling expense factor calculations, the only expenses ALZ lists that relate to home market sales but not to U.S. sales involve two rental cars and annual guest passes to the ALZ soccer box in Genk. Petitioners state that these items cannot constitute the basis for more advanced selling functions, and by extension, the basis for a more advanced stage of marketing in Belgium.

Department's Position: The Department addressed, in detail, the alleged differences in selling functions claimed by ALZ in the Department's *CEP Memorandum,* dated October 27, 1998, which was prepared for purposes of the preliminary determination. ALZ has not attempted to refute the Department's evaluations of those alleged differences, except as indicated below. In its case brief, ALZ claims that differences pertaining to the extent of its involvement in sales negotiation, claims, and technical assistance in the two markets establish that its home market sales are at a different and more advanced level of trade than its U.S. sales. We reject this conclusion for the reasons described below.

Regarding differences in sales negotiation, we found that ALZ's sales process for its home market customers is very similar to its sales process for TrefilARBED. *See ALZ Sales Verification Report* at 7. We noted at verification that ALZ negotiates contracts with TradeARBED Luxembourg governing the relationship between ALZ and TrefilARBED, and that these contracts are subject to renewal and revision. *See ALZ Sales Verification Report* at 7. In addition, according to TrefilARBED, there are occasional revisions to base prices and extras prices for transactions between ALZ and TrefilARBED, and that sometimes such revisions result from discussions between ALZ and TrefilARBED. *See TrefilARBED Sales Verification Report* at 13. Furthermore, because TrefilARBED buys subject merchandise from sources other than ALZ (*see, e.g., id.* at 12), it is reasonable to assume that ALZ makes some effort to encourage TrefilARBED to purchase from ALZ.

We found that ALZ is involved not only with sales negotiation for transactions between itself and TrefilARBED, but also with TrefilARBED's sales to unaffiliated U.S. customers. This involvement appears to be critical. As noted by ALZ in its case brief at 6, TrefilARBED and ALZ agree on a certain aspect of TrefilARBED's U.S. sales which, if made public, according to the respondent, ''would cause substantial harm to ALZ's competitive position'' (see the cover letter to ALZ's Case Brief of February 8, 1999).

Finally, any difference in size between the non-EU export sales department (which handles U.S. sales) and the domestic sales department (which handles home market sales) is not directly relevant to our analysis, given that it does not demonstrate different levels of activity for particular home market and U.S. sales.

In conclusion, we find that ALZ is involved in comparable levels of sales negotiation activity for its sales of SSPC to TrefilARBED as it is for its sales of SSPC to home market customers.

With respect to ALZ's argument that customer claims handled by TrefilARBED are negotiated with the customer by TrefilARBED, the

information first submitted by ALZ in its *Section A Response* at Exhibit A/3.c suggests that some claims made by U.S. customers could be made with ALZ, and that TrefilARBED may make claims with ALZ.

Regarding technical assistance, ALZ has not provided information with respect to the differences in the level of assistance provided to home market customers. ALZ's admissions that (1) it does not maintain any type of relationship with its customers (*see* page B–10 of ALZ's September 4, 1998, submission (''*September Supplemental Response*'')), and (2) it maintains a relationship with its customers with respect to customer category or end-use only to the extent that the customer will state what it will usually do with the material when first ordering from ALZ (*see October Supplemental Response* at 4–5) indicate that the level of technical assistance is not big. *ALZ Sales Verification Report* at 6 indicates that ALZ creates a customer-specific technical sheet for new customers, but it is not clear from the record that this function requires substantial effort or, furthermore, how typical it is for ALZ to gain new customers.

We agree with petitioners that there are a few categories of indirect selling expenses which ALZ includes in the buildup for its home market expenses but not for its U.S. sales. However, we disagree that the record evidence indicates that we should consider these expenses (*i.e.,* costs in connection with car rentals and a box at the local soccer stadium) as applicable to U.S. as well as home market sales. We consider these factors to be of minimal importance with regard to distinctions between levels of trade between markets.

ALZ argues that an error that it incorporated into its submission resulted in an overstatement of the ratio of ALZ U.S. indirect selling expenses to total U.S. sales (value or quantity), and that when this is accounted for, the revised ratio is less than the ratio of ALZ's home market indirect selling expenses to total home market sales (value or quantity). However, even if we were to correct such an error and utilize ALZ's methodology, we could not determine that different LOTs exist on this basis alone. First, ALZ's analysis is distorted because (1) it compares SSPC-specific indirect selling expenses to total (SSPC and non-SSPC) invoice values, and (2) it includes in total invoice the values associated with products invoiced in Belgium but shipped outside of Belgium. More importantly, even if a 22 percent difference existed, it would not be sufficient to warrant a determination of different LOTs, given that ALZ merely alleged that differences in numerous selling functions existed between both markets, but failed to demonstrate the relative magnitude of those differences or, in most if not all instances, that any differences existed at all. Consequently, ALZ failed to support its contention that different LOTs exist. Thus, consistent with our preliminary determination, we find that a CEP offset is unwarranted.

Comment 3: Foreign Brokerage/Handling and International Freight for U.S. Sales. Petitioners assert that ALZ had misreported its relationship to Transaf N.V. (''Transaf''). Petitioners note that, while ALZ falsely reported at page C–10 of *September Supplemental Response,* that it was not affiliated with Transaf, the Department verified that Transaf is five percent owned by ARBED and 95 percent owned by TradeARBED Luxembourg. Petitioners further indicate that, according to ALZ's submission, Transaf is primarily responsible for both foreign brokerage/handling and international freight for shipments to the Chicago area. Petitioners identify certain U.S. sales that were clearly destined to the Chicago area, based on the destination information provided in the U.S. sales database for various sales. Petitioners also note that the respondent did not provide the requested destination information for numerous U.S. sales, and that it is almost certain that Transaf was the broker for a significant portion of these sales as well. Petitioners indicate that the average freight charge of sales not identifiable as to the Chicago area is considerably above the average freight charge for virtually all sales identifiable as to the Chicago area, even though charges for transportation to Chicago, which is an inland destination, should be significantly higher than similar charges for east coast shipment. Consequently, petitioners argue, the misreporting of ALZ's relationship with Transaf provides grounds for the use of adverse FA, and petitioners state that the highest reported per kilogram expense for the field in question should be applied to all U.S. sale observations.

ALZ argues that petitioners have provided no support for their call for the application of adverse FA for ALZ's international freight and brokerage charges. ALZ contends that petitioners have exaggerated Transaf's role in U.S. sales. ALZ notes that it explained to the Department the reasons why only certain U.S. shipments were handled by Transaf. ALZ contends that petitioners are incorrect to assume that every sale to Chicago was shipped via Transaf when, in fact, not every sale in Chicago involved Transaf. Furthermore, ALZ argues, petitioners provide no support for their assertion that it is almost certain that Transaf was the broker for a significant portion of the sales for which no destination was reported. ALZ argues that the petitioners' arm's-length test is flawed because it is based on the assumption that the brokerage for all Chicago sales was done by an affiliated party. Furthermore, ALZ argues that the record demonstrates that shipments involving Transaf cannot be compared to other sales. ALZ states that the Department verified that most of Transaf's shipments are bulk shipments, while container shipments are not Transaf's primary concern. ALZ also states that the Department noted in *ALZ Sales Verification Report* at 28 that shipments to Chicago through Transaf were made in bulk shipments, typically without pallets. Therefore, ALZ concludes, the cost basis for shipments through Transaf were radically different from the cost basis for other shipments, both with respect to quantities shipped and with respect to packing materials.

Department's Position: We agree with the petitioners. In the Department's *Original Questionnaire* at A–4, we asked ALZ to report all of its affiliates, in addition to describing the nature of each affiliate's involvement with the product under investigation. In response, ALZ did not indicate that it was in any way affiliated with Transaf, a company from the same ARBED Group, which handles foreign brokerage and international freight for ALZ's U.S. sales. Subsequently, in its response to the Department's supplemental questionnaire, ALZ informed us that it was not affiliated with Transaf. *See September Supplemental Response* at C–10. ALZ reiterated this assertion at the outset of verification. *See ALZ Sales Verification Report* at 3. However, in the course of verification, when asked about the reference to Transaf on ARBED's website, ALZ finally admitted that it is affiliated with Transaf. *Id.* at 3–4. Because the record evidence is not clear to what extent brokerage/handling and international freight services were handled by Transaf, as opposed to other brokers, the Department is unable to identify with certainty the Transaf-related U.S. sale observations.

Section 776(a) of the Act provides that if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use, subject to

subsection 782(d) and (e), facts otherwise available in reaching the applicable determination. In addition, section 776(b) provides that an adverse inference may be used against a party that has failed to cooperate by not acting to the best of its ability to comply with requests for information.

As detailed above, ALZ withheld information concerning its affiliation with Transaf, a company in charge of various brokerage/handling and international freight services for ALZ's U.S. sales. Moreover, ALZ did not admit that it was affiliated with Transaf until verification, when this relationship was established by the Department officials, as described in the verification report. *See ALZ Sales Verification Report* at 3. Moreover, contrary to ALZ's assertion, the Department did not verify that most of Transaf's shipments are bulk shipments or that container shipments are not Transaf's primary concern. Furthermore, the record does not demonstrate the extent to which certain pallets were used for shipments handled by affiliated brokers, as opposed to those handled by unaffiliated brokers, or the full extent to which variations in reported costs could reflect pallets or containerization costs. Claims relating to these issues were raised as late as verification and, thus, any supporting information in this connection would have been untimely under § 351.301(b)(1) of the Department's regulations. As a result, ALZ could not demonstrate, in a timely fashion, that (1) other brokers handled the brokerage/handling and international freight to the Chicago area, (2) Transaf was not involved with shipments to other destinations, or (3) Transaf charges to ALZ were at arm's length.

Under these circumstances, we were unable to identify which U.S. sale observations were handled by Transaf, and the absence of destination information for many of the sales further inhibits our effort to limit the application of FA to only a portion of the U.S. sales database. Furthermore, because ALZ failed to provide accurate and timely information regarding its affiliation with Transaf, despite our explicit requests, we find that it failed to cooperate to the best of its ability in providing this information and, therefore, an adverse inference is warranted. This is consistent with the Department's practice of applying adverse FA when certain requested information is withheld by an interested party in its questionnaire response, but discovered at verification. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile,* 63 FR 56613, 56620 (October 22, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Spain,* 63 FR 40391, 40396 (July 29, 1998). As partial adverse FA, we have assigned the highest reported per hundred weight brokerage/handling and international freight expense for the U.S. sales which can reasonably be assumed to have involved shipments to the Chicago area. For further explanation of the Department's methodology for this issue, see *Final Sales Analysis Memorandum* at 3.

Comment 4: Missing U.S. Warehouse Expenses. Petitioners allege that ALZ failed to report the U.S. warehouse expenses for some U.S. sales. According to petitioners, ALZ reported that TrefilARBED did not incur any warehousing for further-processed material during the POI. Petitioners observe, however, that if the merchandise leaves the warehouse without further manufacturing, ALZ is charged for storage. In addition, petitioners argue that the above sales have no reported warehouse expense, even though the data show that there were warehoused, rather than further manufactured. Consequently, petitioners argue, the Department should apply, as adverse FA, the highest single charge reported under the U.S. warehouse expense.

ALZ points to the Department's verification report which notes that when material is transferred to a customer at the warehouse/processing facility, TrefilARBED does not incur the warehousing expense. ALZ argues that if the Department uses FA, it should apply the average of all reported warehousing.

Department's Position: We partially agree with petitioners. While ALZ has indicated that there are circumstances in which TrefilARBED is not charged for warehousing, it is not clear that those circumstances were applicable to certain U.S. sales observations without a reported warehousing expense.

At the U.S. sales verification, TrefilARBED reiterated its explanations of U.S. warehousing expenses that had been originally provided in ALZ's questionnaire responses. *See TrefilARBED Sales Verification Report* at 12–13. TrefilARBED noted that, for certain warehousing locations, if the merchandise leaves the warehouse without having been further processed, TrefilARBED is charged a set per coil warehousing expense if it is shipped to the customer without further processing. If title to the merchandise is transferred by TrefilARBED to the customer at these facilities, TrefilARBED does not incur warehousing charges. Finally, if the merchandise at warehouses is further processed, TrefilARBED is not charged for warehousing.

For the few sale observations at one of the warehouses in question that did not involve steel that was further processed, and for which no warehousing expenses were reported, the record does not establish that title was transferred to the customer prior to leaving the warehouse. Consequently, to account for the missing warehouse expenses, we have decided to apply the set per coil fee amount for the warehouse in question as the basis for the unreported expense. Furthermore, in one instance involving a sale of unprocessed steel from a warehouse location not even covered by the aforementioned ALZ explanation regarding transfer of title, we have decided to apply a per pound storage expense charged by the warehouse in question for another transaction (see page 9 of Verification Exhibit 4 from the TrefilARBED sales verification).

Comment 5: Packing Costs. Petitioners argue that ALZ, despite repeated inquiries by both petitioners and the Department, reported and maintained distorted U.S. packing cost data in its U.S. sales databases, until the outset of verification, in an effort to minimize its preliminary duty rate. Petitioners state that ALZ was aware of the fact that ocean-going coils would require more expensive packing than those shipped to domestic customers.

According to petitioners, although ALZ acknowledged at the outset of verification that it had understated its U.S. unit packing costs (due to having characterized the reported figures as on a per kilogram basis when they in fact had been on a per pound basis), ALZ's reporting methodology continues to be flawed. Petitioners argue that ALZ calculated an average skid cost and divided it by the quantity of the particular product invoiced. Under this methodology, petitioners assert, the larger the coils packed, the less packing material and labor is absorbed. Petitioners note that larger coils would require more labor and material; thus, the use of an average skid cost is inappropriate.

Furthermore, petitioners argue that for U.S. sales, U.S. packing costs, for the most part, cannot be tied to values examined at verification. In addition, petitioners question why a particular sea-packing code does not apply to a single U.S. sale, and assert that certain calculated packing costs are nonsensical. Based on ALZ's assertion at verification (*see ALZ Sales Verification Report* at 28) petitioners

also question whether or not Transaf has passed along skid charges to ALZ. Assuming it has, petitioners query on what basis such charges could be presumed to have been at arm's-length. Finally, petitioners dispute ALZ's assertion that a certain packing type did not involve pallet costs.

Petitioners state that, given the small number of sales observations, ALZ could have provided transaction-specific packing costs. Petitioners state that, in light of ALZ's illogical constant-to-weight based allocations, its systematic misreporting of U.S. packing charges, its failure to report its affiliation with Transaf, and its unsupported claims regarding lack of pallet costs, the Department should apply adverse FA to all U.S. packing costs. Petitioners state that this should be based on the highest single reported U.S. packing charge. Alternatively, the Department should, at the least, apply that charge to all sales packed with no pallet costs and to all sales for which ALZ failed to report a packing type (*i.e.*, those ordered in 1997 but invoiced thereafter).

ALZ argues that its packing cost calculation methodology provides the most accurate measure of per-unit packing costs allowed by ALZ's records and accounting system, and accounts for cost differences between export and home market packing methods. Furthermore, ALZ states that the Department tied all of the reported packing costs directly to ALZ's income statement.

ALZ also argues that, when transaction-specific reporting is not feasible, the Department's regulations at section 351.401(a)(1) allow for expenses and price adjustments on an allocated basis. In addition, ALZ states that the Department neither requested transaction-specific packing costs, nor expressed any concern that the allocation methodology used by ALZ produced distorted results.

In addition, ALZ notes that, during verification, the company explained that the slight variation observed by the Department between reported and verified packing expenses was due to the truncation of the original per-unit packing expenses prior to their conversion to per-kilogram amounts.

Furthermore, ALZ argues that petitioners mistakenly infer which packing methods used include skids. Finally, ALZ asserts that for shipments made through Transaf, ALZ did not incur costs for pallets because shipments via Transaf are made in bulk.

Department's Position: We disagree with petitioners. First, the petitioners' assertion that ALZ intentionally understated its U.S. packing expenses in its initial responses in order to minimize the preliminary margin rate is unsubstantiated. The record evidence does not support the petitioners' claim that ALZ employed such a strategy, or that the magnitude of the initial understatement was such that it would have a major effect upon the margin.

Second, ALZ described its basic methodology for reporting packing expenses in its questionnaire responses, and the Department has found no grounds for rejecting either that methodology or the reported expenses specifically derived from that methodology. *See Section B Response* at 47. The Department conducted a thorough review of those reported expenses. At verification, the Department found no evidence that, for a given packing type, significantly greater labor or material expenses would be incurred for larger coils compared to smaller coils. *See ALZ Sales Verification Report* at 27. Contrary to petitioners' assertion, U.S. packing costs did, in fact, tie to values examined at verification, and the Department did not find any evidence of miscoding of packing type for U.S. sales. *Id.* at 28.

Moreover, contrary to the petitioners' allegation, there is no evidence on the record that any reported packing expenses for U.S. sales are understated. For almost all U.S. sale observations, the total reported packing expenses (kilograms times cost per/kg) is within the range of total per coil packing expenses. The only discrepancy in reported U.S. packing noted at verification involved rounding of numbers and, as such, it was minimal (see *ALZ Sales Verification Report* at 21). The remaining few U.S. sales observations with reported packing expenses outside the range of total per coil packing expenses involve disproportionately small quantities which may have been a fraction of an individual shipped coil and, therefore, would only absorb a portion of the total coil packing expenses.

Finally, the Department never requested that ALZ report transaction-specific packing expenses, and the petitioners provided neither rationale nor precedent for such reporting. With respect to any packing expenses that might have been incurred by Transaf in its brokering arrangements for ALZ, the Department has addressed Transaf-related expenses in Comment 3. Consequently, the Department has made no additional adjustments to ALZ's reported packing expenses.

Comment 6: Sales with no Reported Warehouse/Vendor Identification. Petitioners argue that ALZ did not report the warehouse location for a number of observations. Thus, none of the discussions and documentation for warehousing in the U.S. verification report could be tied to the U.S. sales database. As a result, the petitioners argue that the Department should apply to these sales, as adverse FA, the highest single charge reported under U.S. warehouse expense.

ALZ argues that (1) the information on the field WARELOCU is not a factor in the Department's antidumping duty calculation, and (2) the missing information did not hinder the Department's ability to verify the per-unit warehousing expenses for the selected sales.

Finally, ALZ states that the Department verified that TrefilARBED accurately reported the per-unit warehousing expense for two observations with no warehouse location. According to ALZ, FA is not warranted for TrefilARBED's warehousing expenses.

Department's Position: The Department agrees with petitioners that for some U.S. sale observations the warehouse location is missing. However, the Department did verify some sales for which the warehouse location was not reported and found no major discrepancies. *See TrefilARBED Sales Verification Report* at 36. Therefore, the Department will not use FA for sales with no warehouse location, but where a positive U.S. warehouse expense was reported.

As noted in Comment 4, ALZ provided two explanations for instances in which TrefilARBED would not have been charged for warehousing: if the material was further manufactured or if title to the material was transferred to the customer at the warehouse. However, we note that those explanations related only to warehousing performed by a particular company. Various U.S. sale observations involve merchandise that was warehoused, but for which ALZ failed to identify the warehouse location. While ALZ indicated that TrefilARBED did not incur any warehousing expenses for further processed material during the POI (see September Supplemental Response at 16), it did not state that transfer of title was relevant in the context of warehousing charges other than for the one particular warehousing company. Furthermore, no information exists on the record to indicate when title was transferred to the final customer.

Section 776(a) of the Act provides that if an interested party withholds information that has been requested by the Department, fails to provide such

information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use, subject to subsection 782(d) and (e), facts otherwise available in reaching the applicable determination. In addition, section 776(b) provides that an adverse inference may be used against a party that has failed to cooperate by not acting to the best of its ability to comply with requests for information.

Despite having been given several opportunities, prior to verification, to explain its warehousing expenses in detail (see the *Original Questionnaire* under the U.S. warehousing expense field; the August 11, 1998 supplemental questionnaire at question 34; and the September 25, 1998 supplemental questionnaire at question 9), ALZ chose not to explain those charges for all of the warehouses it utilized. Moreover, the Department indicated in its U.S. sales verification outline that it was willing to review information regarding how the reported charges for warehousing of material not further processed were determined by the respondent for each of the six warehouses (*see, e.g., TrefilARBED Sales Verification Report* at 28). However, at verification, TrefilARBED failed to provide such information. In light of ALZ's failure to report the information repeatedly requested by the Department, we have determined that ALZ did not act to the best of its ability, and have assigned, as partial adverse FA, the highest reported U.S. warehousing expense to U.S. sales observations involving merchandise that was warehoused at an unidentified location, but for which no warehousing expense was reported. However, because ALZ stated that TrefilARBED did not incur any warehousing expenses for further processed material, we have not assigned any warehousing expenses to any such U.S. sale observations for which further manufacturing expenses were reported.

Comment 7: U.S. Brokerage and Handling Charges. Petitioners argue that, according to documentation examined by the Department, the value reported for U.S. brokerage and handling, for U.S. sales observation #30, was incorrectly derived. In addition, there is no discussion regarding the extent of the under-reporting. Therefore, petitioners argue that the Department should correct all of the reported U.S. brokerage and handling charges to reflect the under-reporting found in U.S. sales observation #30.

ALZ argues that the *TrefilARBED Sales Verification Report* provides no further discussion regarding the extent of the error found in U.S. sales observation #30, because the error was limited to this one sale. Furthermore, ALZ states that, at verification, the Department performed complete sale traces on 14 U.S. sale observations, where many charges including U.S. brokerage and handling charges were verified. Consequently, considering that the Department found only one discrepancy related to these charges, the application of FA of any kind is unwarranted.

Department's Position: We agree with ALZ that the use of FA is unwarranted for this expense. The Department reviewed numerous other sales traces and cited no discrepancies for those reported expenses. See *TrefilARBED Sales Verification Report* at 32–37. Consequently, the Department finds that petitioners' allegation is unsupported by record evidence and our verification findings. Therefore, the use of FA is unwarranted.

Comment 8: U.S. Indirect Selling Expenses. Petitioners argue that ALZ's calculation of the U.S. indirect selling expenses of its affiliate, TrefilARBED, is methodologically wrong. Petitioners assert that ALZ calculated these expenses using quantity as a basis, while the Department's questionnaire specifies that allocations should be based on the manner in which the seller incurs a given expense in the ordinary course of business. Petitioners assert that the rationale for a value-based calculation is that a higher-value product absorbs a greater absolute amount of costs. In support of this position, petitioners cite the following Department precedent: *Pure Magnesium From the People's Republic of China: Final Results of Antidumping Duty New Shipper Administrative Review,* 63 FR 3085, 3088 (January 21, 1998) (''*Magnesium from China*''); *Notice of Final Determination of Sales at Less Than Fair Value: Certain Carbon Steel Butt-Weld Pipe Fittings from India,* 60 FR 10545, 10547 (February 27, 1995); *Notice of Final Determination of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China,* 62 FR 9160, 9164 (February 28, 1997); and *Frozen Orange Juice Concentrate from Brazil; Final Results of Antidumping Duty Administrative Review,* 55 FR 26721, 26723 (June 29, 1990). Petitioners note that a respondent must calculate G&A expenses on an annual basis as a ratio of total G&A expenses divided by cost of sales, and such methodology logically applies to the reporting of SG&A by a sales affiliate. Therefore, petitioners argue, TrefilARBED, the selling agent, must report its total SG&A expenses on the basis of value of its merchandise, just as ALZ as a factory reports its G&A expenses on the same basis.

Petitioners also note that ALZ, when given the opportunity to explain its allocation of indirect selling expenses by quantity rather than value, only stated that a value-based allocation would result in a disproportionate allocation to SSPC relative to other products. Petitioners argue that this claim is unsupported by any findings at verification or elsewhere on the record.

In addition, petitioners challenge the completeness of the reported total TrefilARBED indirect selling expenses. Petitioners state that ALZ based part of its argument for not including TrefilARBED's net interest expenses in the TrefilARBED indirect selling expense calculation on the fact that all of TrefilARBED's financial expenses pertain to short-term debt. *See September Supplemental Response* at C–23 and C–24. Petitioners argue that because the Department found at verification that only a portion of TrefilARBED's interest expenses pertained to short-term debt (*see TrefilARBED Sales Verification Report* at 29), the Department should include in TrefilARBED's indirect selling expenses, as partial adverse FA, the entire interest expense. Alternatively, petitioners argue that the Department should include in TrefilARBED's indirect selling expenses, as non-adverse FA, the portion of TrefilARBED's interest expenses that cannot be classified as short-term interest expenses.

ALZ asserts that quantity is properly used to determine the correct amount of SG&A expenses to include in the calculation. ALZ adds that a comparison of the indirect selling expenses reported for U.S. observations 13 and 18 clearly demonstrates that, under TrefilARBED's value-based methodology, higher value sales do absorb a greater amount of selling expenses.

ALZ states that the Department verified that TrefilARBED's sales department is organized by product line (*see TrefilARBED Sales Verification Report* at 2), and argues that TrefilARBED's resources are not applied to the sales value of specific product lines, but rather on the need to handle the tonnage sold of a particular line. For example, ALZ notes, the resources needed for selling stainless steel plate in coils are not determined by the value of the product, but by the need to meet the customer's demands in terms of quantity. Consequently, the most appropriate method to allocate a portion

of TrefilARBED's total SG&A expenses to subject merchandise, ALZ argues, is to use quantity as the allocation factor.

Regarding interest expenses incurred by TrefilARBED, ALZ argues that the Department does not request or use such expenses in its calculations of U.S. affiliate indirect selling expenses, and that it is, in fact, the Department's stated practice to exclude all types of interest expenses from the calculation of SG&A. *See Final Determination of Sales at Less Than Fair Value: New Minivans from Japan,* 57 FR 21937, 21956 (May 26, 1992). Furthermore, ALZ argues that there is no evidence on the record indicating that items excluded from the interest rate calculation were long-term in nature, and the other interest expenses, as explained at verification, do not pertain to short-term loans (*see TrefilARBED Sales Verification Report* at 29–30), but they refer almost entirely to other short-term financing expenses. ALZ argues that, if the Department erroneously chooses to include some portion of TrefilARBED's interest expenses in the calculation of indirect selling expenses, it should limit that amount to total interest expenses minus total interest expenses on short-term loans used in the interest rate calculation. ALZ provides a calculation of this remainder, and an allocation of that amount to subject merchandise.

Department's Position: We agree with petitioners that the Department should use a value-based allocation rather than a quantity-based one. ALZ was given ample opportunity to explain its allocation methodology prior to verification, and the information provided did not justify the calculation of the indirect selling expense factor based on quantity. The initial *Section C Response* at Exhibit C/48.2 simply presented the quantity-based calculation. When asked why it employed such an allocation methodology, ALZ stated that allocating the expenses based on value would result in an ''artificially high'' allocation to SSPC and ''would not be proportionate'' to the company's expenses in terms of other products. However, ALZ did not explain the basis for these assertions. *See September Supplemental Response* at C–22. When asked further about the rationale for its quantity-based allocation methodology, ALZ stated that the amount of selling expenses incurred by TrefilARBED bears no relation to the sales value of any particular product line. ALZ noted that salaries, the largest component of TrefilARBED's SG&A, are not determined or paid according to product line, and that some salaries are paid to personnel not even involved with sales. *See October Supplemental Response* at 9. ALZ indicated that the same holds for all of the other SG&A expenses, such as rent, management fees, medical insurance, etc., and concluded that ''[b]ecause all of TrefilARBED's sales are based on weight, quantity is the most accurate factor to use to allocate total SG&A expenses between subject and non-subject merchandise.'' *Id.* at 9–10.

As we explained in *Magnesium from China* at 3088, the Department's normal practice is to base calculations of SG&A factors based on value (cost), and ALZ has not provided a credible explanation of why the Department should utilize a quantity-based methodology in this instance. First, because it is clear that TrefilARBED's sales are based on price and value as much as they are on quantity, we find that ALZ's basic premise provides no basis for the use of a quantity-based allocation. Second, the fact that TrefilARBED's sales department is organized by product line does not demonstrate that a quantity-based allocation is appropriate. Finally, the record evidence does not demonstrate that TrefilARBED's resources are applied based on the need to handle the tonnage sold of a particular line. We note that ALZ's reference to U.S. sale observations #13 and #18 only shows that when a given indirect selling expense factor is applied to two sales, a higher indirect selling expense figure is calculated for the sale with the higher price. This does not negate the fact that the factor calculated by ALZ was based on a quantity-based allocation, rather than a value-based one. In conclusion, we agree with petitioners that the allocation should be based, in its entirety, upon value.

We disagree with ALZ that we do not include U.S. affiliate interest expenses in the calculation of indirect selling expenses. As the Department recently explained, it will include such interest expenses in the calculation of total indirect selling expenses to the extent that such expenses do not reflect the financing of inventory or accounts receivable, which would be reflected for reported sales in the imputed inventory carrying cost and imputed credit expense fields, and do not relate to non-subject merchandise. *See, also, Certain Cold-Rolled and Corrosion-Resistant Carbon Steel Flat Products From Korea: Final Results of Antidumping Duty Administrative Reviews,* 64 FR 12927, 12931–32 (March 16, 1999) (''Korean Flat-Rolled Steel''). *See, e.g., Certain Fresh Cut Flowers from Colombia; Final Results and Partial Recission of Antidumping Duty Administrative Review,* 62 FR 53287, 53294 (October 14, 1997); *Certain Cold-Rolled Carbon Steel Flat Products from Germany; Preliminary Results of Antidumping Duty Administrative Review, 60 FR 39355* (August 2, 1995), unchanged in *Certain Cold-Rolled Carbon Steel Flat Products from Germany; Final Results of Antidumping Duty Administrative Review,* 60 FR 65264, 65281 (December 19, 1995); and *Notice of Amended Final Results of Antidumping Duty Administrative Reviews: Certain Cold-Rolled Carbon Steel Flat Products from Korea; Certain Corrosion-Resistant Carbon Steel Flat Products from Korea,* 63 FR 20572, 20573 (April 27, 1998).

In this case, the interest expenses cannot be determined to have reflected the financing of inventory or accounts receivable, and are not identifiable as related solely to non-subject merchandise. In our September 25, 1998 supplemental questionnaire we requested that ALZ ''explain the extent to which the interest expenses incurred by TrefilARBED were associated with the financing of receivables, and the extent to which the interest expenses incurred by TrefilARBED were associated with non-subject merchandise.'' ALZ responded that most of the interest expense involves non-subject merchandise, but that it could not at that time indicate the extent to which these expenses related to subject merchandise. *See October Supplemental Response* at 11. Thus, in accordance with our practice, we decided to include them in the calculation of U.S. indirect selling expenses. However, because the Department did not find evidence that TrefilARBED's interest expenses related disproportionately to SSPC or to non-subject merchandise, we have concluded that these expenses, like other indirect selling expenses, should be allocated to SSPC based on the ratio of SSPC value to total product value.

We disagree with ALZ's assertion that interest expenses should not be included in the calculation of indirect selling expenses because of double-counting. As noted above, the Department has included U.S. affiliate interest expenses in the calculation of U.S. indirect selling expenses independent of our calculation of imputed credit expenses, even if the interest expenses in question constituted part of the basis for determining the interest rate used to calculate the imputed credit expenses. Regarding ALZ's assertion that virtually all of TrefilARBED's expenses involved short-term debt and, therefore, they should not be considered for inclusion in the calculation of indirect selling expenses, we note that the record evidence is not clear these interest

expenses reflected short-term debt. More importantly, the short-term or long-term nature of the debt is irrelevant in this context, given that either type may relate to subject merchandise and involve activities other than financing of inventory or receivables. Despite our request for more detail, the breakdown of the TrefilARBED interest expenses provided in the October *Supplemental Response* at Exhibit S2/13 does not indicate what portion of these expenses related to financing inventory or accounts receivable. Consequently, we agree with petitioners that we should include the entire interest expense figure in the calculation of total TrefilARBED indirect selling expenses, and have allocated them to subject merchandise on the same value-basis as that indicated above.

Finally, as noted in *TrefilARBED Sales Verification Report* at 2, some additional TrefilARBED expenses (related to insurance) should be included in the calculation of total indirect selling expenses. Those expenses have been included in the Department's recalculation for the final results.

Comment 9: Credit and Inventory Carrying Costs in Constructed Value. ALZ asserts that the Department inadvertently included credit and inventory carrying in its calculation of CV. ALZ notes that the statue directs the Department to calculate selling costs for CV value based upon the actual expenses of the company.

Petitioners did not comment on this issue.

Department's Position: We agree with ALZ. In accordance with section 773(e)(2)(A) of the Act, the calculation of CV should not include additions for imputed expenses. Consequently, we have changed our CV accordingly.

Comment 10: Changes to the Department's SAS Computer programing. First, petitioners assert that the kilogram/hundred weight conversion factor used in the preliminary determination margin calculation, 45.3579, should in fact be 45.3597.

Second, petitioners note that the Department should adjust its margin calculations to account for billing adjustment 3, which ALZ reported for the first time in its November 13, 1998 submission, but which was not used in the preliminary calculations. Petitioners state that this expense was reported as a negative value. Because it relates to further manufacturing the billing adjustment should be subtracted from (thereby increasing) the further manufacturing expense.

Third, petitioners assert that the Department should adjust its margin calculation program so that billing adjustments 1 and 2 are utilized in the calculation of net price for further manufacturing sales.

ALZ did not comment on the above issues.

Department's Position: We agree with petitioners, and have made the adjustments. However, we note that the formula cited by petitioners regarding the third change is not utilized in our calculations because ALZ coded all U.S. sales, whether or not further manufactured, as CEP sales, and adjustment for further manufacturing expenses is made in the CEP net price calculations.

In addition, the Department has also made changes pursuant to previous comments indicated above, and has also made some adjustments based on information noted at the sales verifications (see the *Final Sales Analysis Memorandum*). Adjustments to costs are discussed below and in the *Final Cost Analysis Memorandum.*

Comment 11: Unreported U.S. Sale. Petitioners argue that, as the Department noted during the TrefilARBED verification, ALZ failed to report one sale during the POI. Therefore, the Department should apply, as FA, the highest margin to the quantity of this sale.

ALZ argue that the Department should not apply adverse FA on the one unreported sale. ALZ notes that, if the Department uses invoice date as the date of sale, then this one sale will not be part of the POI. However, ALZ notes that if the Department decides to use order date as the date of sale, the Department should not apply FA for this one sale because the quantity and value are very small relative to the entire U.S. sales universe, and because ALZ has cooperated with the Department's requests for information throughout the investigation.

Department's Position: The Department has decided to use invoice date as date of sale in this case (see Comment 1). We verified that the one sale in question, which TrefilARBED identified at the outset of the TrefilARBED verification, was invoiced after the POI. *See TrefilARBED Sales Verification Report* at 3. Consequently, the sale in question is not needed for our analysis.

Comment 12: Major Inputs. ALZ argues that the hot rolling services provided by SwB, an affiliated company, occurred at prices that were above market prices and its affiliate's COP. Thus, according to ALZ, the Department has no grounds to adjust such transfer prices in accordance with sections 773(f)(2) and (3) of the Act. According to ALZ, the transactions used by the Department to determine market prices for the preliminary determination were not representative of those transactions with SwB. ALZ states that these transactions are not comparable because ALZ benefits from a large quantity contract with SwB for hot rolling services, while the unaffiliated customers use SwB's hot rolling services for small quantities only. According to ALZ, the appropriate market price is the price charged by its unaffiliated supplier, who performed the same hot rolling services as SwB for comparable quantities.

ALZ asserts that, if the Department continues to inflate ALZ's hot rolling service costs for the final determination, the percentage used to increase the costs should not be applied to the hot rolling fixed overhead field, the transportation costs within the hot rolling variable overhead field, or the percentage of merchandise hot-rolled by the unaffiliated party.

The petitioners contend that the Department correctly adjusted ALZ's affiliated hot rolling transactions for the preliminary determination. According to petitioners, to determine whether the transfer prices reflect arm's-length prices, the Department normally compares the transfer price to (1) the prices related suppliers charge to unrelated parties, or (2) the prices charged by unrelated suppliers to the respondent. Thus, the Department's reliance on prices SwB charges unaffiliated purchasers for its services is fully in accordance with its practice and the law. Petitioners claim that the best measure of market value for services SwB provided to its affiliate, ALZ, is in fact prices SwB charged unaffiliated customers for those same services. Petitioners contend that ALZ's claim that SwB hot rolled an uncomparable volume of material for unaffiliated customers is without merit. Petitioners maintain that the volume of material hot rolled by SwB for unaffiliated customers is commercially significant.

Department's Position: We agree with ALZ that the hot rolling services provided by its affiliate, SwB, occurred at above market prices and its affiliate's COP. Accordingly, we agree with ALZ that no adjustment is necessary. Section 773(f)(2) of the Act directs the Department to disregard transactions between affiliated parties if such transactions do not fairly reflect amounts usually reflected in sales of merchandise under consideration in the market under consideration. We consider the prices ALZ paid to its

unaffiliated supplier of hot rolling services to be the best indicator of market prices in this case. These prices are for comparable services provided by SwB, and are reflective of the market under consideration. Because we found, during verification, that sales between SwB and its unaffiliated customers represent sales to foreign customers (*see ALZ Cost Verification Report* at 18), we consider them not to be reflective of the market under consideration.

Comment 13: Affiliated Party Purchases. The petitioners argue that adverse FA should be applied to ALZ's COP due to ALZ's failure to disclose affiliated party purchases of certain raw materials it deems to be major inputs. According to petitioners, even though ALZ had over seven months to disclose that it purchased raw materials from affiliates, it was not until verification that this information was disclosed. Thus, according to petitioners, the Department was unable to adequately test these affiliated party raw material purchases to ensure that they occurred at arms-length prices and above its affiliated suppliers' actual COP. Given ALZ's numerous deficiencies, petitioners contend that the use of total FA is fully warranted. If the Department does not agree to apply total FA, petitioners propose the application of adverse FA on a product-specific basis. As adverse FA, petitioners contend that the Department should apply the highest reported cost for scrap and alloys by grade to all CONNUMs within that particular grade.

As further support for the application of adverse FA, petitioners claim that the undisclosed affiliated party purchases are major inputs as defined in the *Final Determination of Sales at Less than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Japan,* 61 FR 38139, 38162 (July 23, 1998), (''*LNPP's from Japan*''). According to petitioners, as set forth in *LNPP's from Japan,* a major input in this investigation accounts for five percent or more of any individual production stage, and any input that accounts for two percent of more of the total COP of the plate in coils.

For the final determination, ALZ argues that the Department should not consider the quantities of scrap and ferroalloys supplied by affiliated parties as representative amounts of a major input. ALZ contends that the amount of scrap and ferroalloys provided by affiliated suppliers for the subject merchandise is not a representative amount; therefore, ALZ did not disclose them as major input as requested by the Department's questionnaire.

Further, ALZ asserts that, for the final determination, if the Department decides to apply the major input rule to the affiliated purchases of raw materials, it should compare the transfer price to the market price. According to ALZ, at verification the Department had the opportunity to compare the transfer price to the market price, concluding that there were minimal or no differences between the prices charged by affiliated and unaffiliated suppliers. In addition, ALZ argues that, to compare scrap and ferroalloy prices for the same elements, the Department must take the price fluctuations into account and compare materials with similar chemical compositions.

With respect to the application of FA, ALZ maintains that, if the Department determines that FA must be applied, the FA adjustment should only be applied to the raw material inputs purchased from affiliated suppliers. ALZ notes that, for instance, in *Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the People's Republic of China,* 62 FR 41347, 41356 (August 1, 1997), the Department decided that, because the respondent was cooperative in all other regards, it applied adverse FA only to one or two items. ALZ asserts that it has complied fully with all the Department's requests throughout the investigation. Thus, if the Department decides to apply FA, it should only be with respect to the raw material costs that are deemed deficient.

Department's Position: We agree with petitioners. In section D of the *Original Questionnaire,* we specifically instructed ALZ to identify all inputs obtained from affiliated parties. *See* Section D of the *Original Questionnaire,* at II.A.5. In its questionnaire response, ALZ stated that ''it receives inputs from two affiliated parties for the production of subject merchandise : Stahlwerke Bremen (hot-rolling mill) and ALBUFIN (annealing and pickling of hot-rolled coils).'' *See* ALZ's July 27, 1998, Section D response at 9. Subsequently, during the cost verification at ALZ's production facilities, the Department discovered that the company purchased raw materials from affiliated parties. *See ALZ Cost Verification Report* at 2. As a result of this untimely disclosure, the Department was not able to adequately test the affiliated party raw material purchases to ensure that they occurred at arm's-length prices and above the affiliated suppliers' actual COP.

Section 773(f)(3) of the Act provides that, where transactions between affiliated parties involve a major input, the Department may value the major input based on the COP if the cost is greater than the amount (higher of transfer price or market price) that would be determined under section 773(f)(2). Under this provision, the Department is required to review purchases from affiliated parties of major inputs in order to determine that they reasonably reflect a fair market value. In this instance, ALZ failed to provide in its questionnaire responses information regarding the company's purchases of raw materials from its affiliated supplier, thereby precluding the Department from adequately addressing this issue prior to verification. Furthermore, at verification, we obtained some raw material purchase price information from non-affiliates for certain raw materials. This information provided an idea of the significance of the unreported affiliated party raw material purchases; however, it was insufficient to verify that ALZ's purchases of these products from the affiliate were at fair market value.

Section 776(a) of the Act provides that if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use, subject to subsection 782 (d) and (e), facts otherwise available in reaching the applicable determination. In addition, section 776(b) provides that an adverse inference may be used against a party that has failed to cooperate by not acting to the best of its ability to comply with requests for information.

As detailed above, ALZ withheld information concerning its purchases of raw materials from an affiliated party in its questionnaire responses. It was not until verification that the affiliated nature of the supplier relationship was discovered by the Department verifiers, as described in the verification report. *See ALZ Cost Verification Report* at 2. Under these circumstances, we were unable to obtain information needed to test affiliated party purchases because the data available to the Department did not allow the Department to isolate identical types of scrap and ferro-alloy purchases, in their entirety for the POI, to allow for a meaningful market value analysis. As a result, the Department is unable to determine whether the reported transfer prices for certain raw materials occurred at arm's-length prices. Thus, we determine that use of partial FA is appropriate in valuing the cost of certain raw materials in our calculation of the COP and CV.

Furthermore, in light of ALZ's failure to provide the data regarding purchases of inputs from affiliated parties, despite our specific instructions, we find that the company failed to cooperate to the best of its ability in providing this information and, therefore, adverse inferences in applying FA are warranted. This is consistent with the Department's practice of applying adverse FA when certain requested information is withheld by an interested party in its questionnaire response, but discovered at verification. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from Chile,* 63 FR 56613, 56620 (October 22, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Spain,* 63 FR 40391, 40396 (July 29, 1998). As partial adverse FA, we have applied the highest cost for scrap and alloys reported within each grade, to its respective materials fields in the COP and CV databases, for CONNUMs with the particular grade. *See Final Cost Analysis Memorandum* at 1.

Because we cannot adequately evaluate whether the unreported transactions with ALZ's affiliates occurred at market prices, we are unable to reach the question of whether the affiliated party purchases of raw materials constitute major inputs. It should be noted, however, that we disagree with petitioners' characterization that the Department's threshold for what constitutes a major input is outlined in *LNPPs from Japan,* (*i.e.,* an input that represents at least two percent of cost of manufacturing (''COM'')). As stated in *LNPPs from Japan, i*n a typical case in which subject merchandise only requires a few inputs, a threshold of two percent for defining a major input may be low. However, in that case, the product required thousands of inputs with no single input representing a large share of the total product cost. In addition, the company involved in the LNPP investigation obtained numerous inputs from affiliated suppliers, the sum of which represented a substantial portion of the total COM of LNPP. Thus, as the Department explained in *LNPP's from Japan,* the product under investigation in that case is very unique and our determination in that case should not be used as precedent for the major input rule. As we explained in the Preamble to the Departments regulations, the determination of whether an affiliated party input constitutes a ''major input'' is made on a case-by-case basis, and the decision depends on the nature of the input, the product under investigation, and the nature of the transactions and operations between the producer and the affiliated suppliers. *See* Preamble at 351.407.

Comment 14: Non-Prime Products. ALZ argues that the Department should accept the revised costs for non-prime products, which according to ALZ, accurately reflect the actual costs incurred to produce these products. ALZ stated that, originally, it incorrectly reported only the direct materials costs associated with the production of non-prime products. According to ALZ, it is the Department's practice to assign the same cost to prime and non-prime merchandise. As evidence of this, ALZ points to *Polyethylene Terephthalate Film, Sheet, and Strip from the Republic of Korea; Final Determination of Sales at Less than Fair Value,* 61 FR 35177, 35182, (July 5, 1996) (''*PET film from Korea''*), in which the Department relied on equal costing for the production of prime and off-grade film. Thus, according to ALZ, for the final determination, the Department should use the revised COP and CV databases submitted by ALZ for non-prime merchandise.

Petitioners contend that ALZ succeeded in ''capping'' its preliminary rate by intentionally misreporting costs for non-prime merchandise. However, to avoid the use of FA for the final determination, ALZ reported actual non-prime costs, which will lower the overall profit level. Therefore, petitioners assert that the Department should consider the impact of ALZ's preliminary and intentional misreporting of non-prime costs in its final determination.

Department's Position: We agree with ALZ that non-prime products should reflect the actual costs incurred to produce the products. The Department recognizes that the same costs are incurred to produce non-prime and prime products of the same chemical composition. As stated in *PET Film from Korea* at 35182, the only difference between prime and non-prime products is that at the end of the production process the products are classified. Since we have found no problems with the revised reported costs for non-prime merchandise, for the final determination, we used the revised COP and CV databases for non-prime products. We note that there is no support on the record for petitioners' claim that ALZ intentionally misreported its costs for non-prime merchandise.

Comment 15: Depreciation. ALZ alleges that, in the preliminary determination, the Department double-counted depreciation expense in its cost calculation. According to ALZ, the Department included the field for depreciation in the cost calculation even though this field was already captured in the fixed overhead field. ALZ asserts that, for the final determination, the Department should correct the double-counting of depreciation by excluding the depreciation variable in the calculation of COP and CV.

Petitioners contend that ALZ's argument rests on the assumption that the values in the depreciation field for COP and CV duplicate the depreciation elements in each fixed overhead field. According to petitioners, ALZ did not apply the depreciation ratio to the ''other variable overhead'' costs. Petitioners claim that ALZ changed without explanation, the ratio applied to ''other variable overhead'' between the first COP and CV databases submitted and the latest cost submissions. Given that ALZ changed its methodology without informing the Department, petitioners submit that adverse FA should be used to calculate depreciation in the final determination. Moreover, petitioners assert that, if the Department determines that the use of adverse facts available is not warranted, at minimum, the Department should use the COP and CV databases which conform with the narrative submitted by ALZ.

Department's Position: We agree with ALZ that the depreciation fields in the COP and CV databases should be excluded from the cost calculation. At the preliminary determination, the Department was unable to thoroughly evaluate whether all of ALZ's depreciation costs were fully captured . However, at verification, the Department reviewed several cost build-ups for selected products (see ALZ's Cost Verification exhibits 12, 13, and 14) and determined that the depreciation costs were included in the fixed overhead field.

The petitioners' argument that ALZ changed the ratio which was applied to other variable overhead is without merit. As the Department examined at verification, and as ALZ demonstrated in its exhibits, the depreciation ratio was properly applied to the variable processing costs within the ''other variable overhead'' field (see ALZ's Cost Verification exhibits 12, 13, and 14).

Comment 16: Extraordinary Costs. ALZ argues that the Department should revise its costs for a certain product to exclude extraordinary costs incurred outside the ordinary course of business. Specifically, ALZ points to the fact that in order to comply with customer specifications, which were not known at the time the production of the product

began, the merchandise had to be sent to an outside processor, thus causing ALZ to incur extraordinary costs for this product. ALZ states that in the ordinary course of business it would not incur the extra costs to produce the coil. In support of its position ALZ cites section 773 (b)(3)(a) of the Act, in which it notes the Department is required by the statute to rely on costs that ordinarily permit the production of the product in the ordinary course of business. In addition, as evidence of this ALZ points to *Stainless Steel Wire Rod from Taiwan; Final Determination of Sales at Less than Fair Value,* 63 FR 40461, 40467, (July 29, 1998) (''*Wire Rod from Taiwan*'') and *LNPP's from Japan,* 61 FR at 38153, in which the Department chose to exclude costs associated with unforseen events.

Petitioners contend that the Department should dismiss ALZ's claim of extraordinary costs and, instead, apply adverse facts available. Petitioners point out that, *LNPP's from Japan* and *Wire Rod from Taiwan,* the two cases cited by ALZ, dealt with accidents that were unexpected and unforeseen. Further, petitioners cite *Floral Trade Council* v. *United States,* 16 CIT 1014 (1992), under which the court established a two-prong test defining ''extraordinary'' events, namely, these events must be (1) infrequent in nature, and (2) unusual in occurrence. Petitioners argue that ALZ's series of business decisions giving rise to the additional costs do not rise to the general level of potential unpredictability of accidents, and have no credibility as unforseen, unpreventable and infrequent events.

Furthermore, petitioners argue that the Department should apply total adverse FA to ALZ's total costs or adverse FA to certain proprietary cost for ALZ, due to its failure to timely report affiliated party purchases for the extraordinary costs incurred by ALZ.

Department's Position: We agree with petitioners that the costs incurred by ALZ for outside processing are not extraordinary in nature. The Statement of Administrative Action (the SAA) at 832 states that ''when an unforeseen disruption in production occurs which is beyond management's control * * * (the Department) will continue its current practice such as using the costs incurred for production prior to such unforeseen event.'' The Department's long-standing practice with regard to ''unforeseen events'' is to treat expense items as extraordinary only when they are both unusual in nature and infrequent in occurrence. *See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Certain Preserved Mushrooms from India,* 63 FR 72246, 72251 (December 31, 1998) (the Department determined that death of the manager, flooding and crop disease were not extraordinary or unforeseen); *Notice of Final Determination of Sales at Less Than Fair Value: Static Access Memory Semiconductors from Taiwan,* 63 FR 8909, 8932–33 (February 23, 1998) (the Department denied a claim for an offset due to losses incurred because of a fire); and *Notice of Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Argentina,* 60 FR 33539, 33549 (June 28, 1998) (the Department rejected respondent's claim for an offset due to restructuring costs). Because adjustments of this type are, by definition, extraordinary, the Department makes its decisions regarding extraordinary costs on a case-by-case basis.

In this case, ALZ needed services from an outside processor in order to meet special requirements of one of its customers. The decisions to use an outside processor to do what was needed to meet the requirements of its customer was a business decision, not an extraordinary expense. ALZ's claim that it does not normally use outside processors to perform the service at issue does not make it an extraordinary event. As the court held in *Floral Trade Council* v. *United States* 63 F.3d 318 (Fed. Cir. 1995), extraordinary events must be infrequent in nature and unusual in occurrence. We do not consider a steel company needing specialized services from an outside processor to be infrequent in nature or unusual in occurrence. In fact, we consider this to be a routine event for a company in the steel industry. Furthermore, ALZ's reliance on section 773(b)(3)(a)'s requirement that the Department must rely on costs that permit the production of the product in the ordinary course of business is misplaced. We do not agree that the outside processing cost incurred by ALZ in order to meet its customer's requirements was outside the ordinary course of business. The obligation to comply with customer specifications throughout a production process is a normal part of doing business and does not place it outside of the ordinary course of business. Thus, for the final determination, we are not excluding the outside processing costs incurred to produce the product in question.

We disagree with the petitioners' assertion, however, that we should apply total adverse FA in calculating ALZ's dumping margin as a result of ALZ's acquiring these proprietary services from an affiliate. The Department was informed within a week prior to verification that the extraordinary costs incurred by ALZ were performed by an affiliated party. We have no reason to believe that the transfer price between ALZ and its affiliate for these services did not occur at arm's-length prices. The same affiliate that provided ALZ with hot rolling services also provided the proprietary service at issue. At verification we tested the appropriateness of the transfer prices between ALZ and its affiliate for the hot rolling services, noting that no adjustment was necessary (see Comment 12 above and *ALZ Cost Verification Report* at 18). We do not consider it necessary to test every transaction with an affiliate in order to conclude that all transactions with the affiliate can be relied upon. In this case, based on our findings at verification, we conclude that the transfer prices between ALZ and its affiliate for the proprietary services at issue can be relied upon based on the results of our testing of the hot rolling transfer prices between ALZ and the same affiliated supplier (*id.*).

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of subject merchandise from Belgium that are entered, or withdrawn from warehouse, for consumption on or after November 4, 1998 (the date of publication of the preliminary determination in the **Federal Register**). The Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below. These suspension of liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
ALZ, N.V	9.86
All Others	9.86

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (''ITC'') of our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S.

industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7537 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[A–583–830]

Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils From Taiwan

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Gideon Katz or Michael Panfeld, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–5255 or (202) 482–0172, 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 (''Department'') regulations are to the regulations at 19 CFR part 351 (April 1998).

Final Determination

We determine that stainless steel plate in coils (''SSPC'') from Taiwan is being sold in the United States at less than fair value (''LTFV''), as provided in section 735 of the Act. The estimated margins are shown in the ''Suspension of Liquidation'' section of this notice.

Case History

Since the amended preliminary determination (*Notice of Amended Preliminary Determination of Sales at Less Than Fair Value: Stainless Steel Plate in Coils from Taiwan, (Amended Preliminary Determination*) (63 FR 66785, December 3, 1998), the following events have occurred: We conducted a cost verification of YUSCO's questionnaire response from November 30–December 4, 1998, and a sales verification of YUSCO from December 14–17, 1998. We also conducted verifications at Ta Chen Stainless Pipe, Co. from December 18–21, 1998 and Ta Chen International from January 12–15, 1999.

Petitioners and respondents submitted case briefs on February 8, 1999. On February 11, 1999, petitioners (the only party requesting a public hearing) withdrew their request for the public hearing. Petitioners and respondents submitted rebuttal briefs on February 16, 1999.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.,* cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars. The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are 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 January 1, 1997, through December 31, 1997.

Verification

As provided in section 782(i) of the Act, we verified the sales and cost information submitted by the respondents for use in our final determination. We used standard verification procedures, including examination of relevant accounting and production records and original source documents provided by respondents.

Facts Available

We determine that the use of facts available is appropriate for YUSCO in accordance with section 776(a) of the Act, because it failed to report all of its home market sales made during the POI.

Where necessary information is missing from the record, the Department may apply facts available under section 776 of the Act. Further, where that information is missing because a respondent has failed to cooperate to the best of its ability, section 776(b) of the Act authorizes the Department to use facts available that are adverse to the interests of that respondent, which may include information derived from the petition, the final determination, a previous administrative review, or other information placed on the record. As described below in detail in Comment 1, YUSCO did not act to the best of its ability in the reporting of its home market sales. We have chosen the highest of the calculated petition margins for Taiwan of 8.02 percent as total adverse facts available.

Middleman Dumping

1. Dumping Calculation

As a result of further analysis and comments raised by interested parties, we have changed our middleman dumping methodology. As in our *Amended Preliminary Determination,* for the final determination, we have determined whether a substantial portion of Ta Chen's U.S. sales were below acquisition costs by comparing the total value of stainless steel plate sold below acquisition cost to the total value of all stainless steel plate sales made by Ta Chen during the POI. We first identified sales below acquisition cost by comparing Ta Chen's resale price for stainless steel plate sold during

the POI to its total acquisition cost for this merchandise. We used YUSCO's invoice price to Ta Chen as the basis for determining acquisition cost. However, unlike our *Amended Preliminary Determination,* we added to this cost an appropriate portion of Ta Chen's interest expense and general and administrative expenses (G&A) to obtain the total acquisition cost. We based the U.S. resale prices on Ta Chen's sales to unaffiliated customers in the United States. From that starting price we have continued to deduct further processing costs, discounts, movement expenses (freight, insurance, U.S. duties, and brokerage and handling fees), and the actual selling expenses incurred by Ta Chen (commissions, warehousing charges, bank charges, and indirect selling expenses), where applicable, as in our *Amended Preliminary Determination.* We then compared that price, after deductions, to the total acquisition cost. Based on this comparison, 44.53 percent of Ta Chen's resales to the United States were at prices below total acquisition cost. Therefore, we determine that Ta Chen made a substantial portion of its sales below total acquisition cost. As a result of this determination, we have examined whether Ta Chen's U.S. prices were substantially below its acquisition costs from YUSCO to determine whether Ta Chen engaged in middleman dumping during the POI. *See Comment 9.*

As we stated in the *Amended Preliminary Determination,* Congress has left to the Department the discretion to devise a methodology which would accurately capture middleman dumping. *See* S. Rep. No. 249, 96th Cong., 1st Sess. at 94 (1979) (''Senate Report''). To determine the magnitude of the losses incurred by Ta Chen in selling YUSCO's subject merchandise to the United States during the POI, we divided the amount of losses by the total sales value of all sales.

In the *Amended Preliminary Determination,* we calculated the amount of losses by comparing a weight-averaged adjusted U.S. price to the individual acquisition cost by model. We now believe this to be in error. Therefore, for the final determination, we are comparing a weighted-average adjusted U.S. price (as described above) to a weighted-average total acquisition cost (*i.e.,* invoice price plus an appropriate portion of Ta Chen's interest and G&A expenses). A weighted average to weighted average comparison is consistent with our methodology for calculating a margin in a less-than-fair-value investigation. *See* section 777A(d)(1)(A)(i).

Therefore, for the final determination, we multiplied the difference between the weighted-average adjusted U.S. price and the weighted-average total acquisition cost by the respective quantity of each U.S. model to determine the ''amount of losses.'' Based upon this calculation, we have determined that Ta Chen's losses on U.S. sales of subject merchandise during the POI are 2.18 percent, which we deem to be substantial. *See* Comment 11. Therefore, we find that Ta Chen engaged in middleman dumping during the POI.

2. Cash Deposit Rate

Where a producer sells through an unaffiliated trading company and has knowledge that the merchandise is intended for the United States, we normally focus only on the producer's sales to the trading company to determine the margin of dumping. However, as we stated in our *Amended Preliminary Determination,* a producer may sell to an unaffiliated reseller, such as a trading company which in turn sells the producer's merchandise at prices below the trading company's acquisition costs, thereby engaging in middleman dumping. Where we find middleman dumping in an investigation, as here, we must calculate a cash deposit rate that reflects that middleman dumping, as well as any dumping which occurs from the producer to the trading company. Therefore, we have assigned a cash deposit rate of 10.20 percent to sales produced by YUSCO and sold to the United States through Ta Chen. This reflects YUSCO's margin on U.S. sales to Ta Chen as well as the middleman dumping by Ta Chen. *See* 19 CFR 351.106. Any sale of subject merchandise by YUSCO other than through Ta Chen will be subject to a deposit at the rate determined for YUSCO alone.

Interested Party Comments: YUSCO

Comment 1: Petitioners contend that a group of YUSCO's ''indirect export sales'' (which we call ''scenario two'' sales) are, in reality, unreported home market sales. Petitioners note that these sales differ from export sales in four respects: (1) These sales are not packed in the manner usually required for export; (2) these sales are shipped to the customer's warehouse in Taiwan; (3) these sales do not have a completed shipping number (unlike direct export sales); and (4) these sales are subject to domestic value-added tax (VAT) (unlike direct export sales). Moreover, petitioners maintain that YUSCO was unable to support its claim of knowledge that the merchandise was exported. Petitioners assert that without such proof and in light of the evidence gathered at verification, the Department should include these sales in YUSCO's home market database. Petitioners further argue that the Department should not allow any deductions from the gross unit price because these sales were unreported and YUSCO has not made a timely claim for adjustments.

YUSCO argues that the Department should treat YUSCO's scenario two sales as third country sales. The determining factor, according to YUSCO, is the extent of the producer's knowledge of the final destination of these sales at the time of sale. Respondent explains that the Department and the courts have, in similar cases, considered sales to home market customers as export sales when the producer knew at the time of sale that the merchandise would be exported. Respondent cites to several cases to illustrate its point, including *Certain Hot-Rolled Carbon Steel Flat Products from Korea*, 58 FR 37176 (July 9, 1993) (finding that a sale to a home market customer was an export sale where the customer had knowledge of export, but no specific knowledge of the customer's further manufacturing).

YUSCO claims that the Department verified that YUSCO did indeed know at the time of the sale that the scenario two sales were for export to third countries. YUSCO argues that the Department verified that YUSCO used information provided by customers at the time of order to assign order numbers, the prefix of which always begins with ''U'' (for export) and a country code, effectively labeling these sales as export sales, and that YUSCO's customers for scenario two sales handled Taiwan custom clearance, further demonstrating exportation.

YUSCO claims that contrary to petitioners' assertion, every government uniform invoice (''GUI'') for scenario two sales has a shipping number followed by an asterisk, and that the asterisk is additional evidence that shows specific knowledge that the SSPC was destined for export. With regard to petitioners' claim that scenario two sales do not require any special export packing, YUSCO claims that nothing on the verified record indicates that packing specifications for scenario two sales were different from the packing specifications for direct export sales.

YUSCO argues that its collection of VAT from scenario two customers, and place of delivery of scenario two sales, are both irrelevant to the determination of the ultimate market for these sales, because, while it is YUSCO's responsibility to collect VAT from a

Taiwan company, in the end there is actually no VAT paid because the customer obtains a refund from the government. YUSCO cites *Antifriction Bearings (Other than Tapered Roller Bearings) an Parts Thereof from France, et al,* 60 FR 10900 (February 28, 1995), a case in which the Department determined that with regard to indirect export sales, the collection of VAT by the respondent is ''not a determinant of the ultimate destination of the merchandise.''

Department's Position

Application of Facts Available. Section 776(a) of the Act provides that, if an interested party withholds information that has been requested by the Department, fails to provide such information in a timely manner or in the form or manner requested, significantly impedes a proceeding under the antidumping statute, or provides information which cannot be verified, the Department shall use, subject to sections 782(d) and (e) of the Act, facts otherwise available in reaching the applicable determination. Thus, pursuant to 776(a), the Department is required to apply, subject to section 782(d), facts otherwise available. Pursuant to section 782(e), the Department shall not decline to consider such information if all of the following requirements are met: (1) The information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

We find, based on the evidence set out below, that by not reporting a large portion of the home market database (so-called scenario two sales), YUSCO withheld information that had been requested by the Department (*i.e.,* all home market sales of the foreign like product) and did not act to the best of its ability in providing this information. Because the Department discovered the existence of these sales only at verification, this information was not provided in a timely manner (*i.e.,* in response to Section B of the Department's questionnaire). Furthermore, YUSCO's withholding of crucial information which the Department needed to calculate an accurate normal value significantly impeded the Department's investigation. Moreover, the Department cannot consider the information presented at verification because : (1) The information was not submitted by the established deadline; (2) the information discovered at verification is so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; and (3) the information cannot be used without undue difficulties. As a result, we must rely on the facts otherwise available. Where the Department determines that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, section 776(b) of the Act provides that the Department may use an adverse inference in selecting from the facts available. *See, e.g., Roller Chain, Other Than Bicycle, From Japan; Final Results and Partial Recission of Antidumping Duty Administrative Review,* 63 FR 63671 (Nov. 16, 1998); *Certain Welded Carbon Steel Pipes and Tubes From Thailand: Final Results of Antidumping Duty Administrative Review,* 62 FR 53808, 53819–20 (Oct. 16, 1997). We have determined, as described below, that YUSCO failed to cooperate within the meaning of Section 776(b) and have applied as facts available the highest petition margin, 8.02%. *See e.g., Notice of Final Determination of Sales at Less than Fair Value: Certain Preserved Mushrooms from Chile,* 63 FR 56613, 56620 (October 22, 1998); *Notice of Final Determination of Sales at Less Than Fair Value: Stainless Steel Wire Rod from Spain,* 63 FR 40391, 40396 (July 29, 1998) (applying adverse facts available when certain requested information is withheld by an interested party in its questionnaire response, but discovered at verification). *See* Facts Available Memorandum from Rick Johnson to Edward Yang, March 19, 1999 for full discussion.

Total Facts Available

Section 773(a)(1)(B) of the Act requires that, in determining normal value, the Department use all sales of the foreign like product sold for consumption in the exporting country, provided the sales are in the usual commercial quantities, made in the ordinary course of trade and, to the extent practical, at the same level of trade as the export price or constructed export price sale. Our questionnaire requires that where the home market is viable, respondents report all sales of the foreign like product sold in the home market. *See* Questionnaire at B–1.

The Department's antidumping questionnaire issued to YUSCO, at B–1, notes that Section B of the questionnaire ''provides instructions for reporting your sales of the foreign like product in your home market or a third-country market.'' Foreign like product, in turn, is defined in the glossary to the antidumping questionnaire as referring ''to merchandise that is sold in the foreign market and that is identical or similar to the subject merchandise. When used in the questionnaire, foreign like product means all merchandise that is sold in the foreign market and that fits within the description of merchandise provided in Appendix III to the questionnaire. (Section 771(16) of the Act).'' Therefore, it is clear from the instructions in the questionnaire that respondent is required to report all sales of subject merchandise in the foreign market. Furthermore, in explaining how to report customer codes for home market sales, the questionnaire states that, ''{i}f known, identify customers that export some or all of their purchases of the foreign like product. Explain how you determined which sales were for consumption in the foreign market.'' *See* Questionnaire at page B–8. This instruction clearly places an obligation upon a respondent and contemplates, in accordance with the section 773(a)(1)(B) of the statute, that sales for consumption in the home market be reported as home market sales. Moreover, the questionnaire specifically asked respondent to identify customers that export and explain how it determined what sales were for home market consumption.

The record establishes that YUSCO failed to report a substantial portion of sales consumed by home market customers. Moreover, YUSCO failed to identify these customers and explain how it determined what sales to report. As a result, the Department was unaware of the existence of these so-called scenario two sales until verification. *See* Verification Report at 6. At verification, we found that YUSCO erroneously considered a substantial portion of its sales as third country export sales, even though they were sales to unaffiliated home market customers. *See* Verification Report at 6–7.

Further, we learned for the first time at verification that in determining that these scenario two sales were for export, YUSCO relied solely upon its internal classifications. Under YUSCO's system, sales with order numbers starting with ''D'' are home market sales and order numbers starting with ''U'' are destined for export. However, verification revealed that at least some portion of sales classified under ''U'' were consumed in the home market. YUSCO merely relied upon customers' statements that a product would be exported, without taking into account whether the customer would consume the SSPC by using it to produce non-

subject merchandise prior to export. YUSCO's internal classifications were therefore insufficient and unreliable in this regard.

We found at verification that one group of these scenario two sales, classified by YUSCO as ''UZ sales,'' accounted for a substantial portion of all scenario two sales. We found that all the customers which made up this subgroup of UZ sales were pipe manufacturers located in the home market. *See* Verification Report at 7 and Exhibit 7. Therefore, it is clear that YUSCO knew or had reason to know that the sales of SSPC to these pipe customers would be used in Taiwan to manufacture non-subject merchandise (*i.e.,* consumed in Taiwan). *See* Verification Report at 7. The other scenario two sales (also substantial in number), which were coded by YUSCO with a ''U'' at the beginning of the order numbers, were also sales made to companies in Taiwan. *See* Verification Report at 6–7. YUSCO provided no information about these customers, except for one customer, which YUSCO stated generally further manufactures SSPC into sheet, *i.e.,* non-subject merchandise, before export. *See* September 4, 1998 YUSCO supplemental questionnaire response. Therefore, from what information was provided, YUSCO knew that at least some ''U'' sales of SSPC were consumed in the home market by Taiwan manufacturers of downstream products. Although we took as exhibits sales listings of UZ sales and other ''U'' sales, and while they provided information as to gross unit prices and quantity, YUSCO did not provide us with sufficient product or customer information to allow us to determine if the merchandise sold was exported or further manufactured into non-subject merchandise in Taiwan. *See* Verification Exhibits 7 and 8.

YUSCO argues that the so-called scenario two sales were ''indirect export sales'' ultimately destined for export to third countries by YUSCO's Taiwanese customers. Because, according to YUSCO, at the time of sale YUSCO had knowledge that these sales were ultimately for export to third countries, YUSCO claims that it was correct in not reporting these sales as home market sales, even though sales were made to home market customers and shipped within the home market. As noted above, the Department's questionnaire requires that *all* sales of the foreign like product in the home market be reported (except as specifically provided for in the questionnaire which do not obtain here) and places an obligation on the respondent to identify customers that export and explain how it determined sales were for consumption in the home market.

As noted above, under section 773(a)(1)(B), normal value is based on sales of the like product for consumption in the home market. Thus, sales should be excluded from the home market database only if a respondent knew or had reason to know that merchandise was not sold for home consumption. *See INA Walzlager Schaeffler Kg* v. *United States,* 957 F. Supp. 251 (CIT 1997). Therefore, only if YUSCO could demonstrate that it knew or had reason to know that merchandise subject to investigation was not sold for consumption in the home market under section 773(a)(1)(B) might it have been appropriate for YUSCO to omit these so-called scenario two sales as home market sales. In this case, substantial evidence establishes that this was not the case. It is without question that merchandise sold in the home market, even if ultimately destined for export, is consumed in the home market in producing non-subject merchandise prior to exportation. *See, e.g., Certain Hot-Rolled Carbon Steel Flat Products From Korea,* 58 FR 37176 (July 9, 1993)(Comment 9); *Dynamic Random Access Memory Semiconductors of One Megabit and Above From the Republic of Korea,* 58 FR 15467 (March 23, 1993). Therefore, YUSCO should have reported as home market sales at least the portion of the scenario two sales (UZ sales) that were consumed in the home market, regardless of whether the non-subject merchandise made by these customers from YUSCO's merchandise was later exported, because YUSCO knew or had reason to know that its pipe customers would consume the SSPC in Taiwan to manufacture pipe.

With regard to the remaining high percentage of the non-reported ''U'' sales, it was incumbent upon YUSCO to demonstrate that it knew or had reason to know that such sales to Taiwan customers were not destined for home consumption. Because the Department first learned of these sales during verification, it was compelled to review very limited information. *See* Verification Report at 6. There was no information concerning the customers involved in these ''U'' sales from which we could determine if such customers were merely Taiwanese resellers of SSPC for export or producers which had used YUSCO's merchandise to manufacture non-subject merchandise in Taiwan. YUSCO had no sales contracts or commercial invoices for ''U'' sales to demonstrate its claim. The only evidence to which YUSCO could point to establish that these sales were destined for export was YUSCO's internal classifications, which categorized the sales as export sales. *See* Verification Report at 7. Although YUSCO's invoices did have an asterisk in the shipping number which we were told signified ''indirect export'', as stated, all sales were made to Taiwan customers, and YUSCO's classifications did not sufficiently describe the types of customers. *See* Verification Report at 7. Thus, from such classifications, one cannot distinguish whether the customer is a manufacturer (*e.g.* pipe producer) or a mere reseller. Moreover, no evidence at verification revealed that YUSCO packed such sales for export. *See* Verification Report at 7. Again, these same internal forms also characterized the other portion of the scenario two sales, ''UZ'' sales (which, as stated, were in and of themselves a substantial percentage of home market sales), as destined for export, while verification revealed that UZ sales were for consumption in the home market in producing non-subject merchandise (pipe) prior to export. *See* Verification Report at 7.

Because YUSCO's classification was inadequate, by relying on it YUSCO failed to comply to the best of its ability with the Department's instructions. Moreover, what information it did possess regarding its Taiwan customers indicates that its merchandise was consumed in the home market. Therefore, YUSCO should have reported such sales to the Department in its questionnaire response. Because of its failure to report a substantial portion of its home market sales to the Department, which the Department did not learn until verification, it was too late for the Department to verify and use these sales in determining normal value. The information available to the Department at verification only included gross prices and quantity; the merchandise sold was not sufficiently described to permit model-matching to U.S. sales (although the Department took a computer diskette containing information about physical characteristics of the scenario two sales at verification, the information was incomplete, not verified, and in any event could not be utilized without undue difficulty by the Department because it would have to be input manually). Therefore, we determine that the information is so incomplete that it cannot serve as a reliable basis for reaching our determination of normal value.

We note that petitioners' argument regarding VAT is not valid since although YUSCO collects VAT from Taiwan companies involved in indirect

exports, its customers are reimbursed by the Taiwan government upon exporting the merchandise.

We also note that the circumstances of this case are different from those articulated in *Certain Cut-To-Length Carbon Steel Flat Products from Korea,* 58 FR 37176, 183 (July 9, 1993), which YUSCO cites for support in deeming the scenario two sales as export sales. The crucial distinction is that, in that proceeding, the respondent had timely reported the sales at issue to the Department. Thus, the Department was able to collect information, later verified, which established that the sales at issue were home market sales because the respondent did not know or have reason to know at the time of sale that its merchandise was destined for export. The present case, to the contrary, involves a large number of unreported sales which the Department was unaware of until verification, and so was unable to verify the nature of the sales to determine whether to use the sales in calculating normal value. Moreover, what the Department did uncover at verification indicated that YUSCO was aware that, at a minimum, a substantial portion of scenario two sales (''UZ'' sales) were for consumption in producing non-subject merchandise by YUSCO's Taiwan customers.

Adverse Facts Available

Section 776(b) of the Act authorizes the Department to use as adverse facts available information derived from the petition. Section 776(c) provides that, when the Department relies on secondary information, such as the petition, as facts available, it must, to the extent practicable, corroborate that information from independent sources that are reasonably at its disposal. The SAA clarifies that ''corroborate'' means that the Department will satisfy itself that the secondary information to be used has probative value (*see* SAA at 870). The SAA also states that independent sources used to corroborate may include, for example, published price lists, official import statistics and customs data, and information obtained from interested parties during the particular investigation (*see* SAA at 870).

At the outset of this investigation, the Department examined the accuracy and adequacy of the price to price information in the petition. While we rejected the petition margins based on cost, we determined that the price to price comparisons constituted sufficient evidence of dumping to justify initiation. *See Antidumping Investigation Initiation Checklist; Stainless Steel Plate in Coils from Belgium, Canada, Italy, South Africa, South Korea and Taiwan, pages 14–16* (estimated margins for Taiwan ranged from .29% to 8.02%); *see also* petitioners' submission dated April 17, 1998 (amendment to petition regarding price information).

In order to determine the probative value of the petition margins for use as adverse facts available for the purposes of this determination, we have examined evidence supporting the petition calculations. In accordance with section 776(c) of the Act, to the extent practicable, we examined the key elements of the U.S. price and normal value calculations on which the petition margin was based and compared the sources used in the petition to YUSCO's reported sales databases. Based on this analysis, we have successfully corroborated the information in the petition. *See* Facts Available Memorandum.

Therefore, we have chosen the highest of the calculated petition margins for Taiwan of 8.02 percent as total adverse facts available.

Comment 2: YUSCO argues that even if the Department makes an affirmative finding on middleman dumping by Ta Chen, the Department should assign and calculate an independent dumping margin for YUSCO based on the one reported U.S. sale made through a company in Taiwan other than Ta Chen. Ta Chen makes the same assertion. YUSCO claims that the Department verified that the sale in question was, in fact, a U.S. sale and that this sale was not made through Ta Chen. According to YUSCO, its order acceptance sheet for this sale shows its limited knowledge of the Taiwan company's further processing, as well as its knowledge that the merchandise would ultimately be sold to a U.S. customer. YUSCO argues that its lack of specific knowledge about its customer's further processing does not meet the Department's standard for ''consumption'' of SSPC in the home market.

YUSCO cites several instances in which it claims that the Department has considered a sale to a local customer as a U.S. sale where the respondent ''is aware at the time of sale that the merchandise is ultimately destined for the United States'': *Fresh Atlantic Salmon from Chile,* 63 FR 31411 (June 9, 1998); *Dynamic Random Access Memory Semiconductors of One Megabit or Above from the Republic of Korea,* 63 FR 50867 (September 23, 1998); *Yue Pak, Ltd.* v. *United States,* Slip. Op. 96–65 at 9 (CIT), aff'd. 1997 U.S. App. LEXIS 5425 (Fed. Cir. 1997); *Peer Bearing Co.* v. *United States,* 800 F. Supp. 959, 964 (CIT 1992).

YUSCO also cites the final determination in the LTFV investigations of *Certain Hot-Rolled Carbon Steel Flat Products, Certain Cold-Rolled Carbon Steel Flat Products, Certain Corrosion-Resistant Carbon Steel Flat Products, and Certain Cut-to-Length Carbon Steel Plate from Korea* (58 FR 37176 (July 9, 1993)) to support its argument that the Department considers a sale to a local customer as an export sale where the respondent has specific knowledge that the merchandise would be exported, but had no specific knowledge regarding the customer's further manufacturing. YUSCO distinguishes these circumstances from those addressed in the preliminary determination in the LTFV investigation of *Stainless Steel Sheet and Strip in Coils from Korea,* (64 FR 137 (January 4, 1999)), in which sales to a further manufacturer/exporter in Korea were deemed home market sales because the respondent had specific knowledge that the subject merchandise would be further manufactured into non-subject merchandise prior to exportation. YUSCO concludes that since Ta Chen was not involved in this U.S. sale, the Department should assign and calculate an independent dumping margin rate for YUSCO based on this sale.

Petitioners argue that sales to home market customers that are further manufactured prior to export are reportable home market sales. In this case, continue petitioners, the sale in question should be considered a home market sale since YUSCO knew at the time of sale that the merchandise would be further manufactured in Taiwan into non-subject merchandise and then sold to the United States. Petitioners cite the preliminary determination in *Stainless Steel Sheet and Strip in Coils from Korea* (64 FR 137) in which the Department included as home market sales those sales of subject merchandise to Korean companies that respondent knew would further manufacture the subject merchandise into non-subject merchandise for export. Petitioners also point to two of YUSCO's submissions in which YUSCO stated that it knew at the time of sale that the SSPC would be consumed prior to exportation. *See* YUSCO's September 22, 1998 letter to the Department and YUSCO's September 4, 1998 supplemental questionnaire response.

Petitioners also claim that the sale in question should be classified as a home market sale because YUSCO considered it a domestic sale in its normal course of business, it did not require special export packing, it was shipped to a customer in Taiwan prior to export, it

did not have a complete shipping number in the Government Uniform Invoice (''GUI''), and the sale was subject to a value-added tax (VAT). Petitioners also refer to a Department memorandum to the file dated November 25, 1998 which states that evidence established that YUSCO knew that the SSPC would be further manufactured into non-subject merchandise.

Petitioners conclude that, even if the Department continues to classify this sale as a U.S. sale, it should disregard this sale for the final determination since it is an ''outlier'' sale, and thus not representative of YUSCO's normal selling behavior. Petitioners cite several cases in which the Department ruled similarly; including *Ipsco, Inc.* v. *United States,* 714 F. Supp. 1211, 1216 (CIT 1989); *Silicon Metal from Brazil: Notice of Final Results of Antidumping Duty Administrative Review,* 64 FR 6305 (February 9, 1999); and *Tapered Roller Bearings, and Parts Thereof, Finished and Unfinished, from Japan; Final Results of Antidumping Duty Administrative Review,* 57 FR 4960 (February 11, 1992).

Department's Position: The accurate determination of which sales should be classified as home market sales and used to calculate normal value, and which sales should be classified as U.S. sales and used to calculate export price, is central to accurately determining antidumping margins. In determining whether a sale made prior to importation to a customer outside the United States should be considered a U.S. sale, section 772(a) requires that respondent know that subject merchandise, purchased by an unaffiliated reseller, is destined for exportation to the United States. Because the statute does not address how the Department is to determine if a respondent knew whether home market sales of subject merchandise were destined for the U.S. market, the Department has discretion in making this determination. It has been the Department's practice to examine the evidence on a case-by-case basis to determine whether the respondent knew or had reason to know that its sales of subject merchandise to an unaffiliated company in the home market were destined for export to the United States. *See, Ina Walzlager* v. *United States,* 957 F. Supp. 251 (CIT 1997)(standard for determining knowledge under section 773(a) is imputed knowledge, not actual knowledge); *Yue Pak* v. *United States,* Slip Op. 96–65 at 9 (CIT) (upholding the Department's interpretation of ''for exportation to the United States'' to mean that the reseller or manufacturer from whom the merchandise was purchased knew or should have known at the time of sale that the merchandise was being exported to the United States).

Based on the record evidence, it is clear that YUSCO knew or had reason to know that its sale of subject merchandise to a certain customer was not for export to the United States because it would be further manufactured in Taiwan into non-subject merchandise. The non-subject merchandise was then to be exported to the United States. *See* September 4, 1998 Supplemental Questionnaire Response, September 22, 1998 letter to the Department, and October 19, 1998 letter to the Department in which YUSCO states that it had general knowledge and an understanding that the SSPC would be used to manufacture non-subject merchandise prior to export to the United States. Therefore the sale in question is in fact a home market sale. *See Memorandum to Edward Yang: Stainless Steel Plate In Coils from Taiwan; YUSCO Sales,* November 25, 1998. Nevertheless, as we have applied total adverse facts available to YUSCO (see Comment 1), the classification of this sale as either U.S. or home market is irrelevant to the calculation of YUSCO's margin.

Comment 3: YUSCO states that the Department should calculate YUSCO's dumping margins incorporating its corrections to minor errors that it submitted at the commencement of both cost and sales verification. Petitioners state that the Department should include an unreported discount for one YUSCO U.S. sale, as noted in the verification report.

Department's Position: We agree with both YUSCO and petitioners. However, we have not made these corrections for the final determination, since we have applied total adverse facts available to YUSCO, as described in Comment 1.

Comment 4: Petitioners claim that during YUSCO's cost verification YUSCO failed to quantify differences between the reported and booked costs of manufacture. Although YUSCO offered ''three contributing factors,'' state petitioners, YUSCO was unable to quantify the amounts related to each of the claimed reconciling items. Petitioners claim that the Department must thus adjust the reported total manufacturing costs (''TOTCOMs'') to reflect the unreconciled difference.

YUSCO contends that the Department should reject petitioners' argument to increase YUSCO's TOTCOM since all elements of YUSCO's production costs were verified to have been included in YUSCO's calculation of TOTCOM by control number (''CONNUM''). YUSCO argues that the difference between the reported TOTCOM and the booked TOTCOM is a result of the exclusion of beginning work-in-process prices from the reported TOTCOM, and from the allocation of processing costs by processing time for the purpose of this investigation, and these adjustments have been quantified in the verified record. Furthermore, YUSCO claims that during verification it was not asked to quantify the difference between the reported and booked TOTCOMs by item, so it is not fair to say that the company was unable to quantify the difference by item.

Department's Position: We agree with petitioners that the unreconciled difference found between the costs in the accounting records and the reported costs should be included in the revised reported costs. As articulated in *Certain Cut-to-Length Carbon Steel Plate From Mexico: Final Results of Antidumping Duty Administrative Review,* 64 FR 77, 78 (January 4, 1999) (Comment 1), the Department must assess the reasonableness of a respondent's cost allocation methodology according to section 773(f)(1)(A) of the Act. Before this can be done, however, the Department must ensure that the aggregate amount of costs incurred to produce the subject merchandise was properly reflected in the reported costs. In order to accomplish this, a reconciliation of the respondent's submitted COP and CV data to the company's audited financial statements, when such statements are available, is performed. YUSCO did not complete this reconciliation because it did not identify and quantify all differences shown on the reconciliation. As stated in *Certain Cut-to-Length Carbon Steel Plate From Mexico,* ''[i]n situations where the respondent's total reported costs differ from the amounts reported in its financial statements, the overall cost reconciliation assists the Department in identifying and quantifying those differences in order to determine whether it was reasonable for the respondent to exclude certain costs for purposes of reporting COP and CV.'' As to YUSCO's argument that it was never asked to identify and quantify the unreconciled differences in its cost reconciliation, the Department requested YUSCO to quantify differences between its accounting records and reported costs in step III.D. of the cost verification agenda. While we agree with petitioners that the unreconciled difference found between the costs in the accounting records and the reported costs should be included in

the revised reported costs, based on our decision to apply total adverse facts available, this issue is moot.

Comment 5: Petitioners argue that the Department should include exchange gains and losses associated with notes payable instruments in YUSCO's net interest expense. According to petitioners, the Department discovered at the cost verification that YUSCO had excluded these exchange gains and losses from its financial expense rate, and that since net exchange losses related to notes payable is a cost incurred by the company as a whole for financing purposes, it should be included in the net interest expense calculation. Petitioners also assert that this result is consistent with the Department's cost questionnaire.

Respondents did not comment on this issue.

Department's Position: The Department agrees with petitioners that the current portion of the net exchange loss related to notes payable should be included in the financial expense rate calculation. As explained in *Notice of Final Determination of Sales at Less Than Fair Value: Fresh Atlantic Salmon from Chile,* 63 FR 31430 (June 9, 1998) (Comment 24), the Department includes in the cost of production the amortized portion of foreign exchange losses resulting from loans. For this final determination, we would have amortized the net exchange losses generated from debt over the current maturities of the debt and included the amortized portion in YUSCO's financial expenses. However, based on our decision to apply total adverse facts available, this issue is moot.

Interested Party Comments Re: Ta Chen

Comment 6: Ta Chen contends that the transactions involving the subject merchandise do not fall within the ambit of any middleman dumping provision because: (1) The transactions involve a direct sale between a Taiwanese manufacturer and an unaffiliated U.S. buyer and (2) the Department cannot determine that middleman dumping is occurring because there is no middleman.

Ta Chen explains that Ta Chen is merely a processor of paperwork and a communications link and is acting as an agent of TCI, Ta Chen's U.S. affiliate. Ta Chen claims that TCI initiates all purchase requests from YUSCO and uses Ta Chen as a facilitator due to language barriers and time zone differences. Ta Chen further claims that there is a straight pass-through of the purchase price from YUSCO to TCI such that TCI incurs both the risk and the profit or loss on the sale.

Ta Chen states that the Department must recognize and follow commercial law in its administration of the antidumping laws. *See NSK* v. *United States,* 115 F. 3d 965 (Fed.Cir. 1997). Ta Chen claims that, under commercial law, a four-pronged test exists for determining whether an intermediary is acting as an agent or as a buyer. The test analyzes: (1) Whether the intermediary could or did provide instructions to the seller; (2) whether the intermediary was free to sell the items at any price it desired; (3) whether the intermediary could or did select its own customers; and (4) whether the intermediary could or did order the merchandise and have it delivered for its own inventory. Ta Chen claims that the Department generally follows this analysis in determining whether sales through a U.S. subsidiary should be treated as EP or CEP transactions. *See Stainless Steel Wire Rod from Spain,* 63 FR 40391, 40395. Ta Chen maintains that if the intermediary cannot perform these tasks and if there is a simultaneous passage of title and risk of loss from the seller to the intermediary to the buyer, then the intermediary is acting as an agent. Ta Chen states that an analysis of the record will show that the answers to these questions are negative and thus, Ta Chen is acting as an agent. Moreover, Ta Chen claims that based on the terms of sale from YUSCO to Ta Chen and from Ta Chen to TCI, there is a simultaneous transfer of title from YUSCO to TCI. In addition, Ta Chen claims that the terms of payment from TCI to Ta Chen are such that TCI assumes all risk of loss, and that furthermore, petitioners point to these same facts in their case brief. Thus, Ta Chen concludes that Ta Chen is acting as an agent of TCI.

Ta Chen states that the Tariff Act of 1930 allows only for dumping margin calculations with regard to producers and exporters. Ta Chen states that it is the Department's practice to treat manufacturers who have knowledge that the merchandise was exported to the United States as exporters, citing *AFBs from France,* 57 FR 28360 (Comment 18)(1992). According to Ta Chen, the record shows that the manufacturer, YUSCO, had such knowledge and therefore, would be treated as the exporter under the Department's normal practice. However, Ta Chen notes that the above practice has one exception, namely, middleman dumping.

Ta Chen argues that middleman dumping is a narrowly defined exception and does not apply in this case. Ta Chen points to the legislative history of the Trade Agreements Act of 1979 as evidence that middleman dumping is limited to the issues involved in *Voss International* v. *United States,* (*Voss*) C.D. 4801 (May 7, 1979), citing S. Rep. 249, 96th Cong., 1st Sess. 93–94 (''Senate Report'')(July 17, 1979). Ta Chen argues that the authority to perform a middleman dumping analysis, borne out of the legislative history, does not operate as a broader grant of authority beyond the issues presented in *Voss* and the issues in *Voss* are not present in the instant case, citing *PQ Corp.* v. *United States,* 652 F. Supp. 724, 734, 11 CIT 53 (1987), because YUSCO did not make a sale to Ta Chen. Therefore, Ta Chen concludes, the Department does not have the authority to investigate Ta Chen nor does it have the authority to use TCI's U.S. resale prices in the calculation of a dumping margin.

Notwithstanding this conclusion, Ta Chen argues that if the Department wishes to take on a broader view of its ability to investigate middleman dumping, in the instant case there is no sale to a middleman outside the United States who then makes the first sale to the United States. Ta Chen again cites to the Senate Report at 93–94:

> Regulations should be issued, consistent with present practice, under which sales from the foreign producer to middlemen and any sales between middleman *before* sale to the first unrelated U.S. purchaser are examined to avoid below cost sales by the middlemen. (Emphasis added in Ta Chen brief)

Ta Chen asserts that this sentiment is repeated in the Statement of Administrative Action of the Trade Agreements Act of 1979, H. Doc. No. 153 (Pt.II), 96th Cong., 1st Sess. At 412, in the Department's determination in *Fuel Ethanol from Brazil; Final Determination of Sales at Less Than Fair Value,* (*Fuel Ethanol*) 51 FR 5572, 5577 (Feb. 14, 1986), and in the Department's own *Antidumping Manual.* Ta Chen claims that YUSCO sells directly to TCI, an unaffiliated U.S. customer, and therefore, there is no middleman.

Ta Chen argues that the Department has *not* considered a U.S. distributor which buys from a foreign manufacturer to be an ''exporter'' on the basis that the U.S. distributor is foreign-owned. Ta Chen states that to conclude otherwise would be contradictory because the U.S. distributor is clearly an ''importer.'' Ta Chen points to the Department's statements in its middleman dumping initiation memorandum in the investigation of *Stainless Steel Sheet and Strip in Coils from Taiwan,* as suggesting that TCI could be subject to a middleman dumping investigation by virtue of the collapsing doctrine. Ta

Chen argues that if the Department applied the collapsing doctrine in this manner, it would render moot all EP/CEP analyses of sales between a foreign parent and its U.S. subsidiary. Because this is clearly not the case, Ta Chen argues that the collapsing analysis does not apply to a U.S. importer and its foreign-owned parent. Rather, Ta Chen states that the collapsing doctrine applies to situations where two producers, with their own production facilities, are considered to be one entity for purposes of issuing a duty margin. Finally, Ta Chen argues that to discriminate against U.S. corporations that are foreign-owned would be bad policy and contrary to free trade policies.

Petitioners argue that the Department should take into account Ta Chen's dumping of YUSCO's SSPC since the Department has the authority to consider and include in its dumping calculations price discrimination by a middleman who can be located anywhere in the world. Petitioner claims that the Department should follow standard procedures as employed in *Mitsui & Co.* v. *United States,* Court No. 90–12–00633 at 9–10 and in *Fuel Ethanol,* and compare the foreign manufacturer's net U.S. price to its normal value, compare the middleman's net U.S. price to its normal value, and then sum the dumping margins.

Petitioners cite the legislative history of section 772 of the Tariff Act of 1930, H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979); and the Senate Report to illustrate that Congress gave the Department the authority to investigate resales by middlemen. Petitioners further cite the Statement of Administrative Action of the Trade Agreements Act of 1979, H. Doc. No. 153 (Pt. II), 96th Cong., 1st Sess. 412 (1979) reprinted in 1979 U.S.C.C.A.N. at 682. They argue that this Statement reiterated that resales by middlemen are to be examined as possible below-cost sales, regardless of the location of the middleman.

Furthermore, petitioners claim that Ta Chen is incorrect in asserting that the Department should not consider Ta Chen's resales of YUSCO's SSPC to Ta Chen's unaffiliated U.S. customers. Petitioners point to the Trade Agreements Act of 1979, accompanying legislative history, and *Voss,* and claim that the legislative history at H.R. Rep. No. 317, *supra* at 75 and the Senate Report at 94 explicitly state that sales involving middlemen are to be examined to avoid below cost sales by middlemen. When middlemen sell above their costs, the courts and the legislative history state, according to petitioners, that the producer's price to the first unrelated middleman may be used as a purchase price, as found in *Sharp Corp.* v. *United States,* 63 F.3d 1097, 1093–94 (Fed. Cir. 1995); *Smith Corona Group* v. *United States,* 713 F.2d 1568, 1572 (Fed. Cir. 1983); *PQ Corp.* v. *United States,* 652 F. Supp. 724, 735 (CIT 1987), and H.R. Rep. No. 317, *supra* at 75; and the Senate Report at 94. In these cases, according to petitioners, sales to middlemen were not to be examined when any sales involving them appeared to be below cost. Petitioners claim the Department's decision in *Fuel Ethanol* was consistent with these authorities and precedents.

Petitioners hold that for these reasons, Ta Chen is in this case a middleman, not YUSCO's first unaffiliated U.S. customer as Ta Chen claims, and that the Department should reject Ta Chen's contentions that the middleman dumping provision is inapplicable here.

Alternatively, if the Department concludes that middleman dumping refers solely to middlemen outside of the United States, petitioners argue that the Department should still find that Ta Chen acted as a middleman for YUSCO and ascribe middleman dumping accordingly. Petitioners believe that, contrary to Ta Chen's claim that YUSCO sold its SSPC directly to TCI, the record shows that YUSCO's sales were to Ta Chen, which then resold the SSPC to TCI. *See* Petitioner's Rebuttal Brief at 15–17 (proprietary version). Petitioners claim that the verified record shows that Ta Chen was intimately involved in the purchase and intra-company resale to TCI of YUSCO's product, and that the verification report did not conclude that TCI buys plate from YUSCO, but merely states that Ta Chen officials claimed such during verification.

Petitioners claim that the three-pronged test which Ta Chen discusses and bases on AK *Steel Corp.* v. *United States,* Slip Op. 98–159 at 15 (Nov. 23, 1998), is not applicable here. They argue that this test is used merely to classify sales as CEP or EP, and that in either instance, the Department uses sales to unaffiliated U.S. customers. In this case, according to petitioners, the Department can determine whether a middleman has dumped only by examining each middleman resale leading to the ultimate sale to the unaffiliated U.S. customer. Petitioners further argue that even if this test were to be used, it would result in the Department's finding that Ta Chen was substantially involved in the purchase and resale of SSPC because its role in the sales process was similar to that of a selling agent in *Industrial Nitrocellulose from the United Kingdom,* who was deemed to be substantially involved in the sales process because its duties included sales solicitation and price negotiation.

Department's Position: We disagree with Ta Chen that it is not the middleman for resales of YUSCO's merchandise into the U.S. market. Evidence plainly establishes that for the purposes of conducting a middleman dumping investigation, there were sales of subject merchandise between YUSCO and Ta Chen which, in turn, Ta Chen resold into the United States through its U.S. affiliate, TCI. We find the activity engaged in by Ta Chen as that of a classic middleman and therefore subject to our scrutiny.

Where a producer sells its merchandise to an unaffiliated middleman, it has been the Department's long-standing practice normally to select as the U.S. price the price between the foreign producer and the unaffiliated middleman, provided that the foreign producer knew or had reason to know that its merchandise was destined for export to the United States. *See Antifriction Bearings From France,* 57 FR 28360 (1992) (Comment 18). However, if the middleman is reselling below cost, the sale between the producer and the middleman may not be an appropriate basis for establishing the total margin of any dumping that may have occurred. The legislative history to the 1979 Act makes clear that Congress recognized that middlemen may also be engaged in dumping and acknowledged that the Department had authority to investigate ''sales from a foreign producer to middlemen and any sales between middlemen before sale to the first unrelated U.S. purchaser * * * to avoid below cost sales by the middlemen.'' *See* H.R. Rep. No. 317, 96th Cong., 1st Sess. 75 (1979); and the Senate Report. Therefore, there is no question that the Department has the authority to depart from its normal practice, where circumstances warrant, and investigate whether dumping is being masked or understated by middlemen. *See Fuel Ethanol* (the legislative history of the 1979 Act sustained the Treasury Department's practice of using the price between the manufacturer and unrelated trading company for exports to the U.S. when the manufacturer knew the destination at the time of sale to the exporter, but was not intended to bar us from looking at all facets of the transaction). Where the Department determines that a substantial portion of the middleman's resales in the United States was made at below the middleman's total acquisition costs and the middleman incurred substantial losses on those resales, middleman dumping has occurred and

the margin calculation is adjusted accordingly, *i.e.,* we look to the middleman's first sale to an unaffiliated customer. *See Amended Preliminary Determination; Fuel Ethanol;* and Comments 9 and 13.

Ta Chen acknowledges that the Department has the authority to conduct middleman dumping investigations but offers various arguments against applying middleman dumping to Ta Chen. Ta Chen mainly argues that if there was not a sale between YUSCO and Ta Chen, but Ta Chen merely acted as a selling agent for its wholly-owned U.S. affiliate, TCI, there can be no middleman and thus no middleman dumping.

Here, the verified evidence establishes that YUSCO made sales to Ta Chen, not directly to TCI. Contrary to Ta Chen's assertions otherwise, Ta Chen did take legal title to the merchandise. Even though YUSCO shipped the merchandise fob to TCI at a port in Taiwan, a purchaser need not take physical possession of merchandise to have legal title. Here, Ta Chen negotiated the sale with YUSCO, signed a sales contract with YUSCO, was invoiced by YUSCO, paid YUSCO for the merchandise in Taiwan dollars, paid bank charges on payments to YUSCO, entered these sales into Ta Chen's books, signed the export declaration, invoiced TCI, and undertook various other activities involved in exporting and transporting the merchandise. *See* Ta Chen's Verification report at 3, and YUSCO's Verification Report at 3 and Exhibit 11 (both reports dated January 28, 1999); *see also* Petitioners' Rebuttal Brief (proprietary version) at 15–17 (dated Feb. 16, 1999). Thus, the evidence is sufficient to establish that Ta Chen was acting as a middleman within the meaning of the antidumping law.

Further, trading companies such as Ta Chen have typically been the focus of the Department's investigation into middleman dumping allegations because most often trading companies engage in the ''successive resales from the foreign producer to the first unrelated U.S. buyer,'' thus prompting our scrutiny. *See, e.g., Electrolytic Manganese Dioxide From Japan,* 58 FR 28551 (May 14, 1993); *Fuel Ethanol; PC Strand From Japan:* Final Results of Redetermination Pursuant to Court Remand, Court. No. 90–12–00633 (August 5, 1994); see also *Consolidated International Automotive, Inc.* v. *United States,* 809 F. Supp. 125, 130 (CIT 1992).

We also disagree that we should examine Ta Chen's role in the transaction chain by applying the criteria we normally use to determine if U.S. sales are EP or CEP sales. The EP/CEP analysis is used to determine if the selling activities of parties in the United States are more than ancillary to the transaction, in which case CEP methodology is warranted to take into account the selling expenses incurred in the United States when calculating the dumping margin. In contrast, the middleman dumping analysis is used to determine whether a transaction with a middleman is masking or understating any dumping. Regardless of whether Ta Chen calls itself an agent, it is a middleman and an appropriate subject of a middleman dumping inquiry. YUSCO invoiced Ta Chen for the merchandise and it was subsequently resold to an unaffiliated purchaser at less than the acquisition cost. This is precisely the type of situation cited by Congress when it addressed the middleman dumping concern. *See* H.R. Rep. No. 317 at 75. (*Voss* also involved the sale of subject merchandise by a producer to an unaffiliated trading company in the exporting country, which was then exported to the middleman's wholly-owned U.S. affiliate for resale to an unrelated U.S. customer). Therefore, Ta Chen's assertion that the Department's authority is limited to the issues presented by *Voss* is misplaced, because the issues in the instant case mirror those in *Voss.* YUSCO sold its merchandise to Ta Chen which, as the middleman, in turn sold it to the first unaffiliated U.S. customer through TCI.

Finally, given that we find that Ta Chen is a middleman, the question Ta Chen raises regarding the geographical location of the middleman is moot, since Ta Chen is located in the exporting country and hence clearly within the ambit of a middleman dumping investigation. *See e.g.,* Antidumping Manual, Chapter 7 at 5 (if the Department receives a documented allegation that the trading company located in the exporting country or a third country is reselling to the United States at prices which do not permit the recovery of its total acquisition costs, we will initiate a middleman dumping investigation).

Comment 7: Ta Chen states that this middleman dumping investigation was unlawfully initiated. Ta Chen states that the Department's standards for initiating such an investigation requires timely and convincing evidence of middleman dumping, citing *e.g., Certain Forged Steel Crankshafts From Japan,* 52 FR 36984, 36985, *Consolidated Int'l Automotive* v. *U.S.,* F. Supp. 125, 129–30 (CIT 1992), and *Mitsui & Co., Ltd.* v. *U.S.,* 18 CIT 185 (1994). Further, Ta Chen states that the petitioners have an obligation to submit such evidence that is reasonably available to them, citing *Electrolytic Manganese Dioxide From Japan,* 58 FR 28551 and *Certain Stainless Steel Cooking Ware From Korea,* 51 FR 24563–64. Ta Chen argues that there was no convincing evidence of actual middleman dumping nor did petitioners submit evidence reasonably available to them on the subject and thus, the Department's standards have not been met.

Ta Chen contends that the record does not establish that the alleged lost sale was due to a sale of Taiwanese-origin product. Ta Chen asserts that in petitioner's September 21, 1998 submission, petitioners acknowledged that the alleged lost sale possibly due to a sale of both (or, as respondents believe petitioners' statement implies, either) Taiwanese and Korean product. Ta Chen also argues that the product alleged to have been sold to Company X was T04L 3/16 to 1/2 inch plate. However, respondent argues that petitioners misstated this specification in its middleman dumping allegation as 0.1875 to 0.3125 inch product. *See, e.g.,* paragraph 5 of Exhibit 1 of petitioner's August 25, 1998 submission and petitioner's August 11, 1998 submission at 10. Regardless, Ta Chen argues that its sole Taiwanese supplier, YUSCO, does not produce or sell a product above 1/4 inch plate. Thus, Ta Chen argues that the alleged sale could not have been a sale of Taiwanese product. Thus, Ta Chen concludes, the convincing evidence standard has not been met.

Ta Chen also states that the Department initiated this middleman investigation based on a claim by petitioners that Ta Chen actually sold subject merchandise to Company X in October 1997. Ta Chen argues that both petitioners and the Department had available to them the knowledge that there was no such sale. Ta Chen states that this same ''lost sale'' was previously alleged in petitioner's March 31, 1998 antidumping petition to both the Department and the International Trade Commission (ITC). Ta Chen stated that the petition also included a contact name and phone number at Company X. Ta Chen claims that it made no sales whatsoever to Company X in October 1997 or at any other time. Moreover, Ta Chen suggests that a review of its sales listing will show that in October 1997, its lowest sales price was well above both the alleged price to company X and petitioner's alleged acquisition costs. Finally, Ta Chen states that the ITC contacted Company X regarding the alleged ''lost sale'' and that Company X denied the sale took place. Ta Chen

argues that because the results of the ITC's phone call were known to petitioners before it used this ''lost sale'' in its request to initiate a middleman dumping investigation, counsel for petitioners submitted a false representation to the Department.

Moreover, Ta Chen claims that petitioners did not satisfy their requirement to utilize sources readily available to them. Ta Chen states that the petitioners made only a single attempt to contact Company X themselves but were unsuccessful in attempting to reach a certain contact at Company X. Ta Chen asserts that it had subsequent contact with this individual and was aware of that individual's ready availability to speak with petitioners. However, respondent argues that petitioners never attempted to call back this individual. Thus, Ta Chen argues, petitioners did not make use of the sources readily available to them.

Petitioners argue that they met the Departmental requirement of ''timely and convincing evidence that the trading company is in fact dumping.'' *See* Petitioners' Rebuttal Brief at page 27. Moreover, petitioners assert that evidence may be only that which is reasonably available to Commerce. On these accounts, petitioners defend their submissions as consistent with the standard required by the Department. Petitioners also assert that their evidence was advanced in good faith as the best information reasonably available to petitioners that pointed toward middleman dumping by Ta Chen, and furthermore, that Ta Chen has not shown this information to be false. Petitioners conclude that the reasonableness of the evidence provided is borne out by the fact that the Department indeed found middleman dumping in its *Amended Preliminary Determination.*

Department's Position: We disagree with Ta Chen that our initiation of a middleman dumping investigation was illegal and should be rescinded. As stated, Congress plainly intended for the Department to have the authority to both investigate middlemen and to avoid below cost sales by middlemen. *See Senate Report* at 412, (''successive resales from the foreign producer to the first unrelated U.S. buyer are examined to avoid sales by middlemen below their costs''). Through its administrative practice, the Department has developed a reasonable standard for analyzing allegations of middleman dumping.

As we stated in our memorandum initiating this middleman dumping investigation, the standards for initiating a middleman dumping allegation are similar to those of initiating a traditional antidumping investigation, in that we must have evidence to suspect that middleman dumping is occurring. *See Memorandum for Joseph Spetrini: Stainless Steel Plate in Coils From Taiwan: Whether To Initiate a Middleman Dumping Investigation* (Middleman Initiation Memo)(Aug. 25, 1998)(non-proprietary version on file in Rm. B–099 at the Department of Commerce). In analyzing whether to initiate we will evaluate information, either direct or circumstantial, and will require that petitioners provide supporting data on prices and costs which are reasonably available to them and that this information is convincing. *See Consolidated International Automotive, Inc.* v. *United States,* 809 F. Supp. 125, 130 (CIT 1992)(upholding the Department's refusal to initiate a middleman dumping investigation where petitioner only offered a theory, but no sufficient data); *Preliminary Determination of Sales at Less Than Fair Value; Stainless Steel Cooking Ware From the Republic of Korea,* 51 FR 24563 (July 7, 1986)(refusing to initiate because no documents submitted contained pricing or cost data); *Electrolytic Manganese Dioxide (EMD) From Japan; Final Results of Antidumping Administrative Review;* 58 FR 28551 (May 14, 1993)(the Department will not initiate on mere conjecture but requires convincing evidence presented by petitioners). Here, petitioners provided both timely price and cost information, reasonably available to them, which was supported by affidavits and which the Department reviewed and found credible and convincing. *See Middleman Initiation Memo.*

First, we disagree with Ta Chen's claim that the sale (which we viewed as an offer, see below) described in petitioner's affidavit to Company X was not of Taiwanese origin, and that the Department should have recognized this as the case because the ''weekly report'' (sales call report) attached to the affidavit described a product which was not in the range of thickness produced by YUSCO, Ta Chen's supplier. We looked at the grade, thickness, width and surface finish of the U.S. sale referred to in the affidavit, compared its characteristics to those of the three YUSCO reported control numbers (CONNUMS) which petitioner had relied upon in their analysis and found two of YUSCO's sales that were comparable. *See* Middleman Initiation Memo at 5. Further, contrary to Ta Chen's assertions otherwise, the product dimensions for the price quoted in the affidavit covered a product with a thickness between .1875 and *either* .3125 or .50. Ta Chen admits that YUSCO produced subject merchandise up to .25 inches in thickness. *See* Ta Chen Case Brief at 31 (Feb. 9, 1999). Therefore, regardless of the upper end of this product's thickness range, YUSCO produced product within the ranges described in both the affidavit and the accompanying weekly report. The affidavit clearly indicated that this alleged sale took place within the POI, and thus the information submitted by petitioners was also relevant to this investigation. As a result, the Department had reasonable evidence from which to conclude that this was merchandise produced by YUSCO.

Second, with regard to whether the sale alleged in the affidavit occurred, Ta Chen argues that this sale was never made and, as a result, the Department could have learned this had it contacted the affiant directly. However, we initiated our middleman dumping investigation on the basis that this was a price quote, but not necessarily a sale. *See* Middleman Initiation Memo at 4. The affidavit submitted by petitioners stated that the affiant believed there was a sale by Ta Chen of subject merchandise on a date within the POI; it did not say unequivocally that there was a completed sale. As in an antidumping investigation, the Department has the authority to initiate a middleman dumping investigation based upon an offer for sale. *See* section 731(1) (''a class or kind of foreign merchandise is being or is likely to be sold''); section 771(14) (''sold, or in the absence of sales, offered for sale''). Ta Chen has not argued that the transaction at issue was not an offer, but argues only that it was not a completed sale.

Moreover, at the time of the investigation, there was no reason for the Department to go beyond the affidavit and supporting weekly report as submitted by petitioners to confirm whether there was an offer for sale. As a matter of practice, when initiating an antidumping investigation the Department regularly relies upon U.S. price quotes (whether sales or offers) submitted in affidavits, provided the affidavit supplies sufficient and credible information. Here, the affidavit was submitted with a supporting call report by a U.S. customer in the business of selling the domestic like product who was generally familiar in the marketplace with Ta Chen and its 100 percent-owned U.S. affiliate, TCI, and with their U.S. pricing.

Further, Ta Chen did not raise its concerns to the Department regarding the alleged lost sale listed in the petition

for ITC purposes until after our initiation. *See* Letter from Ta Chen dated September 14, 1998 (Ta Chen claims that it did not receive the information it needed until after our initiation because it had not applied for an APO earlier, but we note that its wholly-owned affiliate, TCI, as the importer of record, is an interested party and it is incumbent upon an interested party to timely avail itself of access to proprietary information). However, there was no reason for the Department to have reviewed that information when it initiated the middleman dumping claim. The Department viewed this as an offer for sale and therefore evidence of a lost sale would not have been material. Additionally, as stated, there was no indication before the Department that the affidavit was untrustworthy or lacked merit. Finally, with regard to any information that petitioners may have possessed through the ITC proceeding that the price quote at issue was a lost sale prior to submitting it to the Department, we are not permitted access to proprietary ITC information, and therefore we have no means to arrive at the true state of the facts in this regard. However, as discussed, even if there was not a sale, it does not necessarily follow from Ta Chen's allegations that there was not an offer for sale and Ta Chen has not argued otherwise. As a result, we believe the middleman dumping investigation was properly initiated.

Comment 8: Ta Chen states that the bank charges reported under CREDIT1U and CREDIT2U fields are associated with the movement of funds between affiliated parties. Ta Chen argues that the Department does not deduct these in a below cost of production analysis because these charges are incurred as a result of internal business decisions. As such, the Department should not consider these in its below acquisition cost analysis.

Petitioners did not comment on this issue.

Department's Position: In the Department's *Memorandum to Edward Yang, Office Director: Analysis for the Amended Preliminary Determination of Stainless Steel Plate from Taiwan: Middleman Dumping Investigation,* November 25, 1998, at 1, we agreed with petitioners' allegation that a ministerial error had been made by failing to account for bank fees incurred in Taiwan and the United States. As we stated in the *Amended Preliminary Determination, "actual* selling expenses should be deducted in the middleman dumping analysis." *See Mitsui & Co., Ltd.* v. *United States,* Slip-Op. 97–49 (April 1997)(*Mitsui 1997*).

While Ta Chen argues that these bank charges are for movement of funds within Ta Chen, we note that these charges are incurred with respect to sales of subject merchandise. As Ta Chen stated on page 20 of its November 23, 1998 supplemental response, the bank charge incurred and paid in the United States has been calculated based on the Ta Chen invoice by actual weight, and is a fixed amount which does not vary with transaction value. For the bank charge incurred and paid in Taiwan, Ta Chen stated that this bank charge varies with the value of the transaction and thus is allocated over value.

The fact that these bank charges are costs that Ta Chen argues are "associated with internal movement of funds between affiliated parties" does nothing to negate the fact that these are actual costs incurred with respect to the sale of subject merchandise. These bank charges were actually incurred and would not have been incurred but for the fact that Ta Chen made U.S. sales of subject merchandise. Therefore, they are properly considered as direct selling expenses, and must be deducted from U.S. price in conducting our middleman dumping analysis.

Comment 9: Ta Chen argues that the Department should not consider Taiwanese-based selling expenses incurred prior to importation in its final determination since Ta Chen is a pipe manufacturer and is not in the coil business. Ta Chen bases its argument on the Department's precedent in *Fuel Ethanol.* If, however, the Department chooses to use Taiwanese general and administrative expenses, Ta Chen argues that the Department could add the additional expenses presented at the start of verification and could also increase this sum by the ratio of total administration expenses to total selling departmental expenses. Ta Chen points out that it is not unreasonable to believe that only two clerks in Taiwan are involved in SSPC since there were only a small number of invoices and the clerks acted merely as paper processors.

Petitioners argue that the Department should base Ta Chen's general and administrative expenses (G&A) for constructed value on Ta Chen's audited financial statement since this is required by the Department's questionnaire. Petitioners claim that the G&A that Ta Chen calculated is significantly understated because it only includes expenses associated with two clerks involved in SSPC sales and does not include expenses associated with Ta Chen's accounting, general management and legal departments. Petitioners cite *Mitsui 1997* as precedent for using constructed value in calculating normal value (and therefore, applying G &A) in a middleman dumping case. They continue by claiming that Ta Chen incorrectly relied on a statement in *Fuel Ethanol,* and that in *Fuel Ethanol* the Department did actually include the foreign G&A in the constructed value used in calculating the middleman dumping margin.

Department's Position: As we stated in our *Amended Preliminary Determination,* Congress has left to the Department the discretion to devise a methodology which would accurately capture middleman dumping. See Senate Report. In our *Amended Preliminary Determination,* to determine if Ta Chen's U.S. sales prices were substantially below its acquisition prices from YUSCO, we divided the amount of the losses by the total sales value for all sales. In our *Amended Preliminary Determination,* we calculated the amount of losses by taking the sum of the invoice price from YUSCO to Ta Chen, minus the adjusted U.S. sales price of each below cost sale. However, at that time we did not add any additional costs incurred by Ta Chen in purchasing YUSCO's merchandise. We now believe this was an error. Because Ta Chen incurred G&A expenses (including interest expenses) on its purchases of YUSCO merchandise, such costs must be added to the acquisition price (which is analogous to an input cost) from YUSCO in order to calculate Ta Chen's total acquisition costs regarding purchases of YUSCO's product. Only in this way can we determine the magnitude of losses Ta Chen absorbed in selling such merchandise in the United States and thus calculate the full extent of middleman dumping. This comports with how the Department determines whether sales are made below cost. *See* section 773(b)(3). Our antidumping manual also indicates that middleman dumping occurs where the middleman is not recovering its acquisition and selling costs. *See* Antidumping Manual Chapter 7. Therefore, to the extent that this methodology conflicts with our earlier approaches in *Fuel Ethanol* and *Mitsui 1997,* our determination supersedes both.

In *Fuel Ethanol,* after determining that the middleman was selling below acquisition cost by comparing its acquisition cost from unrelated suppliers to U.S. resale prices to the first unaffiliated customers, minus all costs and expenses incurred in selling the merchandise by the middleman and its U.S. affiliate to the United States, we found all home market sales by the middleman's parent to be below cost

and then calculated foreign market value based upon constructed value. However, it is the middleman's acquisition cost for purchases of subject merchandise and resales of that merchandise into the United States that are under scrutiny. Thus, the proper comparison is between the acquisition costs and the price of those resales. Comparing the middleman's home market sales of the foreign like product from all producers to U.S. resales is inappropriate. In *Mitsui 1997,* although we indicated that to complete our analysis we would require additional information about the middleman and its suppliers regarding sales, expenses and cost information to calculate foreign market value, we did not indicate that we would follow our approach in *Fuel Ethanol* in calculating the magnitude of losses to determine middleman dumping. We found that, based upon comparing the supplier's invoice price to the U.S. resale prices, the trading company had not made a substantial portion of resales at below acquisition cost.

Because we have Ta Chen's verified financial statements, we have Ta Chen's total expenses for all sales and its total cost of all goods. Relying upon this data, we arrived at a percentage of G&A expenses (including interest) for Ta Chen's purchases of YUSCO's merchandise which we have used in our calculation to determine middleman dumping, *i.e.,* the magnitude of losses sustained by Ta Chen in selling YUSCO's product into the United States. We do not agree with Ta Chen that it merely undertook minimal activities on behalf of TCI and, therefore, reject its call to add on G&A expenses only incurred for two clerks (See Comment 6).

Finally, as discussed in a previous portion of this notice (''Middleman Dumping'') we note that we are also changing the methodology used to identify whether there was a substantial portion of resales by Ta Chen sold below its acquisition costs to mirror the methodology used to determine the magnitude of losses. In the *Amended Preliminary Determination,* we compared the U.S. resale price (after deductions as described) to the supplier's invoice price. However, as discussed above, we now believe that the acquisition price alone does not reflect all the costs associated with Ta Chen selling the foreign producer's merchandise to the United States. Because Ta Chen also incurred G&A and interest expenses, we will add such expenses to the acquisition price to arrive at the total acquisition cost (acquisition price plus associated G&A and interest costs) incurred by Ta Chen in selling this merchandise. We will continue to compare the total value of all sales below acquisition cost to the total value of all Ta Chen's resales to determine if there were a substantial portion of resales below acquisition cost. Our change in methodology results in a finding that 44.53 percent of resales were sold below acquisition cost, which we find is a substantial portion of Ta Chen's resales.

Comment 10: Ta Chen requests that the Department use YUSCO's selling prices rather than Ta Chen's reported acquisition costs in the final determination. Ta Chen makes this request based on a comparison of these costs and prices noted in the verification report, which revealed certain differences between YUSCO's selling price and Ta Chen's reported acquisition cost.

Petitioners argue that the Department should disregard Ta Chen's request for the Department to use YUSCO's reported selling prices to TCI rather than TCI's reporting of such prices since at verification the Department found no discrepancies with regard to Ta Chen's constructed value methodology.

Department's Position: We agree with petitioners and are continuing to use Ta Chen's reported acquisition prices. At verification, we found a significant number of discrepancies in attempting to verify Ta Chen's acquisition prices. However, because overall Ta Chen's reporting represents a conservative approach, we will continue to use Ta Chen's reported acquisition costs for this final determination.

Comment 11: Ta Chen argues that although the Department preliminarily determined that Ta Chen sold subject merchandise in substantial quantities and substantially below its cost of acquisition, the Department never articulated the rationale or the standard it used in determining what is substantial. Ta Chen contends that given a *de minimis* level of two percent, and given that ''recognized authorities'' and ITC Commissioners have observed that margins are not considered substantial until they exceed the 10 to 20 percent levels, a determination by the Department that three percent represents a substantial loss must be explained. Ta Chen also argues that since trading companies ''typically'' operate at low margins, and because TCI held the merchandise in inventory in the United States for a substantial amount of time, a three percent loss is reasonable given a (purported) 12 to 23 percent drop in the prices of subject merchandise during the POI.

Petitioners argue that the Department should not set a fixed numerical guideline to determine the existence of substantial losses since each case has its own circumstances. Additionally, Ta Chen has not demonstrated a meaningful correlation between the two percent *de minimis* standard for dumping margins and the middleman dumping criterion of substantial losses. Petitioners continue by claiming that contrary to Ta Chen's claim, Ta Chen should not be allowed to sell at below cost merely because it was following a downward market, and that Ta Chen's selling prices actually contributed to this downward market.

Department's Position: We agree with petitioners. There can be no single threshold which constitutes substantial losses with regard to middleman dumping because each case involves a unique set of circumstances. In this case, we find that 2.18 percent, as well as the three percent calculated in the *Amended Preliminary Determination,* constitutes substantial losses. As an initial matter, it is undisputed by both parties that such losses are above *de minimis.* See 19 CFR 351.106. Secondly, we note that Ta Chen's assertion that trading companies ''typically'' operate at low margins indicates that losses which may, on an absolute basis, be at seemingly lower levels may still be considered ''substantial''. Thirdly, it is our understanding that SSPC is traded as a commodity. Therefore, it is price sensitive and sales are thus often made or lost based on relatively small differences in price. Hence, such a percentage likely is significant in this industry.

Comment 12: Ta Chen requests that the Department clarify its instructions to the U.S. Customs Service to indicate the full name of Ta Chen Stainless Pipe, Ltd. because the *Amended Preliminary Determination* stated that ''this investigation covers two respondents, Yieh United Steel Corporation and Ta Chen Stainless Steel Pipe, Ltd.'' However, the Department has established a deposit rate for Yieh United/Ta Chen.

Petitioners argue that the language should remain the same because the reference to ''Ta Chen'' is inclusive of both Ta Chen Stainless Pipe, Ltd. and TCI. Petitioners assert that this is appropriate given that these two companies are affiliated and that section 772 of the Tariff Act directs the Department to ''examine sales from the foreign producer to middlemen (trading companies) and any sales between middlemen before sale to the first unrelated U.S. purchaser to avoid below cost sales by the middlemen.''

Department's Position: We disagree with petitioners. Although in antidumping investigations we do assign channel-specific deposit rates on occasion, these are producer-exporter specific rates. While we believe that a rate including both YUSCO and Ta Chen is appropriate, as discussed in other sections of this notice, we do not believe it is appropriate to include TCI, because TCI is an importer and if it imports from another producer or reseller, it should, as any other importer, be subject to the cash deposit rate for that producer/reseller or the all others rate. Moreover, the importer-specific rates we calculate in an annual review are for purposes of assessing duties. Since we do not order the final assessment of duties in an investigation, this calculation does not apply. Therefore, for the final determination, we will continue to assign a deposit rate to "Ta Chen" with the understanding that this refers to only Ta Chen Stainless Pipe Co., Ltd. We also note that any sales by Ta Chen of subject merchandise produced by any party other than YUSCO will be subject to the all others rate.

Comment 13: Petitioners argue that the Department should recalculate Ta Chen's U.S. credit and U.S. inventory carrying expenses. Petitioners contend that Ta Chen failed to account for compensating balances required on its loans in Ta Chen's calculation of its short-term interest rate. In addition, petitioners request that the Department increase Ta Chen's credit expenses to account for the interest expenses and bank charges discovered at verification. Petitioners cite *Mitsui 1997* as a precedent for calculating normal value based on constructed value in a middleman dumping case.

Petitioners argue that the Department should calculate inventory carrying costs for the time the merchandise is in transit from Ta Chen's warehouse in Taiwan to the time of entry into TCI's inventory. Petitioners assert that this cost must be deducted from U.S. price as U.S. inventory carrying costs. This claim is based on Ta Chen's statements that title of the merchandise passes instantaneously from YUSCO to Ta Chen to TCI. Thus, the merchandise is in the inventory of TCI during shipment.

Ta Chen requests that, for reasons indicated in *Mitsui 1997,* the Department continue not to deduct imputed costs. Ta Chen claims that the concern related to middleman dumping is only whether the middleman is selling below cost, and thus any attempt to include constructed value or other imputed costs would be unlawful. Thus, since the interest expenses and inventory carrying costs (which are not even incurred in the United States, but rather on the ocean) that petitioners mention are only used in calculating imputed costs, Ta Chen argues that petitioners' argument is irrelevant.

Department's Position: As in our *Amended Preliminary Determination,* we have not included imputed credit expenses and inventory carrying costs in calculating U.S. resale prices because, as we stated, these expenses represent opportunity costs, not actual costs to the company. *See also Mitsui 1997.* In addition, as set out in our *Amended Preliminary Determination,* we will deduct from Ta Chen's U.S. resale the actual expenses incurred in selling the product in the United States. *See* Comment 9. We will not include imputed costs and expenses because we continue to believe that middleman dumping involves sales below the middleman's actual total acquisition costs and expenses and therefore to include imputed costs and expenses would be inappropriate. Similarly, because the focus of middleman dumping is solely on whether the merchandise was sold to the first unaffiliated party in the United States at prices below the middleman's total acquisition costs and expenses, instead of using constructed value, in calculating a middleman dumping margin, we have used a middleman acquisition price which, as stated, is analogous to the input cost, and the middleman's actual G&A and interest expenses. Taken together, these items encompass all costs associated with purchasing the merchandise.

As discussed in other sections of this notice, we will add to Ta Chen's acquisition price a portion of its total G&A expenses, including interest (allocable to sales of subject merchandise), because these are actual costs incurred by Ta Chen in purchasing YUSCO's merchandise. *See* Comments 9 and 20. This is also consistent with constructing costs in lieu of prices under section 773(b)(3), where only actual G&A including interest is used (and will not, therefore, include profit, see Comments 9 and 20).

Comment 14: Petitioners argue that the Department should recalculate Ta Chen's reported warehousing expenses to include building depreciation expenses and total interest for land and buildings associated with TCI's Los Angeles warehouse and then deduct these as direct selling expenses. With regard to the interest for land and building, petitioners' claim that this expense was calculated only for the square footage specifically attributable to coil, but that the Los Angeles warehouse expense was allocated over all merchandise.

Ta Chen states that the correct building depreciation expense for coil shipments from the Los Angeles warehouse can be calculated by multiplying the warehouse building mortgage interest rate by petitioners' estimate of 1997 warehouse building depreciation and then dividing by total pounds shipped.

Ta Chen points to the verification exhibits to show that, contrary to petitioners' claims, the Los Angeles warehouse interest expense was calculated correctly because both the mortgage interest and warehouse expense were allocated over only coil shipments.

Department's Position: Regarding the inclusion of building depreciation expenses, we agree with both Ta Chen and petitioners and have recalculated TCI's warehousing expenses accordingly. We also agree with Ta Chen with regard to the calculation of mortgage interest since, as seen in the verification exhibits, both the interest expense and warehouse expense were allocated over shipments of SSPC.

Comment 15: Petitioner claims that, in the final determination, we should deduct expenses related to an unreported Chicago warehouse discovered at verification.

Ta Chen argues that petitioners erroneously allocate the unreported Chicago warehouse's charge to the amount stored at the reported warehouse, and the fact that this one Chicago warehouse was not reported actually results in over-reported Ta Chen warehouse expenses.

Department's Position: We agree with Ta Chen. Petitioners' recalculation of per unit Chicago warehouse expenses does not account for the quantity stored at the unreported warehouse. Based on an exhibit taken at verification, we conclude that, in fact, Ta Chen's reported warehousing expenses for its warehouse activities in Chicago were conservative. We thus have not adjusted Ta Chen's warehousing expenses.

Comment 16: Petitioners argue that Ta Chen failed to account for all of its overhead expenses in calculating indirect selling expenses. Petitioners cite such expenses as utilities, property taxes, and security expenses as items which are general in nature. Petitioners request that the Department recalculate Ta Chen's indirect selling expenses as total selling expenses, including interest expenses, as a percentage of sales.

Ta Chen acknowledges that perhaps it should have allocated, to SSPC, expenses for charitable contributions,

postage & delivery, security, taxes & licenses, property taxes, and utilities. Ta Chen also claims, however, that for the other indirect expenses mentioned by petitioner there is no evidence that they are related to sales of SSPC, as the verification findings show, and that petitioners should have raised this argument before verification.

Department's Position: We agree with petitioners. In Exhibit 11 of its November 23,1998 supplemental, Ta Chen reported both an overall ratio of U.S. selling expenses for sales of all products and a ratio it represented as appropriate to sales of stainless steel coils. In its data submission, Ta Chen reported the latter. However, Ta Chen stated that ''* * * it does not matter which figures are used, as far as the final dumping margin.'' *See*, November 23, 1998 submission at 24.

While the Department reviewed a portion of TCI's reported indirect selling expenses attributable to coil at verification, the nature of any verification includes the employment of spot-checking techniques, which are necessary given the extreme time constraints for a verification. Therefore, while the Department will generally find an item to be successfully ''verified'' based on successful spot-checks of data, such a conclusion becomes open to rebuttal if compelling evidence is presented after verification which calls into question any calculation. In this respect, in its rebuttal brief, TCI now admits that certain expenses had been erroneously excluded from its selling expense allocation for stainless steel coil. Thus, by Ta Chen's own admission, its calculation of indirect selling expenses for coils is flawed. Therefore, for this final determination, we have used TCI's overall operating costs as a percentage of sales as previously reported in Exhibit 11 of Ta Chen's November 23, 1998 supplemental response. This is in accordance with our normal practice. *See Yieh United Steel Corporation (YUSCO) and Ta Chen Stainless Pipe Co., Ltd. Analysis Memorandum for the Final Determination of the Less-Than-Fair-Value Investigation of Stainless Steel Plate in Coil from Taiwan* (''*Ta Chen Final Analysis Memo*''), March 19, 1999 at 3.

Comment 17: Petitioners argue that the Department should recalculate one CONNUM's acquisition cost in Ta Chen's constructed value worksheet to exclude the warranty claim since the payment of the warranty claim could not be verified and YUSCO stated that it did not accept any such warranty claim.

Ta Chen claims that this is irrelevant since the Department did not use constructed value in its middleman dumping margin analysis.

Department's Position: We agree with petitioner and have recalculated Ta Chen's acquisition price, accordingly. This so-called warranty claim is actually an offset to Ta Chen's acquisition price and is analogous to a billing adjustment on an input. Because we were unable to verify this offset claim, we are calculating a weighted-average acquisition price that excludes this offset.

Comment 18: Petitioners assert that although none were reported, Ta Chen's interest expenses for the constructed value calculation should be calculated by dividing the company's total net interest expense divided by its cost of sales, as required by the Department's questionnaire.

Ta Chen argues that an adjustment should not be made for Ta Chen's interest expenses based on the fact that Ta Chen guarantees TCI's loans. Ta Chen states that, as the record shows, Ta Chen never paid any of TCI's interest expense on TCI's loans.

Department's Position: We agree with petitioners. As described above (*see* Comment 6), Ta Chen plays an integral role in the purchase and resale of SSPC and therefore its interest expenses must be taken into account as part of total G&A expenses. *See* Comments 8, 13. As petitioners suggest and as the questionnaire prescribes, we have calculated Ta Chen's interest expenses by dividing the company's total net interest expense divided by its cost of sales. *See Ta Chen Final Analysis Memo*, at 2–3.

Comment 19: Petitioners state that the Department should correct Ta Chen's errors found at verification. Petitioners also contend that Ta Chen's latest submitted data is missing field INDIRS2U representing U.S. warehousing expenses. Petitioners request that the Department utilize all appropriate expenses in its final determination.

Ta Chen states that U.S. warehousing expenses were reported in field DIRSEL2U and that field INDIRS2U was erroneously included in its initial dataset.

Department's Position: We agree with petitioners and have corrected Ta Chen's errors found at verification. These errors include recalculation of U.S. repacking expenses, U.S. commissions, international freight, credit expenses and U.S. indirect selling expenses. However, we have not deducted the INDIRS2U field because the record does not support a conclusion that this field represents U.S. warehousing expenses or any other expense that has not already been accounted for in this final determination. In fact, the Department included the field INDIRS2U in its *Amended Preliminary Determination* calculations, since this field was included in the database which the Department used in its preliminary calculations. However, such inclusion was in error, because this information constituted unsolicited (as well as unexplained) new data (submitted October 14, 1998, in response to the Department's October 9, 1998 letter requesting unrelated information). Indeed, we note that Ta Chen excluded this field in its supplemental sales submission to the Department of November 23, 1998. However, due to time constraints, we were unable to use the November 23, 1998 database (*i.e.*, an updated database which excluded the field INDIRS2U) for the *Amended Preliminary Determination. See Ta Chen Final Analysis Memo,* at 3.

Comment 20: Petitioners argue that the Department should correct the ''ministerial errors'' found in the preliminary determination. One such alleged error is that the Department did not use the correct exchange rate in its analysis of whether Ta Chen engaged in middleman dumping. Petitioners contend that in that part of its analysis, the Department should have chosen, as the exchange rate, the date of YUSCO's sale to Ta Chen rather than on the date of TCI's resale in the United States. Petitioners support their argument by stating that the focus in middleman dumping is on whether Ta Chen covered its cost of acquisition with respect to the price paid by Ta Chen to YUSCO. Furthermore, they point to the *Amended Preliminary Determination* in which, the Department selected, as the exchange rate, the date of YUSCO's sale to Ta Chen in calculating the dumping margin attributable to YUSCO. Petitioners request that the Department consistently employ the date of sale for the transactions between YUSCO and Ta Chen in evaluating the extent of Ta Chen's middleman dumping.

Petitioners also argue that the Department did not correctly calculate the overall dumping margin for YUSCO/Ta Chen since the margin calculation on the sales between Ta Chen and its unaffiliated U.S. customers inadvertently omitted U.S. credit expenses, U.S. inventory carrying costs, CEP profit, inventory carrying costs incurred in Taiwan for U.S. sales, and indirect selling expenses incurred in Taiwan for U.S. sales. Additionally, claim petitioners, with regard to Ta

Chen's constructed value, the Department failed to include indirect selling expenses, G&A, interest expenses, and constructed value profit.

Ta Chen argues that the Department should use the exchange rate on the date TCI receives payment from its unaffiliated U.S. customer in converting Taiwanese acquisition costs and expenses into U.S. dollars. Ta Chen argues that use of this exchange rate would indicate the true profitability of the transaction because the SSPC was actually purchased from YUSCO in Taiwanese currency. To obtain the actual profit or loss from the perspective of a Taiwanese trading company, one would have to convert the U.S. dollars received and convert that to Taiwanese dollars based on the existing exchange rate to determine if the resale price was more than the acquisition price.

Department's Position: With respect to the appropriate exchange rate, we disagree with both petitioners and Ta Chen and have continued to apply the same currency conversion as that applied in our *Amended Preliminary Determination*. In that determination, we selected the exchange rate for converting the acquisition cost as the rate in effect on the date of Ta Chen's resales (through its 100 percent-owned affiliate, TCI) to its first unaffiliated U.S. customers. Using the same exchange rate for both transactions is in keeping with the statute and our normal practice of making an apples-to-apples comparison between prices and costs. *See* section 773A and *Mitsui 1997*. When calculating a constructed normal value, the Department uses the exchange rate based upon the date of the U.S. sale. *See* section 773A. In the case of middleman dumping, we are attempting to compare costs with prices—the acquisition costs, including actual G&A and interest expenses (*see* Comment 9)—with the resale price to the first unaffiliated U.S. customer (minus actual movement and selling expenses associated with selling the product in the United States). Therefore, because we are comparing costs with prices it is appropriate to follow our standard practice.

Moreover, it is only on the date of sale to the first unaffiliated U.S. customer that the middleman, in this case Ta Chen, will know whether or not it will recover its total acquisition costs on resale. It cannot know this on the date it acquires the merchandise. Therefore, because the basis of middleman dumping is to determine if the middleman is selling below its acquisition costs, the date of sale to the first unaffiliated U.S. customer is the appropriate date upon which to convert Ta Chen's acquisition costs into U.S. dollars.

Although Ta Chen acknowledges that to ensure an apples-to-apples comparison the Department must convert one side of the equation so that both are in the same currency, Ta Chen's suggestion to use the exchange rate on the date *payment is received* for the U.S. sale from the first unaffiliated customer is without merit. The suggestion ignores the statute, the regulations and our standard practice. In constructing a normal value in lieu of actual prices, the Department does not use the date of payment, but rather, as discussed, the date of the actual U.S. sale to the first unaffiliated customer. *See* section 773A; 19 CFR 351.415(a)("in an antidumping proceeding, the Secretary will convert foreign currencies into United States dollars using the rate of exchange on the date of sale of subject merchandise").

We also disagree with respect to petitioners suggestion to deduct imputed selling expenses and CEP profit. Petitioners' argument that we must make these deductions in order to correctly calculate an overall dumping margin is misplaced because, although our calculations contain parallels to a "normal" dumping calculation, here, we are not trying to calculate a constructed normal value or an overall dumping margin. Rather, we are determining the magnitude of losses incurred by Ta Chen in selling the merchandise below its total acquisition cost. Likewise, we will not add to the total acquisition cost the profits gained by Ta Chen, as that would be contrary to the rationale for determining middleman dumping, which is solely to determine the extent of the losses the middleman is absorbing in selling merchandise from an unaffiliated supplier into the United States (*see* Comment 9). Finally, with respect to indirect selling expenses incurred in Taiwan, we note that Ta Chen reported that it had none. Therefore, as we describe in Comments 9 and 18, we are including G&A and interest expenses in calculating Ta Chen's total acquisition costs.

Comment 21: Ta Chen infers that petitioners are arguing that the Department should add YUSCO's and TCI's dumping margins together and base TCI's dumping margin on constructed value, including profit, for the final determination. Ta Chen argues that such a methodology leads to the double counting of margins since it adds the difference between normal value and the price paid by Ta Chen and the difference between normal value and the price paid to the first unaffiliated U.S. customer.

Department's Position: We disagree with Ta Chen and find that adding YUSCO's margin to Ta Chen's margin accurately calculates the extent of middleman dumping. Contrary to Ta Chen's claims, by adding the margins, we are adding the difference between normal value and the price paid by Ta Chen to the difference between Ta Chen's total acquisition cost and the price paid to the first unaffiliated U.S. customer. Doing so accounts for all transaction and all expenses, resulting in an accurate middleman dumping margin.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(1)(B) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of the amended preliminary determination in the **Federal Register**. The all others rate reflects an average of the non-de minimis margins alleged in the petition. The Customs Service shall continue to require a cash deposit or posting of a bond equal to the estimated amount by which the normal value exceeds the U.S. price as shown below. These suspension of liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Exporter/manufacturer	Weighted-average margin percentage
YUSCO	8.02
YUSCO/Ta Chen	10.20
All Others	7.39

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will, within 45 days, determine whether these imports are materially injuring, or threaten material injury to, the U.S. industry. If the ITC determines that material injury, or threat of material injury does not exist, the proceeding will be terminated and all securities posted will be refunded or canceled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered for consumption on or after the effective date of the

suspension of liquidation. This determination is issued and published in accordance with sections 735(d) and 777(i)(1) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7538 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–475–823]

Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils From Italy

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Cynthia Thirumalai, Craig W. Matney, Gregory W. Campbell, or Alysia Wilson, AD/CVD Enforcement, Group I, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–4087, 482–1778, 482–2239, or 482–0108, respectively.

Final Determination

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of stainless steel plate in coils from Italy. For information on the estimated countervailing duty rates, please see the ''Suspension of Liquidation'' section of this notice.

The Petitioners

The petition in this investigation was filed by Armco, Inc., J&L Specialty Steels, Inc., Lukens Inc., AFL–CIO/CLC (USWA), Butler Armco Independent Union and Zanesville Armco Independent Organization (the petitioners).

Case History

Since our preliminary determination on August 28, 1998 (*Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Stainless Steel Plate in Coils from Italy,* 63 FR 47246, (September 4, 1998) (*Preliminary Determination*), the following events have occurred:

Between September 21 and October 16, 1998, we issued supplemental questionnaires to the Government of Italy (GOI), the European Commission (EC) and Acciai Speciali Terni (AST). We received responses to these requests between October 9 and November 4, 1998. We conducted verification in Belgium and Italy of the questionnaire responses of the EC, GOI, and AST from November 11 through November 24, 1998. On January 5, 1999, we postponed the final determination of this investigation until March 19, 1999 (*see Countervailing Duty Investigations of Stainless Steel Plate in Coils from Belgium, Italy, the Republic of Korea, and the Republic of South Africa: Notice of Extension of Time Limit for Final Determinations,* 64 FR 2195 (January 13, 1999)). The petitioners and AST filed case and rebuttal briefs on February 17 and February 23, 1999. A public hearing was held on February 25, 1999. After the hearing, at the Department's request, additional comments were submitted by petitioners and respondents on March 2, 1999. On March 12, 1999, the EC submitted additional comments.

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.,* cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (HTSUS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and customs purposes, the written description of the merchandise under investigation is dispositive.

The Applicable Statute

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations codified at 19 CFR part 351 (1998).

Injury Test

Because Italy is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (ITC) is required to determine whether imports of the subject merchandise from Italy materially injure, or threaten material injury to, a U.S. industry. On May 28, 1998, the 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 Italy of the subject merchandise (*see Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, Korea, South Africa, and Taiwan,* 63 FR 29251 (May 28, 1998)).

Period of Investigation

The period of investigation for which we are measuring subsidies (the POI) is calendar year 1997.

Corporate History of AST

Prior to 1987, Terni, S.p.A, (Terni), a main operating subsidiary of Finsider, was the sole producer of stainless steel plate in coils in Italy. Finsider was a holding company that controlled all state-owned steel companies in Italy. Finsider, in turn, was wholly-owned by a government holding company, Istituto per la Ricostruzione Industriale (IRI). As part of a restructuring in 1987, Terni transferred its assets to a new company, Terni Acciai Speciali (TAS).

In 1988, another restructuring took place in which Finsider and its main operating companies (TAS, Italsider, and Nuova Deltasider) entered into liquidation and a new company, ILVA S.p.A., was formed. ILVA S.p.A. took over some of the assets and liabilities of the liquidating companies. With respect to TAS, part of its liabilities and the majority of its viable assets, including

all the assets associated with the production of plate, transferred to ILVA S.p.A. on January 1, 1989. ILVA S.p.A. became operational on the same day. Part of TAS's remaining assets and liabilities were transferred to ILVA S.p.A. on April 1, 1990. After that date, TAS no longer possessed any operating assets. Only certain non-operating assets remained in TAS.

From 1989 to 1993, ILVA S.p.A. consisted of several operating divisions. The Specialty Steels Division, located in Terni, produced subject merchandise. ILVA S.p.A. was also the majority owner of a large number of separately incorporated subsidiaries. Some of these subsidiaries produced various types of steel products. Others constituted service centers, trading companies, and an electric power company, among others. ILVA S.p.A. together with its subsidiaries constituted the ILVA Group (ILVA). ILVA was wholly-owned by IRI. All subsidies received prior to 1994 were received by ILVA or its predecessors.

In October 1993, ILVA entered into liquidation and became known as ILVA Residua. On December 31, 1993, two of ILVA's divisions were removed and separately incorporated: AST and ILVA Laminati Piani (ILP). ILVA's Specialty Steels Division was transferred to AST while its carbon steel flat products operations were placed in ILP. The remainder of ILVA's assets and liabilities, along with much of the redundant workforce, was left in ILVA Residua.

In December 1994, AST was sold to KAI Italia S.r.L. (KAI), a privately-held holding company jointly owned by German steelmaker Hoesch-Krupp (50 percent) and a consortium of private Italian companies called FAR Acciai (50 percent). Between 1995 and the POI, there were several restructurings/ changes in ownership of AST and its parent companies. As a result, at the end of the POI, AST was owned 75 percent by Krupp Thyssen Stainless GmbH and 25 percent by Fintad Securities S.A.

Change in Ownership

In the General Issues Appendix (GIA), attached to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria,* 58 FR 37217, 37226 (July 9, 1993)(Certain Steel from Austria), we applied a new methodology with respect to the treatment of subsidies received prior to the sale of a government-owned company to a private entity (privatization), or the spinning-off (*i.e.,* sale) of a productive unit from a government-owned company to a private entity.

Under this methodology, we estimate the portion of the purchase price attributable to prior subsidies. We do this by first dividing the sold company's subsidies by the company's net worth for each year during the period beginning with the earliest point at which nonrecurring subsidies would be attributable to the POI and ending one year prior to the sale of the company. We then take the simple average of these ratios. This averaged ratio serves as a reasonable estimate of the percent that subsidies constitute of the overall value of the company. Next, we multiply this ratio by the purchase price to derive the portion of the purchase price attributable to the payment of prior subsidies. Finally, we reduce the benefit streams of the prior subsidies by the ratio of the repayment amount to the net present value of all remaining benefits at the time the company is sold. For further discussion of our methodology, *see* the *Preliminary Determination,* 63 FR at 47247.

With respect to the spin-off of a productive unit, consistent with the Department's methodology set out above, we analyze the sales of a productive unit to determine what portion of the sale price of the productive unit can be attributable to the repayment of prior subsidies. To perform this calculation, we first determine the amount of the seller's subsidies that the spun-off productive unit could potentially take with it. To calculate this amount, we divide the value of the assets of the spun-off unit by the value of the assets of the company selling the unit. We then apply this ratio to the net present value of the seller's remaining subsidies. The result of this calculation yields the amount of remaining subsidies attributable to the spun off productive unit. We next estimate the portion of the purchase price going towards repayment of prior subsidies in accordance with the methodology set out above, and deduct it from the maximum amount of subsidies that could be attributable to the spun off productive unit. For further discussion of these issues, *see* Comment 1 below regarding the application of the methodology to an arm's-length sale of a company, Comment 2 with respect to the calculation of the ratio representing the percentage that subsidies constitute of the overall value of a company, and Comment 3 on the calculation of the purchase price used in the change-in-ownership methodology.

After the 1994 privatization of AST, there were numerous changes in the ownership structure of the parent companies of AST. Respondent argues that the Department should apply its change-in-ownership methodology to two of these transactions. Each of these sales involved minority owners selling their interests in AST's parent companies. In the *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination; Stainless Steel Sheet and Strip from Italy,* 63 FR 63900, 63902 (November 17, 1998) (*Italian Sheet and Strip*), the Department applied its methodology to one transaction but did not have the information with which to do so for the other.

The petitioners oppose the application of the change-in-ownership methodology. They argue that ownership transactions that fail to transfer control of a company to an unrelated party do not warrant the application of the change-in-ownership methodology. The petitioners cite to *Inland Bar Co.* v. *United States (Inland Bar),* 155 F.3d 1370, 1374 (Fed. Cir. 1998) in which it is stated that a purchaser's valuation of a company:

> will depend not only on the intrinsic value of the unit, but also on whether the purchaser opts to discharge the liability at purchase time rather than continuing to pay countervailing duties until the obligation expires. (*Id.* at 1374)

According to the petitioners, the Court's reasoning dictates that a purchaser must be able to value a company's assets and liabilities, assume the liabilities and opt to repay or reallocate the countervailing duty liability. In order to do this, the petitioners argue that a purchaser must take control of the company. In contrast, Krupp has controlled AST since the 1994 privatization and only strengthened its position by virtue of these post-privatization partial changes in ownership, explain the petitioners.

More specifically, AST's post-privatization partial changes in ownership involved transfers of only minority stakes, according to the petitioners. In such cases, argue the petitioners, the liability remains with the current majority owners while the minority purchaser simply buys into the subsidized company. As support, the petitioners cite to the GIA, 58 FR at 37273, where the Department stated:

> A change in ownership position, whereby a company's percentage of ownership fluctuates over time, is not a bona fide spin-off. Therefore, we did not perform the spin-off calculation with regard to change in ownership position.

The petitioners warn that application of the change-in-ownership methodology

in such small share transactions that do not affect the control of a company would create a loophole in the countervailing duty law whereby each share transaction on the open market would constitute a change in ownership. In effect, point out the petitioners, the privatization of a company via stock issuance would result in extinguishment of subsidies as each trade would result in a reallocation of those subsidies. The petitioners also state that continued application of the change-in ownership methodology involving minority transfers of ownership could also provide an incentive for majority owners to manipulate share transactions so as to eliminate countervailing duty liability.

Finally, the petitioners argue that AST's partial changes in ownership are distinguishable from those examined in *Industrial Phosphoric Acid from Israel: Final Results of Countervailing Duty Administrative Review,* 61 FR 53351, 53352 (October 11, 1996) (*IPA from Israel*) where the Department applied its change-in-ownership methodology to partial privatizations. Petitioner argues that AST's private transactions do not warrant any repayment of subsidies as would happen when a government sells a company (*see Delverde I* at 16–17). The petitioners also note that in *IPA from Israel* the partial changes in ownership for which the change-in-ownership methodology was applied occurred on the same level of analysis that the subsidy analysis was done. However, with AST, the petitioners argue that the partial changes in ownership occurred at a higher level than the level at which the subsidy analysis is properly done; thereby rendering the changes in ownership irrelevant for purposes of a change-in-ownership analysis.

AST argues that *IPA from Israel* clearly supports application of the change-in-ownership methodology to all transactions including partial changes in ownership unless application of the methodology would have no affect on the final margin. While the case at hand involves private-to-private partial changes in ownership and *IPA from Israel* involved a public-to-private one, AST notes that the Department has found the application of the change-in-ownership methodology to be appropriate in private-to-private transfers of total ownership (*see Final Affirmative Countervailing Duty Determination: Certain Pasta (''Pasta'') From Italy,* 61 FR 30287, 30298 (June 14, 1996) (*Pasta From Italy*). Moreover, AST points out that the application of the change-in-ownership methodology in private-to-private transactions has been upheld by the CIT (*see Delverde, SrL.* v. *United States (Delverde II),* 24 F. Supp. 2d 314 (CIT 1998).

As for the petitioners' reliance upon *Inland Bar* to show that control of the company must change in order for the change-in-ownership methodology to be applicable, AST states that it is misplaced. According to AST, the issue before the Court in *Inland Bar* was whether Commerce's repayment methodology as articulated in the GIA, was reasonable. AST also mentions that in *IPA from Israel,* there was no change in control yet the Department applied the change-in-ownership methodology. Because the change-in-ownership methodology seeks to determine what portion of the purchase price of a company is attributable to subsidy repayment, AST explains that its post-privatization changes in ownership should be accounted for in that the amount of money the owners of AST paid for the company was increased by virtue of these transactions.

For this final determination, we have determined that it is inappropriate to apply our change in ownership methodology to AST's post-privatization partial changes in ownership. While it is true that the Department has applied its change in ownership methodology to partial changes in ownership in the past, we agree with petitioners that the facts presented here are unique and require a different analysis. *IPA from Israel* involved the partial privatization of the company for which we were measuring countervailable subsidies. The transactions at issue in this case both involve the sale of a relatively small amount of shares by minority owners of a holding company two levels removed from the production of the subject merchandise. Given the flexibility that the statute has conferred upon the Department with respect to changes in ownership and the SAA's guidance that we should examine changes in ownership on a case-by-case basis, we have examined the unique facts of this case and find it inappropriate to apply our change in ownership methodology. It would be unreasonable and impracticable to reallocate subsidies every time a few shares change hands; therefore, we must distinguish the circumstances in which we will reallocate from those in which we will not. We need not set forth the exact parameters under which we would but, rather, we must examine the specific facts of each case. In this case, the ownership interest transferred is relatively small and so remote from the company upon which the subsidies were conferred that we do not think it appropriate to reallocate the subsidies.

We are not persuaded by petitioners' argument that a transaction must involve a transfer of control in order for our methodology to be applicable. However, we are deeply concerned that application of our methodology to sales of private minority share interests such as these could lead us toward the application of our methodology to daily transactions on the open market for publicly traded companies—a clearly absurd result that must be prevented. Moreover, for one of these transactions, we have less than perfect source documentation supporting the essential elements of the transaction. For these reasons, we have not applied our change in ownership methodology to the transactions at issue.

Subsidies Valuation Information

Benchmarks for Long-term Loans and Discount Rates: Consistent with the Department's finding in *Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy* 63 FR at 40474, 40477 (October 22, 1997) (*Wire Rod from Italy*), we have based our long-term benchmarks and discount rates on the Italian Bankers' Association (ABI) rate. Because the ABI rate represents a long-term interest rate provided to a bank's most preferred customers with established low-risk credit histories, commercial banks typically add a spread ranging from 0.55 percent to 4 percent onto the rate for other customers, depending on their financial health.

In years in which AST or its predecessor companies were creditworthy, we added the average of that spread to the ABI rate to calculate a nominal benchmark rate. In years in which AST or its predecessor companies were uncreditworthy (*see* Creditworthiness section below), we calculated the discount rates in accordance with our methodology for constructing a long-term interest rate benchmark for uncreditworthy companies. Specifically, we added to the ABI rate a spread of four percent in order to reflect the highest commercial interest rate available to companies in Italy. We added to this rate a risk premium equal to 12 percent of the ABI, as described in § 355.44(b)(6)(iv) of the Department's 1989 Proposed Regulations, (*see Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment,* 54 FR 23366, 23374 (May 31, 1989) (*1989 Proposed Regulations*)). While the *1989 Proposed Regulations* are not controlling, they do represent the Department's practice for purposes of this investigation.

Additionally, information on the record of this case indicates that published ABI rates do not include amounts for fees, commissions and other borrowing expenses. Because such expenses raise the effective interest rate that a company would experience, and because it is the Department's practice to use effective interest rates, where possible, we are including an amount for these expenses in the calculation of our effective benchmark rates (*see* section 355.44(b)(8) of the *1989 Proposed Regulations* and *Final Affirmative Countervailing Duty Determination: Certain Pasta from Turkey,* 61 FR 30366, 30373 (June 14, 1996)). While we do not have information on the expenses that would be applied to long-term commercial loans, the GOI supplied information on the borrowing expenses on overdraft loans as an approximation of expenses on long-term commercial loans. This information shows that expenses on overdraft loans range from 6 to 11 percent of interest charged. Accordingly, we increased the nominal benchmark rate by 8.5 percent, which represents the average reported level of borrowing expenses, to arrive at an effective benchmark rate.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service (IRS) for the industry-specific average useful life of assets in determining the allocation period for non-recurring subsidies. *See* the GIA, 58 FR at 37227. In *British Steel plc* v. *United States,* 879 F. Supp. 1254 (CIT 1995) (*British Steel I*), the U.S. Court of International Trade (CIT) held that the IRS information did not necessarily reflect a reasonable period based on the actual commercial and competitive benefit of the subsidies to the recipients. In accordance with the CIT's remand order, the Department calculated a company-specific allocation period for non-recurring subsidies based on the average useful life (AUL) of non-renewable physical assets. This remand determination was affirmed by the court in *British Steel plc* v. *United States,* 929 F. Supp. 426, 439 (CIT 1996) (*British Steel II*). In recent countervailing duty investigations, it has been our practice to follow the court's decision in *British Steel II,* and to calculate a company-specific allocation period for all countervailable non-recurring subsidies.

After considering parties' comments and based upon our analysis of the data submitted by AST regarding the AUL of its assets, we are using a 12-year AUL for AST. This 12-year AUL is based on information in *Wire Rod from Italy,* 63 FR at 40477, and *Italian Sheet and Strip,* 63 FR at 63903, which we find to be a good estimate of the AUL of the Italian stainless steel industry. For an explanation of why we are rejecting AST's company-specific AUL, *see* Comment 6.

Equityworthiness

In measuring the benefit from a government equity infusion, the Department compares the price paid by the government for the equity to a market benchmark, if such a benchmark exists. In this case, a market benchmark does not exist. We therefore examined whether AST's predecessors were equityworthy in the years they received infusions. *See, Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Trinidad and Tobago,* 62 FR 50003, 50004 (October 22, 1997) (*Wire Rod from Trinidad and Tobago*). In analyzing whether a company is equityworthy, the Department considers whether that company could have attracted investment capital from a reasonable private investor in the year of the government equity infusion, based on information available at that time. *See* GIA, 58 FR at 37244. Our review of the record has not led us to change our finding from that in *Wire Rod from Italy,* in which we found AST's predecessors unequityworthy from 1986 through 1988, and from 1991 through 1992, 63 FR 40474 at 40477.

Consistent with our equity methodology described in the GIA, 58 FR at 37239, we consider equity infusions into unequityworthy companies as infusions made on terms inconsistent with the usual practice of a private investor and, therefore, we have treated these infusions as grants. This methodology is based on the premise that a finding by the Department that a company is not equityworthy is tantamount to saying that the company could not have attracted investment capital from a reasonable investor in the year of the infusion. This determination is based on the information available at the time of the investment.

Creditworthiness

When the Department examines whether a company is creditworthy, it is essentially attempting to determine if the company in question could obtain commercial financing at commonly available interest rates. *See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from France,* 58 FR 37304 (July 9, 1993) (*Certain Steel from France); Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Venezuela,* 62 FR 55014 (Oct. 21, 1997).

Terni, TAS and ILVA were found to be uncreditworthy from 1986 through 1993 in *Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy,* 59 FR 18357, 18358 (April 18, 1994) (*Electrical Steel from Italy*) and in *Wire Rod from Italy,* 63 FR at 40477. No new information has been presented in this investigation that would lead us to reconsider these findings. (*See* Comment 13 below regarding the issue of AST's creditworthiness in 1993.) Therefore, consistent with our past practice, we continue to find Terni, TAS and ILVA uncreditworthy from 1986 through 1993. *See, e.g., Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Brazil,* 58 FR 37295, 37297 (July 9, 1993). We did not analyze AST's creditworthiness in 1994 through 1997 because AST did not negotiate new loans with the GOI or EC during these years.

I. Programs Determined To Be Countervailable

GOI Programs

A. Equity Infusions to Terni, TAS and ILVA

The GOI, through IRI, provided new equity capital to Terni, TAS or ILVA in every year from 1986 through 1992, except in 1989 and 1990. We determine that these equity infusions constitute countervailable subsidies within the meaning of section 771(5) of the Act. These equity infusions constitute financial contributions, as described in section 771(5)(D)(i) of the Act, and because they were not consistent with the usual investment practices of private investors (*see* Equityworthiness section above) they confer a benefit within the meaning of section 771(5)(E)(i) of the Act. Because these equity infusions were limited to Finsider and its operating companies, TAS and ILVA, we determine that they are specific within the meaning of section 771(5A)(D) of the Act.

We have treated these equity infusions as non-recurring allocable benefits given in the year the infusion was received because each required a separate authorization. Because Terni, TAS and ILVA were uncreditworthy in the years of receipt, we used discount rates that include a risk premium to allocate the benefits over time.

For equity infusions originally provided to Terni and TAS, the predecessor companies that produced stainless steel, we examined these equity infusions as though they had

flowed directly through ILVA to AST when AST took all of the stainless steel assets out of ILVA. Accordingly, we did not apportion to the other operations of ILVA any part of the equity infusions originally provided directly to Terni or TAS. While we acknowledge that it would be our preference to look at equity infusions into ILVA as a whole and then apportion an amount to AST when it was spun-off from ILVA, we find our approach in this case to be the most feasible since information on equity infusions provided to the non-stainless operations of ILVA is not available. For the equity infusions to ILVA, however, we did apportion these by asset value to all ILVA operations in determining the amount applicable to AST because they were not tied to any specific product.

We applied the repayment portion of our change-in-ownership methodology to all of the equity infusions described above to determine the subsidy allocable to AST after it was sold. We divided this amount by AST's total consolidated sales during the POI. Accordingly, we determine the estimated net benefit to be 1.03 percent *ad valorem* for AST.

B. Benefits From the 1988–90 Restructuring of Finsider [1]

As discussed above in the Corporate History of AST section of this notice, the GOI liquidated Finsider and its main operating companies in 1988 and assembled the group's most productive assets into a new operating company, ILVA S.p.A. In 1990, additional assets and liabilities of TAS, Italsider and Finsider went to ILVA.

Not all of TAS's liabilities were transferred to ILVA S.p.A.; rather, many remained with TAS and had to be repaid, assumed or forgiven. In 1989, Finsider forgave 99,886 million lire of debt owed to it by TAS. Even with this debt forgiveness, a substantial amount of liabilities left over from the 1990 transfer of assets and liabilities to ILVA S.p.A. remained with TAS. In addition, losses associated with the transfer of assets to ILVA S.p.A. were left behind in TAS. These losses occurred because the value of the transferred assets was written down. As TAS gave up assets whose book values were higher than their appraised values, it was forced to absorb the losses. These losses were generated during two transfers as reflected in: (1) An extraordinary loss in TAS's 1988 Annual Report and (2) a reserve against anticipated losses posted in TAS's 1989 Annual Report with respect to the 1990 transfer.

Consistent with our treatment of the 1988–90 restructuring in the preliminary determination of this case and *Electrical Steel from Italy,* 59 FR at 18359, we determine that the debt and loss coverage provided to ILVA constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. The debt and loss coverage provided a financial contribution as described in section 771(5)(D)(ii) of the Act and provided a benefit to the recipient in the amount of the debt and loss coverage. Because this debt and loss coverage was limited to TAS, AST's predecessor, we determine that it is specific within the meaning of section 771(5A)(D) of the Act.

In calculating the benefit from this program, we followed our methodology in *Electrical Steel from Italy,* except for the correction of a calculation error which had the effect of double-counting the write-down from the first transfer of assets in 1988 by including it in the calculation of losses generated upon the second transfer of assets in 1990. We have treated Finsider's 1989 forgiveness of TAS' debt and the loss resulting from the 1989 write-down as grants received in 1989. The second asset write down and the debt outstanding after the 1990 transfer were treated as grants received in 1990. We treated these as non-recurring grants because they were one-time, extraordinary events. Because ILVA was uncreditworthy in these years, we used discount rates that include a risk premium to allocate the benefits over time. As with the equity infusions made into Terni and TAS, we have treated this debt and loss coverage as though they flowed directly through ILVA to AST, because we have no information on the debt and loss coverage provided to the non-stainless operations of ILVA. We applied the repayment portion of our change-in-ownership methodology to the debt and loss coverage to determine the amount of the subsidy allocable to AST after its privatization. We divided this amount by AST's total consolidated sales during the POI. Accordingly, we determine the estimated net benefit to be 2.81 percent *ad valorem* for AST.

C. Debt Forgiveness: ILVA-to-AST [2]

As of December 31, 1993, the majority of ILVA's viable manufacturing activities had been separately incorporated (or ''demerged'') into either AST or ILP; ILVA Residua was primarily a shell company with liabilities far exceeding assets, although it did contain some operating assets later spun-off. In contrast, AST and ILP, now ready for sale, had operating assets and relatively modest debt loads.

We determine that AST (and consequently the subject merchandise) received a countervailable subsidy in 1993 when the bulk of ILVA's debt was placed in ILVA Residua, rather than being proportionately allocated to AST and ILP. The amount of debt that should have been attributable to AST but was instead placed with ILVA Residua was equivalent to debt forgiveness for AST at the time of its demerger. In accordance with our past practice, debt forgiveness is treated as a grant which constitutes a financial contribution under section 771(5)(D)(i) of the ACT and provides a benefit in the amount of the debt forgiveness. Because the debt forgiveness was received only by privatized ILVA operations, we determine that it is specific under section 771(5A)(D) of the Act.

In the preliminary determination of *Italian Sheet and Strip,* 63 FR at 63904, the amount of liabilities that we attributed to AST was based on the EC's 9th Monitoring Report of the total cost of the liquidation process to the GOI. However, for this final determination, we have re-examined our methodology and determined that it is more appropriate to base our calculation on the gross liabilities left behind in ILVA Residua. *See* Comment 9 and the March 19, 1999 Memorandum on the 1993 Debt Forgiveness to Richard W. Moreland.

In calculating the amount of debt forgiveness attributable to AST, we started with the gross liabilities appearing on ILVA Residua's consolidated December 31, 1993 balance sheet. This balance sheet represents ILVA after the demergers of and associated debt transfers to AST and ILP. From these gross liabilities, we subtracted amounts for ILVA Residua's liquid assets (cash, bank accounts, etc.) and liabilities eventually transferred to the companies sold from ILVA Residua. We then subtracted the amount of the asset write-downs specifically attributable to AST, ILP and other companies, and attributed AST's portion of these write-downs to AST. Finally, we subtracted the amount of liabilities (*i.e.,* 253 billion lire) that was attributed to Cogne Acciai Speciali

[1] This program was referred to as Debt Forgiveness: Finsider-to-ILVA Restructuring in *Initiation of Countervailing Duty Investigations: Stainless Steel Plate in Coils from Belgium, Italy, the Republic of Korea, and the Republic of South Africa,* 63 FR 23272 (April 28, 1998) (*Initiation Notice*)

[2] Includes the following programs from the *Initiation Notice:* Working Capital Grants to ILVA, 1994 Debt Payment Assistance by IRI, and ILVA Restructuring and Liquidation Grant.

(CAS), an ILVA subsidiary that was left behind in ILVA Residua and spun-off. This amount was countervailed in *Wire Rod from Italy,* 63 FR at 40478. *See* Comments 10–14 below for further information on our calculation methodology.

The amount of liabilities remaining represents the pool of liabilities that are not individually attributable to specific ILVA assets. We apportioned this debt to AST, ILP and operations sold from ILVA Residua based on their relative asset values. We used the total consolidated asset values reported in AST and ILP's December 31, 1993 financial results, and used the sum of purchase price plus debts transferred as a surrogate for the asset value of the operations sold from ILVA Residua. Because we subtracted a specific amount of ILVA's gross liabilities attributed to CAS in *Wire Rod from Italy,* we did not include its assets in the amount of ILVA Residua's privatized assets. Also, consistent with *Italian Sheet and Strip,* we did not include in ILVA Residua's viable assets the assets of the one ILVA Residua company sold to IRI, because this sale does not represent a sale to a non-governmental entity.

We treated the debt forgiveness to AST as a non-recurring grant because it was a one-time, extraordinary event. The discount rate we used in our grant formula included a risk premium based on our determination that ILVA was uncreditworthy in 1993 (*see* Comment 13 below and March 19, 1999 Memorandum on the Appropriate basis for 1993 Creditworthiness Analysis of AST). We followed the methodology described in the Change in Ownership section above to determine the amount appropriately allocated to AST after its privatization. We divided this amount by AST's total consolidated sales during the POI. Accordingly, we determine the estimated net benefit to be 9.58 percent *ad valorem* for AST.

D. Law 796/76: Exchange Rate Guarantees

Law 796/76 established a program to minimize the risk of exchange rate fluctuations on foreign currency loans. All firms that contract foreign currency loans from the European Coal and Steel Community (ECSC) or the Council of Europe Resettlement Fund (CERF) could apply to the Ministry of the Treasury (MOT) to obtain an exchange rate guarantee. The MOT, through the Ufficio Italiano di Cambi (UIC), calculates loan payments based on the lira-foreign currency exchange rate in effect at the time the loan is disbursed (*i.e.,* the base rate). The program establishes a floor and ceiling for exchange rate fluctuations, limiting the maximum fluctuation a borrower would face to two percent above or below the base rate. If the lira depreciates more than two percent against the foreign currency, a borrower is still able to purchase foreign currency at the established (guaranteed) ceiling rate. The MOT absorbs the loss in the amount of the difference between the guaranteed rate and the actual rate. If the lira appreciates against the foreign currency, the MOT realizes a gain in the amount of the difference between the floor rate and the actual rate.

This program was terminated effective July 10, 1992, by Decree Law 333/92. However, the pre-existing exchange rate guarantees continue on any loans outstanding after that date. AST had two outstanding ECSC loans during the POI that benefitted from these guarantees.

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. This program provides a financial contribution, as described in section 771(5)(D)(i) of the Act, to the extent that the lira depreciates against the foreign currency beyond the two percent limit. When this occurs, the borrower receives a benefit in the amount of the difference between the guaranteed rate and the actual exchange rate.

In its responses to the Department's questionnaires, the GOI did not provide information regarding the types of enterprises that have used this program. However, during verification of the GOI, GOI officials explained that over the last decade, roughly half of all guarantees made under this program were given to coal and steel companies. This is consistent with the Department's finding in a previous proceeding that the Italian steel industry has been a dominant user of the exchange rate guarantees provided under Law 796/76. Therefore, we determine that the program is specific under section 771(5A)(D)(iii)(II) of the Act. *See Final Affirmative Countervailing Duty Determination: Small Diameter Circular Seamless Carbon and Alloy Steel Standard, Line and Pressure Pipe From Italy,* 60 FR 31996 (June 19, 1995).

Once a loan is approved for exchange rate guarantees, access to foreign exchange at the established rate is automatic and occurs at regular intervals throughout the life of the loan. Therefore, we are treating the benefits under this program as recurring grants. At verification, we found that AST paid a foreign exchange commission fee to the UIC for each payment made. We determine that this fee qualifies as an "* * * application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy." *See* section 771(6)(A) of the Act. Thus, for the purposes of calculating the countervailable benefit, we have added the foreign exchange commission to the total amount AST paid under this program during the POI. *See Wire Rod from Italy,* 63 FR at 40479.

We have calculated the total countervailable benefit as the difference between the total loan payment due in foreign currency, converted at the current exchange rate, minus the sum of the total loan payment due in foreign currency converted at the guaranteed rate and the exchange rate commission. We divided this amount by AST's total consolidated sales during the POI. Accordingly, we determine the estimated net benefit to AST for this program to be 0.82 percent *ad valorem.*

E. Law 675/77

Law 675/77 was designed to provide GOI assistance in the restructuring and reconversion of Italian industries. There are six types of assistance available under this law: (1) Grants to pay interest on bank loans; (2) mortgage loans provided by the Ministry of Industry (MOI) at subsidized interest rates; (3) grants effectively to reduce interest payments on loans financed by IRI bond issues; (4) capital grants for the South; (5) value-added tax reductions on capital good purchases for companies in the South; and (6) personnel retraining grants.

Under Law 675/77, IRI issued bonds to finance restructuring measures of companies within the IRI group. The proceeds from the sale of the bonds were then re-lent to IRI companies. During the POI, AST had two outstanding loans financed by IRI bond issues. AST was responsible for making semi-annual interest payments and annual principal payments on these bond issues. In turn, AST applied for and received reimbursements from the GOI for interest and expenses that, when combined, exceed 5.275 percent semi-annually.

We determine that these loans constitute a countervailable subsidy within the meaning of section 771(5) of the Act. These loans provided a financial contribution as described in section 771(5)(D)(i) of the Act, and conferred a benefit to AST to the extent that the net interest rate was lower than the benchmark rate. With regard to specificity, a number of different industrial sectors have received benefits under Law 675/77. However, in *Electrical Steel from Italy,* the

Department determined that assistance under this law was specific because the steel industry was a dominant user of the program (the steel industry received 34 percent of the benefits). *See Electrical Steel from Italy,* 59 FR at 18361. In the instant proceeding, the GOI submitted similar information regarding the distribution of benefits under this program. At verification, the GOI stated that this program bestowed benefits on a limited number of industries, one of which was the steel industry. The new information submitted by the GOI is consistent with the information submitted in *Electrical Steel from Italy.* Therefore, consistent with our finding in *Electrical Steel from Italy,* we find the program to be specific within the meaning of section 771(5A)(D) of the Act.

To measure the benefit from these loans, we compared the benchmark interest rate to the amounts paid by AST, less the reimbursements applied for, on these loans during the POI. We divided the resulting difference by AST's total consolidated sales during the POI. In our calculations for the *Preliminary Determination,* we erred by applying the change-in-ownership methodology to these loans. The loans at issue here are variable-rate loans whose benefits are recurring/non-allocable in nature. Since recurring benefits are not affected by our change-in-ownership calculations, we have corrected our error by not reducing the benefits from Law 675/77 loans (*see* GIA, 58 FR at 37263).

We determine the estimated net benefit from this program to be 0.07 percent *ad valorem* for AST.

F. Law 10/91

The GOI provided funds to AST under Law 10/91 for the development of energy conserving technology. Law 10/91 authorized grants based on applications submitted in 1991 and 1992, and was intended to fund projects whose purpose was to save energy or promote the use of renewable energy sources.

This program was not included in the petition and, thus, not addressed in the Department's initial questionnaire. Rather, in response to a supplemental questionnaire issued after the preliminary determination, AST stated that it had received grants under Law 10/91 both prior to and after the POI. In *Italian Sheet and Strip,* 63 FR at 63907, we did not determine the specificity of the program given the limited information available on the record at the time. Since the preliminary determinations in *Italian Sheet and Strip* and the instant proceeding, we have collected and verified information regarding this program.

The aid AST received under Law 10/91, which constitutes a financial contribution under section 771(5)(D)(i) of the Act, provides a benefit in the amount of the grants received. Furthermore, we determine that Law 10/91 is specific within the meaning of section 771(5A)(D)(iii) of the Act. There is no indication that this program is *de jure* specific. However, based on an examination of all the grants approved at the same time as AST's project was approved, we find that both the steel industry and AST's predecessor, ILVA, received a predominate and disproportionate share of the benefits (*see* Memorandum to Susan H. Kuhbach from Team, dated February 19, 1999.) Therefore, we determine Law 10/91 grants to be countervailable.

We treated these grants to AST as non-recurring because they required separate approvals. Because the amount of grant AST received prior to the POI was less than 0.5 percent of its sales in the year of receipt, the benefit was expensed in that year. Section 355.44(b)(8) of the *1989 Proposed Regulations* and *Wire Rod from Canada* 62 FR at 54977. Accordingly, we determine the estimated net benefit in the POI to be 0.00 percent *ad valorem.*

G. Pre-Privatization Employment Benefits (Law 451/94)

Law 451/94 was created to conform with EC requirements of restructuring and capacity reduction of the Italian steel industry. Law 451/94 was passed in 1994 and enabled the Italian steel industry to implement workforce reductions by allowing steel workers to retire early. During the 1994–1996 period, Law 451/94 provided for the early retirement of up to 17,100 Italian steel workers. Benefits applied for during the 1994–1996 period continue until the employee reaches his/her natural retirement age, up to a maximum of ten years.

In the *Preliminary Determination,* the Department determined that the early retirement benefits provided under Law 451/94 are a countervailable subsidy under section 771(5) of the Act. Law 451/94 provides a financial contribution, as described in section 771(5)(D)(i) of the Act, because Law 451/94 relieves the company of costs it would have normally incurred. Also, because Law 451/94 was developed for and exclusively used by the steel industry, we determine that Law 451/94 is specific within the meaning of section 771 (5A)(D) of the Act. No new information has been submitted to warrant a reconsideration of this finding.

In the *Preliminary Determination,* we used the Cassa Integrazione Guadagni-Extraordinario (''CIG–E'') program as our benchmark to determine what the obligations of Italian steel producers would have been when laying off workers. We compared the costs the steel companies would incur to lay off workers under the CIG–E program to the costs they incurred in laying off workers under Law 451/94. We found that the steel companies received a benefit by virtue of paying less under Law 451/94 than what they would have paid under CIG–E.

In *Italian Sheet and Strip,* 63 FR at 63908, we changed our benchmark because we learned that the CIG–E program applied in situations where the laid off workers were expected to return to their jobs after the layoff period. Since the workers retiring early under Law 451/94 were permanently separated from their company, we adopted the so-called ''Mobility'' provision as our benchmark. Like Law 451/94, the Mobility provision addressed permanent separations from a company.

Since then, we have learned more about the GOI's unemployment programs under Law 223 (including CIG–E and Mobility) and the early retirement program under Law 451/94. Based on this information, we do not believe that any of the alternatives described under Law 223 provides a benchmark *per se* for the costs that AST would incur in the absence of Law 451/94. As noted above, the CIG–E program addresses temporary lay offs. The Mobility provision serves merely to identify the minimum payment the company would incur when laying workers off permanently. Under the Mobility provision, the company is first directed to attempt to negotiate a settlement with the unions prior to laying-off workers permanently. Only if the negotiations fail will the company face the minimum payment required under Mobility.

Recognizing that AST would be required to enter into negotiations with the unions before laying off workers, the difficult issue for the Department is to determine what the outcome of those negotiations might have been absent Law 451/94. At one extreme, the unions might have succeeded in preventing any lay offs. If so, the benefit to AST would be the difference between what it would have cost to keep those workers on the payroll and what AST actually paid under Law 451/94. At the other extreme, the negotiations might have failed and AST would have incurred only the minimal costs described under Mobility.

Then the benefit to AST would have been the difference between what it would have paid under Mobility and what it actually paid under Law 451/94.

We have no basis for believing either of these extreme outcomes would have occurred. It is clear, given the EC regulations, that AST would have laid off workers. However, we do not believe that AST would simply have fired the workers without reaching accommodation with the unions. Statements by GOI officials at verification indicated that failure to negotiate a separation package with the union would lead to labor unrest, strikes, and lawsuits. Therefore, we have proceeded on the basis that AST's early retirees would have received some support from AST.

In attempting to determine the level of post employment support that AST would have negotiated with its unions, we looked to AST's own experience. As we learned at verification, by the end of 1993, the company had established a plan for the termination of redundant workers (as part of an overall ILVA plan). Under this plan, the early retirees would first be placed on CIG–E as a temporary measure and then they would receive benefits under Law 451/94. According to AST officials, the temporary measure was needed because ''they were waiting for the passage of the early retirement program under Law 451/94, which at the time had not been implemented by the GOI.''

This statement indicates that at the time an agreement was reached with the unions on the terms of the lay offs, AST and its workers were aware that benefits would be made available under Law 451/94. In such situations, i.e., where the company and its workers are aware at the time of their negotiations that the government will be making contributions to the workers' benefits, the Department's practice is to treat half of the amount paid by the government as benefitting the company. *See,* GIA, 58 FR at 37225. In the GIA, the Department stated that when the government's willingness to provide assistance is known at the time the contract is being negotiated, this assistance is likely to have an effect on the outcome of the negotiations. In these situations, the Department will assume that the difference between what the workers would have demanded and what the company would have preferred to have paid would have been split between the parties, with the result that one-half of the government payment goes to relieving the company of an obligation that would exist otherwise. *See,* GIA, 58 FR at 37256. This methodology was upheld in *LTV Steel Co.* v. *United States,* 985 F. Supp. 95, 116 (CIT 1997) (*LTV Steel*).

Therefore, with respect to AST and its workers, we determine that: (1) Under Italian Law 223, AST would have been required to negotiate with its unions about the level of benefits that would be made to workers permanently separated from the company, and (2) since AST and its unions were aware at the time of their negotiations that the GOI would be making payments to those workers under Law 451/94, the benefit to AST is one half of the amount paid to the workers by the GOI under Law 451/94. *See* Memorandum to Susan H. Kuhbach on Law 451/94–Early Retirement Benefits dated March 19, 1999.

Consistent with the Department's practice, we have treated benefits to AST under Law 451/94 as recurring grants expensed in the year of receipt. *See* GIA, 58 FR at 37226. To calculate the benefit received by AST during the POI, we multiplied the number of employees by employee type who retired early by the average salary by employee type. Since the GOI was making payments to these workers equaling 80 percent of their salary, and one-half of that amount was attributable to AST, we multiplied the total wages of the early retirees by 40 percent. We then divided this total amount by total consolidated sales during the POI. On this basis, we determine the estimated net benefit to AST during the POI to be 0.69 percent *ad valorem.*

H. Law 181/89: Worker Adjustment and Redevelopment Assistance[3]

Law 181/89 was implemented to ease the impact of employment reductions in the steel crisis areas of Naples, Taranto, Terni, and Genoa. The law targeted four activities: (1) Promotion of investment in reindustrialization, (2) promotion of employment, (3) promotion of worker retraining, and (4) early retirement. One of AST's subsidiaries received a grant under the reindustrialization component of Law 181/89 as partial compensation for acquiring equipment used in the processing of subject merchandise.

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. This grant under Law 181/89 constitutes a financial contribution under section 771(5)(D)(i) of the Act and provides a benefit in the amount of the grant received. Because assistance is limited to steel-related enterprises located in specified regions of Italy, we determine that the program is specific under section 771(5A)(D) of the Act.

The grant received by AST's subsidiary was disbursed in several tranches prior to the POI. We treated each of the tranche as non-recurring because they were all included in a single government grant approval which was exceptional. Consistent with the Department's methodology in the GIA, because the amount of each tranche, separately, was less than 0.5 percent of AST's sales in the corresponding year, we expensed the benefit of each tranche in that year. Consequently, we determine the estimated net benefit to AST in the POI for this program to be 0.00 percent *ad valorem*

J. Law 488/92

Law 488/92 provides grants for industrial projects in depressed regions of Italy. the subsidy amount is based on the location of the investment and the size of the enterprise. The funds used to pay benefits under this program are derived in part from the GOI and in part from the Structural Funds of the European Union (EU). to be eligible for benefits under this program, the enterprise must be located in one of the regions in Italy identified as EU Structural Funds Objective 1, 2 or 5b.

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. The grants are a financial contribution under section 771(5)(D)(i) of the Act providing a benefit in the amount of the grant. Because assistance is limited to enterprises located in certain regions, we determine that the program is specific under section 771(5A)(D) of the Act.

According to AST officials, although the company has applied for aid under this program, no approval has yet been granted and no funds have yet been disbursed. Accordingly, we determine the estimated net benefit to AST in the POI for this program to be 0.00 percent *ad valorem.*

EU Programs

A. ECSC Article 54 Loans

Article 54 of the 1951 ECSC Treaty established a program to provide industrial investment loans directly to the member iron and steel industries to finance modernization and purchase new equipment. Eligible companies apply directly to the European Commission (EC) (which administers the ECSC) for up to 50 percent of the cost of an industrial investment project.

The Article 54 loans are generally financed on a ''back-to-back'' basis. In other words, upon granting loan

[3] Includes the Decree Law 120/89: Recovery Plan for Steel Industry program contained in *Initiation Notice.*

approval, the ECSC borrows funds (through loans or bond issues) at commercial rates in financial markets which it then immediately lends back out to steel companies at a slightly higher interest rate. The mark-up is sufficient to cover the costs of administering the Article 54 program.

We determine that these loans constitute a countervailable subsidy within the meaning of section 771(5) of the Act. This program provides a financial contribution, as described in section 771(5)(D)(i) of the Act, which confers a benefit to the extent the interest rate is less than the benchmark interest rate. The Department has found Article 54 loans to be specific in several proceedings, including *Electrical Steel from Italy,* 59 FR at 18362, and *Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Italy,* 58 FR 37327, 37335 (July 9, 1993), (*Certain Steel from Italy*) because loans under this program are provided only to iron and steel companies. The EC has also indicated on the record of this investigation that Article 54 loans are for steel undertakings. Therefore, we determine that this program is specific pursuant to section 771(5A)(D) of the Act.

AST had two long-term, fixed-rate loans outstanding during the POI, each one denominated in a foreign currency. Consistent with *Electrical Steel from Italy,* 59 FR at 18362, we have used the lira-denominated interest rate discussed in the Subsidies Valuation Information section of this notice as our benchmark interest rate because these loans effectively had fixed exchange rates. The interest rate charged on one of AST's two Article 54 loans was lowered part way through the life of the loan. Therefore, for the purpose of calculating the benefit, we have treated this loan as if it were contracted on the date of this rate adjustment. We used the outstanding principal as of that date as the new principal amount, to which the new, lower interest rate applied. As our interest rate benchmark for both loans, we used the long-term, lira-based rate in effect on the date the loan was contracted. Because ILVA was uncreditworthy in the year these loans were approved, the benchmark rate includes a risk premium.

To calculate the benefit under this program, pursuant to section 771(5)(E)(ii) of the Act, we employed the Department's standard long-term loan methodology. We calculated the grant equivalent and allocated it over the life of each loan. As with the equity infusions made into Terni and TAS, we have treated the benefits from these loans as though they flowed directly through ILVA to AST, because we have no information on such loans provided to the non-stainless operations of ILVA. We followed the methodology described in the Change in Ownership section above to determine the amount appropriately allocated to AST after its spin-off from ILVA. We divided this benefit by AST's total sales during the POI. Accordingly, we determine the estimated net benefit to AST for these two loans together to be 0.12 percent *ad valorem.*

B. European Social Fund

The European Social Fund (ESF), one of the Structural Funds operated by the EU, was established to improve workers' opportunities through training and to raise workers' standards of living throughout the European Community by increasing their employability. There are six different objectives identified by the Structural Funds: Objective 1 covers projects located in underdeveloped regions, Objective 2 addresses areas in industrial decline, Objective 3 relates to the employment of persons under 25, Objective 4 funds training for employees in companies undergoing restructuring, Objective 5 pertains to agricultural areas, and Objective 6 pertains to regions with very low population (*i.e.,* the far north).

During the POI, AST received ESF assistance for projects falling under Objectives 2 and 4. The Objective 2 funding was to retrain production, mechanical, electrical maintenance, and technical workers, and the Objective 4 funding was to train AST's workers to increase their productivity.

The Department considers worker training programs to provide a countervailable benefit to a company when the company is relieved of an obligation it would have otherwise incurred. *See Pasta From Italy,* 61 FR at 30294. Since companies normally incur the costs of training to enhance the job-related skills of their own employees, we determine that this ESF funding relieves AST of obligations it would have otherwise incurred.

Therefore, we determine that the ESF grants received by AST are countervailable within the meaning of section 771(5) of the Act. The ESF grants are a financial contribution as described in section 771(5)(D)(i) of the Act which provide a benefit to the recipient in the amount of the grants.

Consistent with prior cases, we have examined the specificity of the funding under each Objective separately. *See Wire Rod from Italy,* 63 FR at 40487. In this case, the Objective 2 grants received by AST were funded by the EU, the GOI, and the regional government of Umbria acting through the provincial government of Terni. In *Pasta From Italy,* 61 FR at 30291, the Department determined that Objective 2 funds provided by the EU and the GOI were regionally specific because they were limited to areas within Italy which are in industrial decline. No new information or evidence of changed circumstances has been submitted in this proceeding to warrant reconsideration of this finding. The provincial government of Terni did not provide information on the distribution of its grants under Objective 2. Therefore, since the regional government failed to cooperate to the best of its ability by not supplying the requested information on the distribution of grants under Objective 2, we are assuming, as adverse facts available under section 776(b) of the Act, that the funds provided by the provincial government of Terni are specific.

In the case of Objective 4 funding, the Department has determined in past cases that the EU portion is *de jure* specific because its availability is limited on a regional basis within the EU. The GOI funding was also determined to be *de jure* specific because eligibility is limited to the center and north of Italy (non-Objective 1 regions). *See Wire Rod from Italy,* 63 FR at 40487. AST has argued that this decision is not reflective of the fact that ESF Objective 4 projects are funded throughout Italy and all Member States, albeit under the auspices of separate, regionally-limited documents (*see* Comment 15). We agree with AST that it may be appropriate for the Department to revisit its previous decision regarding the *de jure* specificity of assistance distributed under the ESF Objective 4 Single Programming Document (SPD) in Italy. Our decision in *Wire Rod* was premised upon our determination in the *Final Affirmative Countervailing Duty Determination; Certain Fresh Atlantic Groundfish from Canada* 51 FR 10055 (March 24, 1986), (*Groundfish from Canada*). In that case, respondents argued that benefits provided under the General Development Agreement (GDA) and Economic and Regional Development Agreements (ERDA) were not specific because the federal government had negotiated these agreements with every province. We did not accept this argument because the GDAs and ERDAs ''do not establish government programs, nor do they provide for the administration and funding of government programs.'' Instead, the Department analyzed the

specificity of the ''subsidiary agreements'' negotiated individually under the framework of the GDA and ERDA agreements.

In contrast to *Groundfish from Canada,* 51 FR at 10066, the agreements negotiated between the EU and the Member States (*i.e.,* Single Programming Documents and Community Support Frameworks) both establish government programs and provide for the administration and funding of such programs throughout the entirety of the European Union. Therefore, if we were to consider all the EU-Member State agreements together, we would arguably be unable to determine that the program is *de jure* specific.

Notwithstanding this argument, given the lack of information on the use of Objective 4 funds by either the EC or GOI, we must, as adverse facts available in the instant case, find the aid to be *de facto* specific. Both the EC and GOI stated that they were unable to provide the Department with the industry and region distribution information for each Objective 4 grant in Italy despite requests in our questionnaires and at verification. While the GOI, at verification, provided a list of grantees that received funds under the multiregional operating programs in non-Objective 1 regions, it declined the opportunity to identify the industry and region of such grantees (*see* February 3, 1999 memorandum on the Results of Verification of the GOI at 16). Furthermore, the regional governments have refused to cooperate to the best of their ability in this investigation despite Department requests. Therefore, we continue to find that the aid received by AST is specific.

The Department normally considers the benefits from worker training programs to be recurring. *See* GIA, 58 FR at 37255. However, consistent with the Department's determination in *Wire Rod from Italy,* 63 FR at 40488, that these grants relate to specific, individual projects, we have treated these grants as non-recurring grants because each required separate government approval. Because the amount of funding for each of AST's projects was less than 0.5 percent of AST's sales in the year of receipt, we have expensed these grants received in the year of receipt. Two of AST's grants were received during the POI. For these grants, we divided this benefit by AST's total sales during the POI and calculated an estimated net benefit of 0.01 percent *ad valorem* for ESF Objective 2 funds and 0.03 percent *ad valorem* for ESF Objective 4 funds.

II. Programs Determined To Be Not Countervailable

A. AST Participation in the THERMIE Program

The EU provided funds to AST for the development of a pilot plant through an EU program promoting research and development in the field of non-nuclear energy (THERMIE). The objective of the THERMIE program is to encourage the development of more efficient, cleaner, and safer technologies for energy production and use. The THERMIE program is part of a larger program categorized under the EU's Fourth Framework Programme which covers activities in research and technological development from 1994–1998.

The objective of AST's demonstration plant is to reduce energy consumption in the production of stainless steel by eliminating some of the traditional production steps through the adoption of ''strip casting'' technology. In *Italian Sheet and Strip,* as well as in the instant proceeding, the EU has requested noncountervailable (green light) treatment for this project as a research subsidy under section 771(5B)(B)(ii)(II) of the Act regarding precompetitive development activities.

In the instant proceeding and in *Italian Sheet and Strip,* the Department preliminarily determined that the THERMIE program did not merit green light treatment because it did not meet the statutory requirement that ''the instruments, equipment, land or buildings be used exclusively and permanently (except when disposed on a commercial basis) for the research activity'' (*see* section 771(5B)(B)(i) (II) of the Act). No new information has been submitted on the record in the instant proceeding to warrant a reconsideration of this finding.

However, in the preliminary determination we did not have sufficient information to determine if the technology and the demonstration plant provided a benefit to subject merchandise, nor did we have information on the distribution of project funds by industry or by company for the year in which AST's project was approved.

Since the preliminary determination, the EU has submitted information on the distribution of assistance under the THERMIE program for 1995 and 1996. Based on the information on the record, there is no indication that this program is *de jure* specific because eligibility is not limited to certain industries or groups thereof. Additionally, based on an examination of the distribution information, the program benefitted a large number of users in different industries, and neither AST nor the steel industry received a disproportionate share of the benefits (*see* Memorandum to Susan Kuhbach from Team, dated February 19, 1999.) Therefore, we determine that the THERMIE program is not specific within the meaning of section 771(5A)(D) of the Act and, consequently, not countervailable.

IV. Other Programs Examined

A. Loan to KAI for Purchase of AST

The government holding company, IRI, granted a loan to KAI for the purchase of AST. The loan had two basic components: an installment loan based on the up-front purchase price, and subsequent price adjustments. While the installment loan functioned as a long-term loan, the price adjustments were more akin to short-term extensions of credit. In addition, the terms of the price adjustments were independent of the terms of the installment loan. Accordingly, we regarded the price adjustments to be distinct from the installment loan.

We are not making a determination as to the countervailability of either the installment loan or the price adjustments since they separately yield no benefit. With respect to the installment loan, the full amount was paid off prior to the POI; hence there was no benefit during the POI. As for the short-term extensions of credit on the price adjustments, the benefit potentially attributable to AST during the POI, even using the most adverse of assumptions (e.g., no grace period), is 0.00 percent *ad valorem,* when rounded.

B. Brite-EuRam

At verification it was discovered that AST received a grant during the POI under the Brite-EuRam program administered by the EC. This program was not alleged in the petition. This program has been looked at by the Department once before in *Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom; Final Results of Countervailing Duty Administrative Review,* 63 FR 18367, 18370 (April 15, 1998) (*1996 UK Lead and Bismuth*). However, in *1996 UK Lead and Bismuth,* the Department did not make a specificity determination with respect to Brite-EuRam assistance because the amount received by the respondent in that review was so small that it would not have impacted the *ad valorem* rate.

In this case, we have no information upon which to make a specificity determination. In addition, because the use of the Brite-EuRam program had not

been alleged or discovered in time to solicit adequate information from all of the necessary respondents, we have no basis upon which to use facts available with respect to this program. Accordingly, we are not making a determination on the countervailability of the Brite-EuRam program in this proceeding. Should an order be put in place, however, we will solicit information on the Brite-EuRam program in a future administrative review, if one is requested. *See* 19 CFR 351.311(c)(2).

V. Programs Determined To Be Not Used

GOI Programs

A. Benefits from the 1982 Transfer of Lovere and Trieste to Terni (called ''Benefits Associated With the 1988–90 Restructuring'' in the *Initiation Notice*)
B. Law 345/92: Benefits for Early Retirement
C. Law 706/85: Grants for Capacity Reduction
D. Law 46/82: Assistance for Capacity Reduction
E. Debt Forgiveness: 1981 Restructuring Plan
F. Law 675/77: Mortgage Loans, Personnel Retraining Aid and VAT Reductions
G. Law 193/84: Interest Payments, Closure Assistance and Early Retirement Benefits
H. Law 394/81: Export Marketing Grants and Loans
I. Law 341/95 and Circolare 50175/95
J. Law 227/77: Export Financing and Remission of Taxes

EU Programs

A. ECSC Article 56 Conversion Loans, Interest Rebates and Redeployment Aid
B. European Regional Development Fund
C. Resider II Program and Successors
D. 1993 EU Funds

Interested Party Comments

Comment 1. The Extinguishing v. Pass-Through of Subsidies during Privatization. AST emphasizes that section 771(5)(F) of the Act directs the Department to consider the facts of each change in ownership and permits the Department to find that subsidies may be extinguished in privatization transactions. In particular, AST argues that the Act does not allow the Department to ignore events subsequent to the receipt of a subsidy in the context of privatization. AST postures that the Department's present privatization methodology does not adequately address the question of whether subsidies are passed through to the purchaser of a privatized firm. Instead, the privatization methodology merely reduces the amount of subsidies that are attributed to the purchaser.

AST cites to section 771(5)(B) of the Act to show that for a subsidy to exist, a benefit must be conferred. In order to determine whether a benefit has been conferred, AST states the measure is that of benefit to recipient (section 771(5)(E) of the Act). While acknowledging that the Department's new regulations are not applicable in this case, AST looks to them as potentially instructive to the extent that they restate prior policy where they state that the Department normally will consider a benefit to be conferred where a firm pays less for its inputs than it otherwise would pay (19 CFR Section 351.503(b)). AST argues that if the normal benefit conferred by a subsidy is the artificially reduced cost to the company of an input, then the benefit no longer exists after a market-value privatization. AST points to the open bidding process used to select the ultimate buyer of AST as evidence that full market value was paid and argues accordingly, that prior subsidies were extinguished upon privatization.

The petitioners cite to section 771(5)(F) of the Act where it states that a change in ownership does not require an automatic finding of no pass through of subsidies, even if accomplished by an arm's-length transaction. In addition, the petitioners cite to the Statement of Administrative Action (SAA) which notes that the statutory provision is intended to ''correct and prevent such an extreme interpretation'' as the idea that subsidies are automatically eliminated in an arm's-length sale see SAA H.R. Rep. No. 103–316, at 928 (1994). Contrary to AST's claim that the Department has never really faced the issue of whether an arm's-length sale extinguishes subsidies under the URAA, the petitioners mention *Wire Rod from Italy* in which the Department rejected the assertion that an arm's-length privatization at market value extinguished prior subsidies. The petitioners also point out that the Department's repayment calculation was upheld by the CIT (*see Delverde II* and *British Steel PLC* v. *United States* (*British Steel IV*), 27 F. Supp 2d 209 (CIT 1998)). In particular, the petitioners quote *British Steel IV* where the court says at page 216:

> As the equations developed by Commerce satisfy the statutory goal of identifying the value of the net subsidies initially provided and as the equations identify a relationship between the net subsidies over time and the value of the corporation at privatization, this Court finds the equations developed by Commerce to apply its repayment methodology are a reasonable interpretation of the statute and are otherwise in accordance with law.

Department's Position. Under our existing methodology, we neither presume automatic extinguishment nor automatic pass through of prior subsidies in an arm's-length transaction. Instead, our methodology recognizes that a change in ownership has some impact on the allocation of previously bestowed subsidies and, through an analysis based on the facts of each transaction, determines the extent to which the subsidies pass through to the buyer. In the instant proceeding, the Department relied upon the pertinent facts of the case in determining whether the countervailable benefits received by AST predecessor companies passed through to AST. Following the GIA methodology, the Department subjected the level of previously bestowed subsidies and AST's purchase price to a specific, detailed analysis. This analysis resulted in a particular ''pass through ratio'' and a determination as to the extent of repayment of prior subsidies. On this basis, the Department determined that when AST was privatized a portion of the benefits received by ILVA passed through to AST and a portion were repaid to the government. This is consistent with our past practice and has been upheld in the Federal Circuit in *Saarstahl AG* v. *United States,* 78 F.3d 1539 (Fed. Cir. 1996) (*Saarstahl II*), *British Steel plc* v. *United States,* 127 F.3d 1471 (Fed. Cir. Oct. 24, 1997) (*British Steel II*) and *Delverde II.*

The Department rejects AST's argument that an arm's-length transaction at fair market value extinguishes any previously bestowed subsidies because no benefit was conferred. As explained in the Remand Determination Pursuant to *Delverde. SrL* v. *United States,* 989 F. Supp. 218 (CIT 1997), (*Delverde Remand*), the countervailable subsidy amount is fixed at the time that the government bestows the subsidy. The sale of a company, *per se*, does not and cannot eliminate this potential countervailability because the countervailing duty statute ''does not permit the amount of the subsidy, including the allocated subsidy stream, to be revalued based upon subsequent events in the market place.'' GIA, 58 FR at 37263. The Federal Circuit *Saarstahl II* addressed the Department's privatization methodology and ''specifically stated that the Department does not need to demonstrate competitive benefit.''

Furthermore, AST's contention that the sale of AST was an arm's-length,

market-valued transaction does not demonstrate that previous subsidies were extinguished.[4] Section 771(5)(F) of the Act states that the change in ownership of the productive assets of a foreign enterprise does not require an automatic finding of no pass through even if accomplished through an arm's-length transaction. Section 771(5)(F) of the Act instead leaves the choice of methodology to the Department's discretion. Additionally, the SAA directs the Department to exercise its discretion in determining whether a privatization eliminates prior subsidies by considering the particular facts of each case. SAA at 928.

The Department's methodology requires it to consider and rely upon several facts particular to the change of ownership at issue. In this investigation, these facts included the nature of the previously bestowed subsidies, the amounts of those subsidies, the time when those subsidies were bestowed, the appropriate period for allocating the subsidies, the net worth over time of the company sold, and the amount of the purchase price. On the basis of these facts, the Department determined the ultimate repayment of the prior subsidies to the GOI. In sum, the Department considered all of the factual evidence presented by AST, and then properly followed its existing methodology. Furthermore, this methodology was upheld by the Federal Circuit in *Saarstahl II, British Steel II* and *(Delverde II)*.

Comment 2. Calculation of ''Gamma''. Should the Department continue to find that subsidies were not extinguished during the arm's-length purchase of AST, AST argues that the Department should revise its calculation of ''gamma,'' the measure of the percentage that prior subsidies constitute of the overall value of the company. Presently, gamma is calculated by taking the ratio of the nominal value of subsidies received each year over the company's net worth for every year in the AUL prior to privatization, and then taking a simple average of those ratios. AST argues that this calculation is distortive as evidenced by the fact that if gamma were multiplied by a firm's equity at any given date, the result would not equal the present value of the subsidy stream. Instead, AST proposes calculating gamma by taking the ratio of the present value of remaining subsidies to assets in the year of privatization. This asset-based calculation of gamma, argues AST, would result in a more reasonable standard upon which to measure the level of subsidization by more accurately measuring the amount of subsidies ''imbedded'' in the assets. According to AST, a buyer acquires assets, not the seller's equity, and the buyer's equity position is independent of the seller's. In addition, AST notes that equity as a percentage of assets can change drastically over time due to many factors, some of which are beyond the control of the company, as opposed to assets which are more constant. In addition to using assets as a reasonable basis upon which to measure subsidization, AST states that its proposed method for calculating gamma would be more consistent with the Department's grant amortization methodology which also assumes that benefits from grants extend over time as opposed to just the year of receipt.

The petitioners take issue with using the present value of subsides in the year of privatization as opposed to the nominal values received in the years preceding the same. According to the petitioners, using the present value in the year of privatization would be tantamount to ''revaluing'' the subsidies in a year other than that in which they were received. The petitioners argue that such a revaluation would be contrary to Department practice as articulated in the GIA, 58 FR at 37263, in which it is stated that the countervailable subsidy and the amount of it to be allocated over time are fixed at the time of bestowal. The petitioners also imply that performing such a revaluation would be equivalent to looking at the effects of the subsidies which is prohibited by section 771(5)(C)) of the Act. The petitioners emphasize that the Department's present methodology has been upheld by CIT. In addition, the petitioners point out that the Department rejected the use of the present value of remaining subsidies in *Wire Rod from Trinidad and Tobago,* 62 FR at 55011. In any event, the petitioners add that the Department's current methodology does, in effect, take into account the amortization of subsidies at the point when gamma is applied to determine the amount of repayment.

The petitioners claim that AST has not explained how assets, as opposed to net worth, would be a better measure of a company's value with respect to calculating the portion of the value attributable to subsidies. The petitioners state that a company's value depends upon both its assets and its liabilities. As for AST's concern about net worth being variable over time, the petitioners assert that variation in the nominal value of net worth is irrelevant in that it is the ratio of subsidies received to net worth that matters. The petitioners add that asset values, too, vary over time and can depend upon factors not necessarily related to the true value of that asset, such as the method of depreciation. Also, the petitioners state that assets are carried in a company's accounting records at historical cost which does not reflect current market value.

Department's Position: For this final determination, we have continued to calculate gamma using historical subsidy and net worth data. In considering parties arguments, we had to keep in mind that gamma is the measure of the level of past subsidies in a selling company and that it is ultimately applied to the purchase price.

Our current methodology for calculating gamma reasonably measures the level of subsides in the selling company by examining a range of years and has been upheld by the courts in *Saarstahl II, British Steel II* and *Delverde II.* AST has proposed using the net present value of the remaining benefit stream in the numerator mainly out of a concern that the application of gamma to the company's net worth should render the present value of the remaining benefits. In response, we note that while gamma itself is not a construction of the present value of the remaining benefits, the results of the gamma calculation are, however, applied to the present value. In this sense, our calculations, as a whole, do take into account the present value of remaining benefits.

Comment 3. Calculation of the Purchase Price. AST argues that the Department undervalued the subsidies repaid in the *Preliminary Determination* by basing the purchase price only on the cash paid for the company. Instead, AST suggests that the purchase price should also include the debt assumed by the purchasers as part of the sales transaction.

AST maintains that including assumed debt in the purchase price is appropriate because buyers and sellers are indifferent as to the mix of cash paid and debt assumed; a dollar of debt assumed, AST argues, is equivalent to a dollar of cash paid. If the buyers of ILVA's stainless division had offered

[4] For example, the precise selection criteria used by the GOI in selecting a buyer apparently were never made clear. Company officials at verification, for example, could not explain the basis upon which their bid was selected over other bids. Moreover, based on the questionnaire responses and verification, it is clear that the GOI required potential purchasers to make certain commitments with respect to the operations of the company after privatization. Additionally, based on statements made by company officials at verification, the GOI may have required that any potential bidder include some degree of participation by Italian companies. Given these circumstances, it could be argued that the price received by the GOI did not reflect the full market value of the company.

only the cash portion of their offer, and had not agreed to assume the debt, AST contends that their bid would not have been accepted.

To support its argument, AST offers the example of purchasing a house with an assumable mortgage. A person wanting to buy the house, according to AST, has several financing options: (1) Paying cash for the total sales price, (2) paying a down payment for some portion of the sales price and obtaining a new mortgage on the balance, or (3) assuming the existing mortgage and paying cash for the balance. AST states that in all cases, the purchase price of the home remains the same.

Moreover, by not including assumed debt in the purchase price the Department's privatization methodology for determining the amount of subsidies repaid will render different results depending upon the mix of assumed debt and cash required in a particular purchase.

The petitioners counter by stating that the cash price paid for a company already reflects the liabilities in that the price paid is the valuation by the buyer of the company as a whole, including assumed liabilities. In addition, the petitioners claim that it is the Department's well-established practice not to add assumed liabilities to the purchase price citing *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Germany,* 62 FR 55490, 55001 (October 22, 1997) (*Wire Rod from Germany*), and *Final Affirmative Countervailing Duty Determination: Steel Wire Rod from Canada,* 62 FR 54972, 54986 (October 22, 1997) (*Wire Rod from Canada*), as two cases in which the Department expressly declined to make an upwards adjustment to price to account for assumed liabilities/obligations. In looking at AST's example of a home purchased with an assumable mortgage, the petitioners point out that the value of that home to the buyer is the net equity position—the difference between the value of the home and the mortgage. Additionally, the petitioners point out that the seller of the home only receives the amount of equity in the home and not the full market value.

Department's Position: We agree with the petitioners that the purchase price should include only the cash paid in the sales transaction. First, as noted by the petitioners, it has been the Department's normal practice not to include assumed debts in the purchase price. Second, the purchase price is multiplied by gamma to determine the amount of the purchase price which represents repayment or reallocation of remaining benefits. Given that, under the Department's current methodology, the gamma denominator is net worth (equity) which, in the case of the privatization of AST, equals the amount of cash that was transferred in the sales transaction, it would be incongruous to multiply gamma by a purchase price amount which includes cash and debt. Third, adding debt to the cash price would imply that some portion (depending on the gamma) of that debt can go towards repayment of subsidy benefits. However, debt assumption by the purchaser, particularly where the creditors are third parties, is not a means through which repayment or reallocation of subsidy benefits back to the seller can occur. Therefore, for the final determination, we have included only cash paid in the purchase price of the units sold in the 1990 and 1992 spin-offs and in the 1994 AST privatization.

Comment 4. Repayment in Spin-Off Transactions. AST suggests that the proper way to apportion untied grants between a company and spun-off division is simply on the basis of the percentage of assets. However, in the *Preliminary Determination* the Department did not simply stop there, explains AST, but further performed a ''pass-through'' analysis on the amount apportioned to the spun-off unit via assets to determine an even smaller portion of prior subsidies that would be ultimately attributable to the spun-off company. The difference between the amount apportioned by assets to the spun-off unit and the amount ultimately attributable to it was inexplicably not extinguished, claims AST. Instead of being taken out of the benefit stream as they should have been, states AST, the extinguished subsidies remained in the benefit stream of the selling company—AST.

The petitioners claim that AST does not understand the difference between a privatization transaction and a spin-off transaction. Only in a privatization context wherein the seller is the government can subsidies be repaid to the government, according to the petitioners. In spin-off transactions, claim the petitioners, subsidies are simply reallocated between the seller and the purchaser.

Department's Position. The Department's calculations in the *Preliminary Determination* properly accounted for all prior subsidies by means of our standard spin-off calculation. In spin-off transactions, such as those at issue, the benefits from prior subsidies are reallocated between buyers and sellers. Our spin-off calculation is not premised solely upon the value of assets spun-off. Rather, we use the ratio of the value of assets spun-off to the value of the selling company's total assets to derive the maximum amount of prior subsidies that can pass through to the purchaser. From this maximum amount, we subtract the amount of subsidies which remain with the seller based on our ''gamma'' calculation and the purchase price of the spun-off unit.

Comment 5: Sale of a Unit to a Government Agency. In the *Preliminary Determination,* explains AST, the Department failed to attribute a portion of prior subsidies to Verres when it was spun off from ILVA. Since subsidies travel with assets, the sale of Verres to a government agency is irrelevant and should not prohibit the attribution of subsidies to that productive unit, argues AST. In any event, AST states that ILVA eventually sold its share in Verres to a private company.

With respect to AST's claim that the spin-off methodology should be applied to the sale of Verres because there is no basis for treating a sale to a government agency differently from a sale to a private investor, the petitioners counter that the Department's practice has been not to consider transfers among related parties to constitute legitimate sales (*see* GIA, 58 FR at 37266).

Department's Position. We agree with petitioners that ILVA's sale of some of its shares in Verres to a government entity does not warrant the application of our spin-off methodology. Regarding the government-to-government aspect of the first transfer, the Department stated in the GIA, 58 FR at 37266:

> [T]he Department has not considered internal corporate restructurings that transfer or shuffle assets among related parties to constitute a ''sale'' for purposes of evaluating the extent to which subsidies pass through from one party to another. Legitimate ''sales,'' for purposes of evaluating the pass-through of subsidies, must involve unrelated parties, one of which must be privately-owned.

ILVA was a wholly owned government entity. Therefore, the transfer of Verres shares from one government-owned entity to another is not a ''sale'' recognized under the criteria of the GIA.

With respect to the sale of ILVA's remaining shares in Verres to a private company, there is insufficient verified information on the record regarding the ultimate sale of Verres on which to base a spin-off calculation. We also note that, based on the limited information that is available for Verres, it appears that any application of our spin-off methodology in this case would probably have a minimal, if any, effect on the final estimated countervailing duty rate due to the relatively small size of the sale.

Comment 6: Use of Company-Specific AUL. The petitioners argue that AST has not fully accounted for and corrected all the data concerns raised by the Department in its preliminary determination. Specifically, argue the petitioners, the effects on financial reporting of the various changes in ownership of the stainless steel assets that now comprise AST cast doubt on the reliability of the data provided by AST. A clear indication of actual distortion from these restructurings, the petitioners assert, is that the largest fluctuations in AST's calculated annual AUL occur in the years surrounding the 1989 and 1993 restructurings. Moreover, the petitioners continue, AST's failure to include all of its depreciable assets (*e.g.,* industrial buildings) in its initial AUL calculation, its unwillingness to provide the tenth year of data, its (and its predecessors') use of certain accelerated depreciation methods, and its various practices regarding write-downs, render AST's company-specific AUL unusable.

AST, however, claims that it has sufficiently addressed the purported deficiencies in its company-specific AUL calculation, as cited by the Department in its preliminary determination and raised at verification. To support this contention, AST states the following: First, the Department verified that AST had not included accelerated depreciation in calculating its AUL. Second, the Department verified that the asset write-down undertaken in 1993 does not significantly impact the AUL calculation. Third, though the company-specific AUL is based on only 9 years of historical data, the Department has in the past acknowledged that an AUL based on fewer years would not necessarily be incorrect or inaccurate. Fourth, although the Department has noted that there was a significant variation in the annual gross asset-to-depreciation ratio, this fact alone is not a basis for rejecting the company-specific AUL. Finally, in the end the Department was able to completely verify the AUL asset and depreciation data submitted by AST. For these reasons, according to AST, the Department should use the revised AUL calculated by AST and verified by the Department.

AST further argues, however, that if the Department does reject AST's company-specific AUL as deficient, the Department should use a 12-year AUL rather than the 15 years indicated in the IRS tables. AST argues that given that the AUL of the other respondent in *Italian Sheet and Strip,* Arinox, is 12 years, and the AUL for all the respondents in *Wire Rod from Italy* was 12 years, this allocation period appears to represent an average for the Italian stainless steel industry in general. As such, this would be a more appropriate allocation period than the 15 years from the IRS tables.

In response, the petitioners, citing the *Countervailing Duties; Final Rule* 63 FR 65348 (November 25, 1998) (*New Regulations*), pre-1995 practice, and certain countervailing cases since 1995, argue that the Department's preference is to use the 15-year industry-wide AUL derived from the IRS tables, and claim that the Department should continue to do so in the instant proceeding. Though recognizing that these are not binding in the instant proceeding, the petitioner notes that according to the *New Regulations* at 65395 ''the IRS tables method offers consistency and predictability and * * * it is simple to administer.'' Furthermore, the petitioners continue, the *Countervailing Duties; Proposed Rule,* 62 FR 8817, 8827 (February 26, 1997), (*1997 Proposed Regulations*) makes clear that the Department intends to reserve the option to use the IRS tables in determining AUL, if appropriate. *See* 62 FR at 8828. Finally, the petitioners note, in *Wire Rod from Italy* the Department stated that it would only use a company-specific AUL ''where reasonable and practicable.'' *See* 63 FR at 40474.

Regarding subsidies that have been countervailed in prior proceedings, the petitioners argue that it is inappropriate to allocate the same subsidy over different periods in different proceedings. Given that some of the subsidies to AST were previously allocated over a 15-year period in *Electrical Steel,* petitioners state that allocating AST's subsidies over a 15-year AUL would be is consistent with the Department's practice of not altering the allocation period during the administrative review process under a countervailing duty order.

AST states that since the *Electrical Steel* decision, the courts have rejected the use of the IRS tables in favor of a company-specific approach for determining AUL (*see, e.g., British Steel I*). Accordingly, AST claims that it would be inappropriate to use the 15-year AUL from *Electrical Steel* since that was based on the IRS tables.

Department's Position. The Department has not used, in its final determination, AST's calculated, company-specific AUL. Though some of the other concerns noted in the *Preliminary Determination* regarding AST's AUL calculation remain, our decision not to use the company-specific AUL is primarily based on the large discontinuity over time in the annual ratios of asset value to depreciation amounts. Such discontinuity, apparently correlated with the changes in ownership, strongly indicates a disparity between the basis on which the AULs of ILVA and AST are based.

For our final determination, in lieu of an adequate company-specific AUL, we have used an allocation period of 12 years for AST as facts available. Twelve years represents a reasonable estimate of a general AUL for the Italian stainless steel industry, as supported by evidence in another case (*Wire Rod from Italy*) and by the company-specific verified data provided by another respondent, Arinox, in *Italian Sheet and Strip.*

With respect to the use of allocation periods from prior proceedings for subsidies previously countervailed, we find it unnecessary to resolve the issue in this case. The allocation period we find appropriate for AST is based on facts available. We believe that, as facts available, 12 years is more appropriate for AST than 15 years because the 15-year period is based upon the IRS tables and not the experience of Italian companies.

Comment 7: Revision of AST's Volume and Value Data. The petitioners object to AST's attempts to revise its volume and value data after the start of verification. Emphasizing that the purpose of verification is to ''verify the accuracy and completeness of submitted factual information (19 CFR 351.307(d)(1998)), the petitioners argue that AST's revised numbers should be rejected. The petitioners take particular issue with AST's revisions which report volume and value data on a consolidated level when AST refused to provide full information on subsidies provided to AST's consolidated subsidiaries. According to the petitioners, the Department should not allow AST to dilute its margins via the use of consolidated volume and value data when the subsidiary companies are not included in the investigation by virtue of AST's withholding of information. To do so, object the petitioners, would provide respondents with an incentive to withhold information as was done here.

AST counters by saying that it provided its consolidated volume and value data during verification at the behest of the Department's verifiers. According to AST, the Department's regulations permit it to request factual information from parties at any time during the proceeding (*see* 19 CFR 351.303(b)(5)). AST adds that the information was verified and served on

the petitioners. Noting that under 19 CFR 351.301(c)(1), the petitioners were afforded ten days in which to rebut the information, AST points out that the petitioners failed to do so. AST additionally notes that the petitioners do not argue that using consolidated sales data is methodologically incorrect. As for the petitioners argument that AST should have reported information on subsidies received by its affiliates, AST explains that such information would be useless in this proceeding as these affiliates neither produce nor sell subject merchandise. Furthermore, AST states that it has reported all of its financial transactions with its related parties. Any information on programs utilized by AST and its affiliates that could conceivably benefit subject merchandise has already been provided, evaluated and verified, according to AST. Based on the foregoing, AST maintains that there is no basis upon which to apply facts available with respect to its volume and value information.

Department's Position: For purposes of this final determination, we are not rejecting AST's consolidated volume and value data. At verification, Department officials requested this data from AST recognizing that the use of consolidated data would be consistent with the Department's practice in certain circumstances. As for the petitioners' concerns regarding the dilution of the *ad valorem* rate due to the use of a consolidated sales value as the denominator in cases where only unconsolidated benefit information is being used in the numerator, we disagree that such dilution is occurring. With respect to all the subsidies received prior to AST's privatization, we believe that those subsidies should be allocated to AST on a consolidated basis. The only benefits relevant to this proceeding that AST received subsequent to its privatization are under Law 10/91, Law 451/94 and ESF. Regardless of whether the consolidated or unconsolidated data is used, Law 10/91 benefits are expensed prior to the POI. With respect to Law 451/94 and ESF benefits, AST provided information pertaining to benefits received by its consolidated operations.

Comment 8: Ratio Adjusting the Benefit Stream for the Sale of AST. AST claims that the Department erred in the *Preliminary Determination* in adjusting the future benefit stream for the sale of AST. In particular, AST states that instead of adjusting the benefit stream by the ratio of prior subsidies repaid to the present value of the benefit stream applicable to AST in the year of sale in accordance with Departmental practice, the Department mistakenly used the present value of the predecessor company's benefit stream in the denominator.

The petitioners counter that the Department's calculations in the *Preliminary Determination* did account for the fact that only a portion of ILVA's assets were spun-off with AST. Unlike the methodology proposed by AST, the Department followed the GIA by multiplying the net present value of the seller's remaining subsidies by the ratio of the assets of the spun-off unit to the assets of the selling company. Making AST's proposed change, claim the petitioners, would amount to reducing the subsidies attributable to AST's assets twice.

Department's Position: AST's proposed adjustment to our calculations would amount to reducing the subsidy benefit stream twice to account for the portion of assets taken by AST. We first apportioned the remaining benefit stream (not including the Terni/TAS equity infusions, benefits associated with the 1989/1990 restructuring and ECSC loans) between AST and ILVA, the seller, by multiplying the benefit stream by the ratio of AST's assets to ILVA's. Second, we reduced the benefit stream assigned to AST (inclusive of Terni/TAS equity infusions, benefits associated with the 1989/1990 restructuring and ECSC loans) to reflect any repayment of those subsidies via the purchase price. In addition to apportioning the remaining benefit stream by the AST asset ratio in the first step, AST's proposed adjustment would amount to apportioning the remaining benefit stream by the asset ratio an extra time in the second step. Accordingly, we have not made the adjustment requested by AST.

We note that in our *Preliminary Determination*, we erred in multiplying the AST asset ratio against all subsidies in ILVA, including benefits to Terni and TAS which are being attributed to AST in their entirety. (For further discussion, *see* the Equity Infusions to Terni, TAS and ILVA; Benefits from the 1988–90 Restructuring of Finsider; and ECSC Article 54 Loans sections of this notice.)

Comment 9: Use of Gross versus Net Debt in 1993 Debt Forgiveness Calculation. AST argues that the record of this case establishes a precise amount that represents the ''actual cost to the GOI'' for the liquidation of ILVA, based on the EC's strict monitoring. Assuming that the Department countervails these costs, AST argues that the Department cannot consider the benefit to the recipients to be larger than the amount calculated by the EC as the actual cost to the GOI.

AST states that in past cases, such as *Al Tech Specialty Steel Corp.* v. *United States*, 661 F. Supp. 1206, 1213 (CIT, 1987), the Department has concluded that it would be inappropriate to look behind the action of a tribunal charged with the administration of a liquidation process. AST states that the GOI would have been subject to significant legal penalty had it failed to abide by the requirements of the EC supervised liquidation. Thus, AST implicitly is arguing that the Department should accept the amount of remaining debt calculated by the EC, without examining the underlying calculation of this remaining debt figure.

Furthermore, AST asserts that, because buyers should be indifferent to the mix of cash paid and debts assumed in purchasing a company, the Department's methodology inappropriately attributes a greater amount of debt forgiveness to a company whose buyers assume less debt but pay a higher cash price. In fact, claims AST, if the GOI had paid down the same amount of ILVA's liabilities calculated as uncovered in the EC's Monitoring Reports prior to the liquidation process, each of the companies could have been ''sold'' entirely for a transfer of debt (*i.e.*, no cash transfer) in the amount of transferred assets. In this event, AST argues, there would be no residual debt, and the Department's methodology would lead it to countervail only the grant given prior to the liquidation process.

The petitioners state that the Department, consistent with its practice, should consider the total amount of ILVA's liabilities and losses forgiven on behalf of AST at the time of its spin-off as the benefit to AST. *See, e.g., Electrical Steel from Italy*, 59 FR at 18365, and *Certain Steel from Austria*, 58 FR at 37221. The petitioners assert that the income received as a result of the sales of ILVA's productive units should not be deducted from the gross amount of ILVA's losses and liabilities for three reasons. First, the petitioners argue, the debt forgiveness occurred prior to the actual sales of ILVA's productive units and, thus, should be treated separately. Second, the amount of income at the time of the sales was greater than it would have been without the debt reduction. Third, the Department's change-in-ownership methodology separately accounts for repayment of prior subsidies associated with the purchase price of the company sold.

Department's Position: We do not dispute AST's contention that the liquidation of ILVA Residua proceeded

as detailed in the EC monitoring reports, and that the final cost, after subtracting income earned from the sale of productive units, to the GOI for the liquidation was as reported in the EC monitoring reports. However, section 771(5)(E) of the Act directs the Department to calculate subsidies as the benefit to the recipient, rather than the cost to the government. (*See* Memorandum to Richard W. Moreland on 1993 Debt Forgiveness dated March 19, 1999). At the time of the demerger, AST clearly benefitted to the extent that it did not assume a proportional share of ILVA's liabilities. In fact, the cash transfer did not take place at the time of the demerger, but nearly a year later when AST was privatized. Furthermore, we note that the liquidation process did not proceed as in AST's hypothetical example. Rather, AST was left with a substantial positive equity position as a result of ILVA Residua's assumption of the vast majority of ILVA's liabilities, unlike the firm in AST's hypothetical.

We agree with the petitioners that it is the Department's practice to determine the size of the benefit to a respondent as the amount of liabilities that are not directly associated with any given assets and that the respondent should have taken. If such a firm is later sold, such as was the case with AST, the Department applies its change-in-ownership methodology to determine the portion of the purchase price attributable to the repayment of prior subsidies.

However, we disagree with the petitioners that the Department should countervail both the liabilities and accumulated losses on ILVA's balance sheet in 1993 because ILVA's gross liabilities already reflect such losses. While we agree it is the Department's practice to countervail grants to cover losses as well as grants to cover liabilities, ILVA did not receive a separate grant in 1993 to cover operating losses. However, if it had received such a grant, ILVA's gross liabilities would have been reduced or its liquid assets would have increased. Because such a grant was not received, ILVA's gross liabilities, after netting out its liquid assets, were higher than they would have been if such a grant had been received and, thus, the total debt forgiveness calculated by the Department already captures such losses.

Comment 10: 1993 Debt Forgiveness Apportionment. According to AST, the Department improperly apportioned ILVA's residual debt after the 1993 demergers based on total viable assets taken by AST and other ILVA operations. AST argues that because there is no record evidence attributing any of this residual debt to the operations assumed by AST, none of that debt should be attributed to it. For example, AST posits, if a government-owned company that consisted of two divisions of equal assets, one healthy and one unhealthy, were split into two, the Department's methodology would illogically allocate the old debts equally, thereby punishing the heathy company for the afflictions of the unhealthy one.

The petitioners state that AST did not provide any information to allow the Department to attribute specific ILVA liabilities to specific ILVA assets despite numerous requests for information such as the financial records of ILVA's specialty stainless steel division. Additionally, the petitioners assert that in various cases, the Department has attributed otherwise untied liabilities left behind in shell corporations to the operations that had been demerged. See *Certain Steel From Austria* at 37221 and *Wire Rod from Trinidad and Tobago* at 55006.

Department's Position: It is the Department's practice to allocate otherwise untied liabilities remaining in a shell corporation to the new, viable operations that had been removed from the predecessor company. In *Certain Steel from Austria*, the Department stated that it treated as debt forgiveness liabilities left behind in the predecessor company, even though there was no indication that these liabilities were specifically related to the operations taken by the new entity (*see* 58 FR at 37221). Therefore, consistent with our past practice, we have assigned a portion of these liabilities to AST based on its proportion of assets taken to the total viable assets of ILVA.

We note, however, that because losses attributable to the write down of AST's assets can be specifically identified, we have assigned those losses to AST. We have not assigned losses attributable to the write down of ILP or Residua's viable assets to AST.

Comment 11: ILVA Residua Asset Value. The petitioners argue that the Department misallocated the amount of debt forgiveness attributable to AST in 1993 in its most recent calculation of the benefit from this program in *Italian Sheet and Strip* by using an incorrect asset amount for ILVA Residua. The petitioners assert that by using the cash price plus the liabilities transferred as a surrogate for asset values in ILVA Residua the Department was inconsistent with its normal practice of excluding liabilities in the determination of the asset value of a company (*see Wire Rod from Trinidad and Tobago* 62 FR at 55012). Thus, the petitioners argue that the Department should only use the cash paid as a surrogate for the viable asset value of the operations sold from ILVA Residua.

AST responds that record evidence contradicts the petitioners' assertion that the value of the viable assets privatized from ILVA Residua is better represented only by the cash price of those assets rather than by the cash price plus debts transferred. Specifically, the asset value of Dalmine, the largest privatization from ILVA Residua, is approximately equal to the value used by the Department. Furthermore, AST argues that relying on only the cash price, in effect the net worth of each privatized unit, to value ILVA Residua's assets is inconsistent with the petitioners' assertion that the Department should use the total consolidated assets, rather than net worth, in compiling the remainder of ILVA's total viable assets. Finally, AST claims that the petitioners reach an erroneous conclusion that *Wire Rod from Trinidad and Tobago* requires the Department to estimate the asset value of a company solely based on its purchase price. AST states that in that case, the issue at hand was not raised because the purchase price did not include any assumption of debt.

Department's Position: For operations sold from ILVA Residua, the Department did not have the necessary asset values. Therefore, as a surrogate for the asset values of these companies, the Department used the cash price plus liabilities transferred. We believe this approach provides a reasonable surrogate asset value because the newly sold company's books will, by the basic accounting equation of ''assets equal liabilities plus owners' equity,'' reflect an asset value that is equal to the debts transferred plus the cash purchase price. The debts transferred become the liabilities in the new company's books, while the cash purchase price becomes the owners' equity. If the assets transferred do not have a book value equal to the cash purchase price plus debts transferred, the new company will, in effect, write-up its asset value by crediting the difference as a goodwill asset. Thus, we have continued to use the cash price plus liabilities transferred as a surrogate for the asset values of the units sold from ILVA Residua.

Comment 12: Use of Consolidated Asset Values for 1993 Debt Forgiveness Calculation. AST argues that the Department improperly calculated the total viable assets of ILVA by using the unconsolidated financial statements of AST and ILP. This error led to an incorrect calculation of the proportion of total viable assets assumed by AST

and, thus, an incorrect assignment of debt forgiveness bestowed on AST, according to the company. AST notes that it provided the Department with the consolidated financial statements of AST and ILP during verification, and that the Department should correct its calculation based on the consolidated asset figures provided therein.

The petitioners agree with AST that the Department should use consolidated asset values in determining total viable ILVA assets. However, they argue that the Department should exclude the asset values for the companies sold out of ILVA Residua to ILP from ILP's consolidated assets in order to avoid double-counting. AST asserts, however, that these assets are not double-counted because they had not yet been sold to ILP by 1993. Therefore, they are not included in ILP's December 31, 1993 consolidated assets.

Department's Position: Consistent with our position in Comment 7, we have altered the calculation allocating the debt forgiveness to account for AST's and ILP's consolidated asset values. Furthermore, we agree with AST that because the companies purchased by ILP from ILVA Residua were purchased after 1993, they are not included in its 1993 consolidated assets. Therefore, our methodology does not double-count these assets.

Comment 13: 1993 Creditworthiness. AST notes that the Department used an uncreditworthy benchmark discount rate to allocate the benefit from the debt forgiveness imputed by the Department to AST as a result of its 1993 demerger from ILVA. AST points out that the Department stated in the *Preliminary Determination* that it would determine whether it would be more appropriate to analyze the creditworthiness of AST, rather than ILVA, in the final determination. Citing the preamble of the Department's new regulations (at 65366), AST states that it is the Department's practice to consider the creditworthiness of the firm receiving the aid, rather than the entity granting the aid.

The petitioners state that the Department should continue to consider the creditworthiness of ILVA, rather than AST, in determining the discount rate used to allocate the 1993 debt forgiveness attributable to AST. The petitioners state that because the GOI provided the debt forgiveness to ILVA Residua, it is appropriate to analyze the creditworthiness of ILVA. Additionally, the petitioners assert that it is illogical to evaluate AST's prospects after ILVA's debt had been lifted from its shoulders.

Department's Position: For the final determination, in allocating the benefit of the 1993 debt forgiveness, we have continued to base our creditworthiness analysis on ILVA as a whole. Our reasons are as follows: Contrary to AST's assertions, ILVA was not the provider of the debt forgiveness to AST. Rather, it was the GOI which ultimately assumed the losses involved in the privatization and liquidation of those units which originally comprised ILVA. All of ILVA, of which AST was but a part, directly benefitted from this GOI assumption of losses. Therefore, focusing on ILVA is in accordance with the Department's practice of focusing on the receiver of the benefit.

It would, moreover, be illogical for the Department to base, as AST argues, its creditworthiness analysis on AST's future financial data (i.e., AST's future prospects after the debt forgiveness had been granted) given the fact that these data were likely considerably impacted by the very program for which the creditworthiness analysis is necessary in the first place. Clearly, the shedding of billions of lire of debt would impact private, commercial lenders' views in deciding whether to loan funds to AST. However, it would be impracticable (if not impossible), based on the information available on the record, to construct what AST's future financial situation would have been absent the debt forgiveness.

Under its normal methodology for analyzing creditworthiness, the Department could, in theory, rely largely on AST's financial data prior to and contemporaneous with the granting of the debt forgiveness. However, this too would be impossible in this instance. AST's debt forgiveness occurred at the moment of the demerger, *i.e.,* at the point when ILVA's stainless steel operating unit was carved out and separately incorporated as AST. There is insufficient AST-specific financial data for the period prior to the demerger on which to base a creditworthiness analysis.

Therefore, because the appropriate level of creditworthiness analysis is the receiver of the debt forgiveness, and because there is insufficient "untainted" AST financial data both prior and subsequent to the debt forgiveness on which to base an AST-specific creditworthiness analysis, we have continued to base our 1993 creditworthiness determination on ILVA as a whole.

Comment 14: ILVA Asset Write-Downs. AST argues that the Department improperly countervailed asset write-downs in the calculation of the 1993 debt forgiveness because the write-downs are not countervailable. The company states that the write-downs did not provide a benefit to AST because the company is simply restating the value of the assets to reflect their market values. AST also asserts that even if one considered there to be a benefit associated with the write-downs, such write downs are generally available because all companies must restate the value of their assets when they are sold. Additionally, AST argues that even if the write-down of assets is treated as a subsidy, the Department must deduct the write-down from the loss incurred in the liquidation of ILVA to ensure that it is not double-counted.

The petitioners rebut AST's argument that write-downs should not be countervailable because they are routinely performed during asset sales. The petitioners argue that AST's focus on the write-downs is misplaced, because the Department's actual concern is not the write-down, but rather the additional loss generated by the write-down which had to be eventually covered by the GOI. Furthermore, the petitioners dispute AST's claim that the write-downs are double-counted in the Department's methodology. The petitioners state that this allegation is based on the fact that the Department excluded the amount of write-downs in its calculation of the debt forgiveness associated with the transfer of TAS's assets to ILVA in 1989 and 1990. The petitioners assert that the Department excluded these write-downs from the remaining liabilities because it captured them separately in the calculations of the loss coverage. However, in the case of the 1993 restructuring, the petitioners note, the Department has not countervailed the write-downs separately and is appropriately measuring the benefit by examining the debt assumed by the GOI.

AST also states that even if the Department finds the write-downs countervailable, the Department should separate all the ILVA write-downs from the other debt forgiveness and instead countervail only the portion of total write-downs attributable to AST assets. AST states that this suggested methodology is consistent with the Department's methodology in countervailing write-downs associated with TAS when it was merged into ILVA in 1989 and that the Department has the appropriate information on the record. Furthermore, AST reasons that for other liquidation losses, the Department should, where possible, attribute the losses to specific assets, only distributing losses that cannot be tied based on relative viable assets.

The petitioners counter that, according to generally accepted accounting principles, losses associated

with write-downs typically are assumed by the company as a whole, rather than tied to specific assets. Additionally, the petitioners note that in AST's calculation, most of the write-downs are left in ILVA Residua, rather than tied to specific assets and, therefore, should be attributed based on relative asset values consistent with the Department's standard debt forgiveness methodology.

Department's Position: We disagree with AST that the write-downs in question are not countervailable. Because the write-downs in question generated a loss that eventually was covered by the GOI through its debt forgiveness to ILVA, we find the write-downs countervailable. This approach is consistent with the treatment of write-downs in the 1988–90 restructuring in the instant case and in *Electrical Steel from Italy*.

However, we agree with AST that the Department should attribute the portion of ILVA's losses associated with the write down of assets to the specific written down assets and, thus, to the company who took those assets. This issue is addressed in more detail in the March 19, 1999 Memorandum on the 1993 Debt Forgiveness to Susan H. Kuhbach. We have modified our calculations accordingly.

Comment 15: ESF Objective 4 Specificity. AST states that the Department found ESF Objective 4 funding countervailable based on its erroneous conclusion that this aid is *de jure* limited to certain regions. AST asserts that Objective 4 funding is available throughout the EU Member States, and that the Department has acknowledged this in the instant case and in previous cases (see Wire Rod from Italy, 63 FR at 40487). Despite this acknowledgment, the Department has based its specificity finding on the fact that the EU has decided to detail its Objective 4 funding in separate documents for each Member State as well as two separate documents within Italy itself, one covering Objective 1 regions, and one covering non-Objective 1 regions. AST asserts that this ''documentary distinction'' does not alter the fact that Objective 4 aid is available to all regions for the same basic goal of reducing unemployment. Regardless of these documentary distinctions, AST claims that all Objective 4 aid is ''integrally linked'' and, thus, the Department must analyze its specificity on this basis.

AST states that in order to find a domestic subsidy *de jure* specific, section 771(5A)(D) of the Act requires that the granting authority ''expressly limit access to the subsidy to an enterprise or industry'' or that the subsidy be expressly limited to ''an enterprise or industry located within a designated geographical region within the jurisdiction of the authority providing the subsidy.'' AST argues that neither of these criteria has been met for ESF Objective 4 funding because the ESF Objective 4 funds available to firms in non-Objective 1 regions are also available to firms in Objective 1 regions. Lastly, AST argues that there is no basis to find the Objective 4 funding *de facto* specific given that it is distributed to a wide variety of industries throughout Italy and the EU.

The petitioners argue that the Department should affirm its decision in *Preliminary Determination* that the funding that AST received under ESF Objective 4 is *de jure* specific. The petitioners assert that this finding is consistent with the Department's decision in *Wire Rod from Italy* which found that this funding was specific because the ''EU negotiates a separate programming document to govern the implementation of the program with each Member State'' and that different programming documents govern the distribution of aid in Objective 1 and non-Objective 1 regions. The petitioners assert that EC officials admitted at verification that aid approved under the programming document for Objective 1 regions has separate purposes, administration, and distribution requirements than aid approved under the programming document for non-Objective 1 regions. Lastly, the petitioners assert that because the aid in question was received by AST through Riconversider, a steel industry group, the aid is also specific because it was disbursed by a organization that by its nature limited its grants to the steel industry.

Department's Position: We agree with AST that it may be appropriate for the Department to revisit its previous decision regarding the *de jure* specificity of assistance distributed under the ESF Objective 4 SPD in Italy. Notwithstanding this argument, the facts of the instant case lead us to find that the Objective 4 funding received by AST was *de facto* specific, as facts available (*see* European Social Fund section above). For this reason, we have continued to countervail the aid in question. As discussed above, while there are separate agreements for different regions in the EC and within Italy, these agreements can be distinguished from the agreements discussed in *Groundfish from Canada*, 51 FR at 10066. Moreover, the statements by EC officials are taken out of context and would need to be examined against all the information before concluding that Objective 4 financing is *de jure* specific. Because we have considered this aid to be *de facto* specific, the petitioners last point is moot.

Comment 16: ESF Objective 3. The petitioners state that the Department should countervail the amount spent by AST on an ESF Objective 3 project for which it claimed reimbursement. The petitioners claim that AST was unable to provide any documentation showing that it did not, in fact, receive any reimbursement for the amount spent on the project.

In response, AST argues that it would be inappropriate for the Department to countervail assistance that AST did not receive. While AST does not dispute that it was unable to provide the Department with any specific document showing that it did not receive the Objective 3 assistance that it applied for, AST states that the Department, in its review of the company's financial statements, did not encounter any previously ''unidentified governmental financial assistance.''

Department's Position: We agree with AST that the Department should not countervail the amount of AST's request for ESF Objective 3 funds. While company officials were not able to provide direct documentation showing that AST's relatively small claim shown in its records for ESF Objective 3 funds was disapproved, we found no indication that this aid was received by AST during verification.

Comment 17: Law 10/91. AST states that funding under Law 10/91 is not limited to any industry or enterprise and, thus, should not be found countervailable. Furthermore, according to AST, Law 10/91 is the successor to Law 308/82 which the Department found not countervailable in *Pasta from Italy,* 63 FR at 30299, *Wire Rod from Italy,* 63 FR at 40488, and (*Certain Steel from Italy*).

The petitioners argue that, whether or not AST received benefits during the POI, the Department should find Law 10/91 *de facto* specific and, thus, countervailable consistent with the finding in its February 19, 1999 analysis memorandum that the steel industry received over half of all aid approvals in 1991 under this program and ILVA companies received over 40 percent of such approvals.

Department's Position: Consistent with the Department's February 19, 1999 analysis memorandum, we find that the funding received by AST under Law 10/91 is *de facto* specific based on the predominant and disproportionate use of this program by the steel industry and AST's predecessor, ILVA. In the

year that the aid in question was approved, the steel industry was approved for 50.52 percent and ILVA was approved for 43.52 percent. Just because a program may replace or succeed a non-specific program, the finding of non-specificity for the earlier program does not carry over to the replacement or successor program.

Comment 18: Specificity of THERMIE. AST argues that the Department should maintain its previous finding in the instant case that the THERMIE program is neither *de jure* nor *de facto* specific and, thus, find the program not countervailable for this final determination. The Department should reaffirm its previous finding, reinforced by a successful verification, that the THERMIE program has not been disproportionately or predominantly used by the steel industry or AST.

The petitioners argue that the Department should find the THERMIE sub-program, ''Rational Use of Energy (RUE) in Industry,'' countervailable because AST's receipt of nearly a third of the funding under this subprogram constitutes disproportionate use. The petitioners state that the Department, in *Wire Rod from Italy,* recently found an Italian subsidy program *de facto* specific when a firm received about one-third of the total assistance (*see* 63 FR at 40483.) The petitioners add that AST's project was one of the three largest projects funded under the RUE in Industry program. Lastly, the petitioners note that the Department found at verification that several of the projects reported as approved by the EC, had in fact, not been funded; thereby increasing the concentration of AST's share of the reported funding.

AST does not dispute the usage figures presented by the petitioners, but states that they are incorrectly based on the usage of only one portion of the THERMIE program (RUE in Industry) and, thus, are legally irrelevant. AST argues that the THERMIE sub-programs are integrally linked and, therefore, the Department must view the usage data of the sub-programs collectively when considering its *de facto* specificity.

The petitioners note that the team recommended finding the RUE in Industry sub-program *de facto* specific in its *Italian Sheet and Strip* concurrence memorandum for the preliminary determination based on the same usage data cited by the petitioners. The petitioners suggest that the Department reverse its preliminary decision to analyze the usage data of the program as a whole, and return to analyzing the specificity based on RUE in Industry.

If the Department finds this program countervailable, the petitioners argue that the Department should consider AST, rather than AST and its partners, as the sole beneficiary of the EU assistance for the project funded because AST will retain the entire value of the project, including licensing rights, after its completion. However, AST argues that the petitioners' claim that AST will have the sole right to retain and exploit equipment and technology is completely false, and contradicted by the Department's verification report. AST notes that the verification report specifically states that ''AST and its partners'' will retain the equipment and technology from the project. Given this, should it find the assistance countervailable, the Department should only countervail the assistance actually attributable to AST.

Lastly, the petitioners state that the Department should find the grant to be tied to sheet and strip because the company admitted at verification that the technology would primarily benefit that product.

Department's Position: Consistent with our finding in *Italian Sheet and Strip,* 63 FR at 63907, and our February 19, 1999 Memorandum on the EC THERMIE Program, we continue to find that the THERMIE program is neither *de jure* nor *de facto* specific. We analyzed the usage data for the THERMIE program at verification, and found no discrepancies within the database of projects reported as approved by the EC. While we did note that a small number of the projects approved were not funded for a variety of reasons, this fact does not substantially alter the usage data reported.

We disagree with the petitioners that we should analyze the specificity of the aid received based on one of THERMIE's sub-programs, RUE in Industry. At verification with the EC, we found that the goals, project selection, and general administration of the programs did not vary significantly between the sub-programs, and that the classification into sub-programs was primarily for administrative convenience. According to the EC, while the technical evaluation of each project is handled by different individuals, this is a result of the need to have evaluators with highly technical specialties in order to evaluate the projects submitted. We also verified that the same level of funding and eligible expense restrictions applied across all three sub-programs, and that each sub-program was subject to the same EC regulations and application procedures (*see* Annex 12, 13, and 14 of the EC's initial questionnaire response).

Comment 19: Law 675 Bond Issues. AST requests that the Department change the methodology used for calculating the benefit for the loans it received under Law 675. Specifically, AST states that the Department should not include the interest accrued for the first semi-annual payment in the principal amount used to calculate the interest due on the second semi-annual payment, because, as verified, AST actually makes semi-annual payments.

Additionally, AST states that the Department, consistent with accrual accounting, should only account for the interest and fee reimbursements from the GOI accrued by AST for its repayments made in the POI, not for reimbursements actually received in the POI for previous year's accruals.

With regard to AST's second point, the petitioners argue that in determining the benefit from this program, the Department should countervail the amount of reimbursements actually received in the POI, rather than those accrued but not received.

Department's Position: We agree with AST's first point and have altered our calculations accordingly. With regard to AST's second point, it is the Department's practice to calculate the benefit from an interest rebate program using its loan methodology if the recipient knows at the time the loan is received that it will receive interest rebates (*see Certain Steel from Italy,* 58 FR at 37331, and *Pasta from Italy,* 61 FR at 30293). Because AST knew at the time it assumed repayment of these bond issues from ILVA that it would receive reimbursements from the GOI for any payments above a certain interest rate, it is appropriate to treat this aid simply as a below benchmark interest rate loan.

Comment 20: 1988 Equity Infusion. According to AST, the Department incorrectly countervailed the September 1988 equity infusion received by ILVA because the infusion was received prior to ILVA becoming a steel company at the beginning of 1989. AST argues that the payment is instead tied to real estate management services because these services were ILVA's only activities at the time of the infusion.

The petitioners argue that the 1988 infusion should be countervailed by the Department because the Department typically treats equity infusions as untied subsidies, benefitting the company as a whole (*see 1989 Proposed CVD Regulations,* 54 FR at 23366, and *Countervailing Duties, Final Rule,* 63 FR 65348, 65400 (November 25, 1998)). Additionally, the petitioners state that the Department has countervailed this same infusion in *Electrical Steel from*

Italy and *Certain Steel from Italy,* and that in *Electrical Steel from Italy* the Department found in that ILVA was more than a real estate company in 1988, owning land, buildings, a plant and machinery.

Department's Position: We have continued to countervail the 1988 equity infusion to ILVA. As noted by petitioners, we consider equity infusions to be untied subsidies benefitting the total consolidated sales of the recipient company. In this case, AST has not provided any information indicating that the benefits of this equity infusion should be tied to non-steel activities.

Comment 21: Law 451/94. The petitioners argue that the Department must countervail early retirement benefits AST received under Law 451/94 because the program relieved AST of an obligation it would otherwise incur during the POI. The petitioners state that an affirmative finding of countervailable benefits under Law 451/94 is consistent with the Department's determination in *Wire Rod from Italy* and in the preliminary determination of this proceeding.

The petitioners note that in the preliminary determination for *Italian Sheet and Strip,* the Department inappropriately found that the Mobility program provided the most accurate benefit benchmark for this program. The petitioners maintain that verification confirms that the Mobility is an inappropriate benchmark by which to measure the benefit of Law 451/94 and a more appropriate benchmark is CIG–E. The petitioners point out that Law 451/94 and CIG–E have similar characteristics in that both are designed for companies which are undergoing structural, long-term problems. Additionally, the petitioners note that at verification an AST official confirmed that the company has placed redundant workers in the CIG-E program while waiting for the passage of Law 451/94.

Lastly, the petitioners object to AST's claims that it was under no legal obligation to retain its workers. First, the petitioners point out that the Department has determined in *Certain Steel from Italy* and *Wire Rod from Italy* that large Italian companies cannot simply lay-off workers. Second, the petitioners maintain that AST's argument misses the point because the obligation refers to the payment that a company would have to make absent government payments. The petitioners argue that record evidence confirms that in the normal course of business, Italian companies are obligated to make severance payments to laid-off workers and the fact that Law 451/94 reduced the financial obligation AST would incur is a countervailable benefit.

AST argues that Law 451/94 early retirement benefits to former AST employees are not countervailable because AST did not receive Law 451/94 benefits during the POI. AST points out that the Department correctly determined in *Italian Sheet and Strip* that since employees were eligible to apply for Law 451/94 only through 1996, AST could not have received benefits during the POI because the Department's practice is to treat employment benefits as recurring grants that are expensed in the year of receipt. AST further argues that as specified by the terms of the Law and AST's own records, all of AST's employees who chose to leave the company under Law 451/94 did so prior to the POI.

AST argues that its use of Law 451/94 did not benefit the company because AST's overall costs under Law 451/94 were greater than those the company would have incurred had it followed the normally applicable Mobility provisions under Law 223. Lastly, the respondents argue that Law 451/94 is not countervailable because AST was under no *de jure* or *de facto* obligation to retain workers. The respondents point out that in the past, the Department has concluded that Italian firms cannot simply fire workers. However, in the instant proceeding, the respondents note that the GOI has informed the Department that Italian companies are under no legal obligation to participate in the GOI's early retirement programs, and if an Italian company is unable to reach an agreement with worker unions and if there are no better means, then the company can fire employees. AST also argues that countervailing the Italian social safety net based on the vague perception that social or political conditions make it impossible to fire workers is inappropriate and unreasonable. Furthermore, AST states that the Department should not assume that it was impossible for AST to fire its workers had it chosen to do so. In fact, the Mobility program would have no purpose if, as a legal or practical matter, employees in Italy could not be fired.

Department's Position: As set forth in the program description for Law 451/94 above, the Department has determined that Law 451/94 provided a countervailable benefit to AST during the POI. Although AST employees applied for Law 451/94 from 1994 to 1996, AST has indicated that all of these employees received pre-pension payments from the GOI during the POI.

We do not dispute AST's argument that it can fire workers. However, as mandated by Law 223, AST was required to negotiate with the labor unions before it fired more than five employees in 120 days. As we stated in the program description above, the outcome of these negotiations is uncertain, and we have no basis for expecting either that AST would have been able to fire the total number of workers without additional payments over and above the standard Mobility costs or that the unions would have successfully negotiated no lay-offs. Since AST's own experience in laying-off employees indicated that its workers were aware beforehand of the GOI's forthcoming early retirement plan and the amount of the GOI's contribution to them, we applied our standard methodology as set forth in the GIA, 58 FR at 37256. See also *Certain Steel from Germany,* 58 FR at 32320–21. Furthermore, this methodology was upheld by the CIT in *LTV Steel.* For more information on this program see Memorandum to Richard Moreland regarding Law 451/94—Early Retirement Benefits dated March 19, 1999.

Comment 22: Law 675/77—Worker Training Program. The petitioners argue that, at verification, the Department confirmed that AST received grants under Law 675/77 between 1984 and 1987 for worker retraining. The petitioners allege that AST failed to document this assistance in its response to the Department's original and supplemental questionnaires. Because AST failed to supply information regarding these grants, the Department should resort to facts available for this program. Furthermore, the petitioners maintain that since several Departmental determinations indicate that benefits received under Law 675/77 are countervailable, the Department should countervail the worker retraining portion of Law 675/77 in the final determination and treat those benefits as a non-recurring grant.

AST argues that it has made available both in its submissions and at verification all factual information available to the company regarding the personnel retraining component of law 675/77. AST points out that these benefits were applied for and received by a predecessor to AST which ceased to exist years ago. Additionally, AST maintains that it is the Department's long-standing policy to treat worker retraining programs as recurring benefits and there is no support in law or Department practice for the treatment of this program as a non-recurring grant as suggested by the petitioners.

Department's Position: We agree with AST. At verification, AST officials indicated that an AST predecessor

company, Terni, received personnel retraining grants between 1984 and 1987. As pointed out by the respondent, it is the Department's practice to treat training benefits as recurring grants and expense the benefit in the year of receipt (*see* GIA at 37226). Furthermore, personnel retraining grants under Law 675/77 were countervailed in *Certain Steel from Italy,* 58 FR at 37331. In *Certain Steel from Italy,* the Department used best information available to determine the benefit provided by this program. However, in *Certain Steel from Italy,* the Department also determined that the treatment of benefits under this program as non-recurring was not appropriate. In the instant proceeding, there is no new information to warrant a reconsideration of this finding. Therefore, since the training grants in question were provided before the POI, there is no countervailable benefit derived from this program during the POI.

Comment 23: Law 796 Benefit Calculation. AST argues that the Department should revise its methodology for allocating the benefit AST received under the Law 796 exchange rate guarantees covering certain ECSC loans. AST notes that in the *Preliminary Determination,* the Department calculated the benefit from these exchange rate guarantees by multiplying the difference between the guaranteed and benchmark exchange rates by the sum of principal and interest paid during the POI. This, AST argues, is a reasonable approach where the loan repayment is structured such that there are regular installment payments of principal and interest. AST notes, however, at least one of its ECSC loans has a balloon payment, *i.e.,* the principal comes due in one lump payment at the end of the loan term. In the cases of balloon-payment loans, AST argues, the Department should treat exchange rate guarantee benefits as non-recurring and allocate these benefits over the full term of the loan.

The petitioners respond that the benefits provided under Law 796 do not stem from the nature of the loans themselves but, rather, from the exchange rate guarantees on those loans. The structure of the underlying loan, argue the petitioners, is not relevant to the analysis of the benefit from the guarantees. Therefore, the petitioners conclude, for its final determination the Department should continue to use the same methodology as that used in the *Preliminary Determination* for calculating the Law 796 benefits.

Department's Position: We agree with the petitioners that no change to the methodology used in the *Preliminary Determination* is warranted. As stated in the *Preliminary Determination,* once an ECSC loan is approved for an exchange rate guarantee, access to foreign exchange at the established rate is automatic and occurs at regular intervals throughout the life of the loan. Longstanding Department practice is to treat non-exceptional, automatically-approved benefits as recurring grants (*see* the Preamble to the *1989 Proposed Regulations,* 54 FR at 23376). Consistent with the Department's regulations, recurring benefits are expensed in the year in which the benefit is received. Accordingly, no change has been made to the Law 796 benefit calculation.

Comment 24: AST's Brite-EuRam Grant. The petitioners argue that the Department should countervail the grant received by AST under the EU's Brite-EuRam program that was discovered at verification. According to the petitioners, AST failed to submit information on this grant in its questionnaire responses and was unable at verification to provide information on the use of the aid and other materials relating to it.

In response, AST notes that the petitioners never requested the Department to investigate the Brite-EuRam program. Since it was not asked a single question regarding the Brite-EuRam program, AST maintains that it cannot be found to be uncooperative by not providing information on assistance received under this program. AST argues that any determination of countervailability of Brite-EuRam assistance should properly be done in the context of an administrative review, should one occur.

Department's Position: We agree with AST that any determination regarding the countervailability of assistance under the Brite-EuRam program cannot be done in the context of this investigation. During the course of this proceeding, the Department did not request information on this program from either the relevant government bodies or AST. Therefore, a finding that respondents were ''uncooperative'' would be inappropriate as would the application of facts available. We will, however, request information on the Brite-EuRam program in a future administrative review in the event one occurs.

Comment 25: ECSC Article 56 Aid. The petitioners argue that, based on information collected by the Department at the verification of the EC, its appears that Law 451/94 benefits were still being provided to AST during the POI. The information further suggests, the petitioners contend, that the GOI made additional severance payments related to ECSC Article 56(2)(b) on AST's behalf. All payments made by the GOI or the EC, the petitioners conclude, should be countervailed.

AST responds that the results of verification make clear that no additional Article 56 assistance, beyond that already countervailed under Law 451/94, has been given to AST. The petitioners' claims to the contrary, AST contends, merely represent a mis-reading of the verification report.

Department's Position: In the course of verifying both the EC and AST, we found no evidence suggesting that additional Article 56(2)(b) assistance has been given to AST beyond that already found countervailable under Law 451/94. At verification we learned that the Article 56(2)(b) program partially compensates the GOI for benefits the GOI has already paid out to workers under its Law 451/94 early retirement program. Moreover, the severance payments, referred to by the petitioners, are benefits stipulated under Law 451/94 and, therefore, have already been incorporated into our analysis of the Law 451/94 benefits.

Comment 26: ECSC Article 54 Loans. AST points out that a subsidy exists only where ''a government of a country or any public entity'' provides a ''financial contribution'' or ''makes a payment to a funding mechanism to provide a financial contribution or entrusts or directs a private entity to make a financial contribution. * * *'' AST then argues that ECSC Article 54 loans do not convey government funds to borrowers and that no financial contribution is provided from the treasury of any public or quasi-public entity. Rather, Article 54 loans are commercially obtained funds re-lent on a private, fully commercial basis. (The European Commission made a similar argument in a submission made prior to the briefing schedule.) Citing to the Department's prior treatment of the ECSC Article 56(2)(b) program (*see, e.g., Certain Hot-Rolled Lead and Bismuth Carbon Steel Products from Germany,* 58 FR 6233, 6236 (January 27, 1993)), AST maintains that if the program operates without government funds, it is the Department's practice to find no countervailable benefit. Finally, respondents argue that no public entity has ''entrusted or directed'' the ECSC to make Article 54 loans to AST.

Petitioners maintain that the Department has previously found that the ECSC met the definition of an ''authority'' capable of granting subsidy benefits (*see* section 771(5)(B) of the Act) and that the ECSC is, in fact, a public entity. Pointing out that the Department's verification found that

ECSC and European Community administrative functions are merged, petitioners argue that it is inconceivable that a purely private entity would be run by Commission officials as claimed by AST. Finally, petitioners argue that the new reference to ''financial contribution'' was not intended by Congress ''to become a loophole when unfairly traded imports enter the United States and injure a U.S. industry.'' SAA at 926.

Department's Position: We determine that the ECSC is a public entity under sections 701(a)(1) and 771(5)(B) of the Act. It is part of the European Union, which undeniably is a particular form of governmental body. Neither AST nor the EC have contested this position. Rather, the issue raised is whether the ECSC has made a ''financial contribution'' to AST. Under the Act and the WTO Subsidies Agreement, a financial contribution includes the direct transfer of funds, such as the provision of loans. While AST and the EC have acknowledged that ECSC loans were provided to AST, they both attempt to make the case that because the loans were not financed directly from ''the treasury of any public or quasi-public entity'' they cannot be considered ''financial contributions.'' However, we see no requirement in the WTO Subsidies Agreement nor the Act that the financial contribution must be funded in a particular manner. In fact, it is common practice for governments and other public entities to finance at least some of their operations via the issuance of bonds or other debt instruments, the proceeds of which are commonly used to fund normal government operations, including subsidy programs.

While this position may arguably conflict with the approach we have previously taken with respect to Article 56(2)(b), there are differences between the two programs. For example, the Article 56(2)(b) program has been funded directly by producer levies, while Article 54 loans, as noted above, are generally financed by means of ''back-to-back loans.'' To the extent this fact fails to adequately distinguish the two programs, we may re-visit our prior reasoning with respect to the Article 56(2)(b) program in light of the new provisions of the WTO Subsidies Agreement and the changes to the Act made pursuant to the Uruguay Round Agreements Act.

Comment 27: Exclusion of Floor Plate from the Scope of the Investigation. AST requests that the Department exclude floor plate from the scope of the instant proceeding and the *Italian Sheet* investigation. AST argues that floor plate should not be included in the scope of these investigations because floor plate is not manufactured in the United States, it does not compete with any product manufactured in the United States or with imports of other covered products, and it is materially different from the other products subject to this investigation. Furthermore, AST argues that floor plate has only one end-use, which is as flooring material and cannot be used for any other application that requires a smooth surface, as is a common requirement of end-uses of stainless steel. Lastly, AST argues that the Department has the inherent authority to exclude products from the scope of an investigation that are not properly included therein.

The petitioners object to AST's request to exclude floor plate from the scope of both investigations. The petitioners argue that floor plate clearly falls within the scope of this case. Furthermore, the petitioners cite *Melamine Institutional Dinnerware Products from the People's Republic of China,* 62 FR 1708 (January 13, 1997), as evidence of the Department's clear and consistent practice of examining the interests of the domestic industry in defining the scope of a case. The petitioners point out that numerous requests to exclude certain products from the scope have been considered and, where there was no interest on the part of the domestic industry, petitioners have excluded such products from the scope as evidenced in the revisions to the initial scope definition set forth in *Italian Sheet and Strip.* The petitioners object to AST's argument that in order for a product to remain within the scope, the domestic industry must be currently producing it. The petitioners state that often products are included in the scope because they are similar to and competitive with the domestic like product. Furthermore, the petitioners point out that the International Trade Commission has preliminarily determined that stainless steel plate in coils produced by the domestic industry is a single domestic like product with all imported stainless steel coiled plate, including floor plate, *Certain Stainless Steel Plate From Belgium, Canada, Italy, Korea, South Africa, and Taiwan,* International Trade Administration, Investigations Nos. 701–TA–376–379 (Preliminary) and Investigations Nos. 731–TA–788–793 (Preliminary) (Publication 3107; May 1998).

Department's position: We disagree with AST. Despite AST's arguments, the scope as set forth in the preliminary determination covers merchandise described as floor plate if it is more than 4.75 in thickness. The scope specifically describes the subject merchandise as ''flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled.'' Additionally, the petitioners have objected to the exclusion of floor plate from the scope of the investigation. Therefore, the Department is not amending the scope of the investigation to exclude stainless steel floor plate.

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examining relevant accounting records and original source documents. Our verification results are detailed in the public versions of the verification reports, which are on file in the Central Records Unit.

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated an individual rate for AST. Because AST is the only respondent in this case, its rate serves as the all-others rate. We determine that the total estimated net countervailable subsidy rate is 15.16 percent *ad valorem* for AST and for all others.

In accordance with our *Preliminary Determination,* we instructed the U.S. Customs Service to suspend liquidation of all entries of stainless steel plate in coils from Italy, which were entered or withdrawn from warehouse, for consumption on or after September 4, 1998, the date of the publication of our *Preliminary Determination* in the **Federal Register**. In accordance with section 703(d) of the Act, we instructed the U.S. Customs Service to discontinue the suspension of liquidation for merchandise entered on or after January 2, 1999, but to continue the suspension of liquidation of entries made between September 4, 1998 and January 1, 1999. We will reinstate suspension of liquidation under section 706(a) of the Act if the ITC issues a final affirmative injury determination, and will require a cash deposit of estimated countervailing duties for such entries of merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, these proceedings will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7528 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–580–832]

Final Negative Countervailing Duty Determination: Stainless Steel Plate in Coils From the Republic of Korea

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Christopher Cassel or Kristen Johnson, Office of CVD/AD Enforcement VI, Group II, Import Administration, U.S. Department of Commerce, Room 4012, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone (202) 482–2786.

Final Determination

The Department of Commerce (the Department) determines that countervailable subsidies are not being provided to producers and exporters of stainless steel plate in coils from the Republic of Korea.

Petitioners

The petition in this investigation was filed by Allegheny Ludlum Corporation, Armco Inc., J&L Specialty Steel, Inc., Lukens Inc., United Steel Workers of America, AFL–CIO/CLC, Butler Armco Independent Union, and Zanesville Armco Independent Organization, Inc. (the petitioners).

Case History

Since the publication of our preliminary determination in this investigation on September 4, 1998 (63 FR 47253), the following events have occurred:

We conducted verification of the countervailing duty questionnaire responses from December 3 through December 18, 1998. Because the final determination of this countervailing duty investigation was aligned with the final antidumping duty determination (*see* 63 FR 47253), and the final antidumping duty determination was postponed (*see* 63 FR 59535), the Department on January 13, 1999, extended the final determination of this countervailing duty investigation until no later than March 19, 1999 (*see* 64 FR 2195). On January 27, February 2, 10, and 12, 1999, the Department released its verification reports to all interested parties. The Department issued decision memoranda on the issue of direction of credit by the Government of Korea (GOK) and the operations of the Korean domestic bond market on March 4 and March 9, 1999, respectively. Petitioners and respondents filed case briefs on March 5 and 10, 1999, and rebuttal briefs on March 10 and 12, 1999.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (URAA) effective January 1, 1995 (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are to the regulations as codified at 19 CFR Part 351 (April 1998).

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.,* cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this petition are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the *Harmonized Tariff Schedule of the United States* (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Injury Test

Because the Republic of Korea (Korea) is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (ITC) is required to determine whether imports of the subject merchandise from Korea materially injure, or threaten material injury to, a U.S. industry. On May 28, 1998, the ITC published its preliminary determination finding 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 Korea of the subject merchandise (*See Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, Korea, South Africa, and Taiwan,* 63 FR 29251).

Period of Investigation

The period for which we are measuring subsidies (the POI) is calendar year 1997.

Subsidies Valuation Information

Benchmarks for Long-term Loans and Discount Rates: During the POI, Pohang Iron & Steel Company, Ltd. (POSCO) had a number of won-denominated and foreign currency-denominated long-term loans outstanding which the company received from government-owned banks, Korean commercial banks, overseas banks, and foreign banks with branches in Korea. A number of these loans were received prior to 1992. In the 1993 investigation of *Steel Products from Korea,* the Department determined that the GOK influenced the practices of lending institutions in Korea and controlled access to overseas foreign currency loans through 1991. *See Final Affirmative Countervailing Duty Determinations and Final Negative Critical Circumstances Determinations: Certain Steel Products from Korea,* 58 FR at 37328, 37338 (July 9, 1993) (*Steel Products from Korea*), and the ''Direction of Credit'' section below. In that investigation, we determined that the best indicator of a market rate for long-term loans in Korea was the three-year corporate bond rate on the secondary market. Therefore, in the final determination of the instant investigation, to calculate the benefit which POSCO received from direct foreign currency loans and domestic foreign currency loans obtained prior to 1991, and still outstanding during the POI, we used as our benchmark the three-year corporate bond rate on the secondary market.

In this investigation, the Department also examined whether the GOK continued to control and/or influence the practices of lending institutions in Korea between 1992 and 1997. Based on our findings on this issue, discussed below in the ''Direction of Credit'' section of this notice, we are using the following benchmarks to calculate POSCO's benefit from long-term loans obtained in the years 1992 through 1997: (1) For countervailable, foreign-currency denominated loans, we are using POSCO's company-specific, weighted-average U.S. dollar denominated interest rate on the company's loans from foreign bank branches in Korea; (2) for countervailable won-denominated loans, we are using POSCO's company-specific three-year corporate bond rate. In the preliminary determination, we used a national average three-year corporate bond rate. *See Preliminary Negative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Duty Determination: Stainless Steel Plate in Coils from the Republic of Korea,* 63 FR 47253, 47254 (September 4, 1998) *(Preliminary Determination).* We continue to find that the Korean domestic bond market was not controlled by the GOK during the period 1992 through 1997, and that domestic bonds serve as an appropriate benchmark interest rate. *See Analysis Memorandum on the Korean Domestic Bond Market,* dated March 9, 1999, (public document on file in the Department's Central Records Unit, Room B–099 (CRU)). On February 5, 1999, POSCO submitted to the Department the company's average interest rate on corporate bonds for each year 1992 through 1997. *See* POSCO's February 5, 1999 Questionnaire Response (QR) (public version on file in the CRU). Because POSCO was unable to retrieve data on the bond issuance fees the company paid in the years 1992 through 1996, we have added to the average interest rate for each of those years the bond issuance fees that POSCO paid in 1997.

We are also using POSCO's three-year company-specific corporate bond rate as the discount rate to determine the benefit from non-recurring subsidies received between 1992 and 1997.

Benchmarks for Short-Term Financing: For those programs which require the application of a short-term interest rate benchmark, we used as our benchmark a company-specific weighted-average interest rate for commercial won-denominated loans for the POI. Each respondent provided to the Department its respective company-specific, short-term commercial interest rate. During our verification of Samsun Corporation (Samsun) on December 15, 1998, we learned that the weighted-average, short-term interest rate which Samsun had earlier submitted to the Department was incorrect. For the final calculations for this determination, we have used the interest rate obtained at verification.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service (IRS) for the industry-specific average useful life of assets in determining the allocation period for non-recurring subsidies. *See* the *General Issues Appendix (GIA),* 58 FR at 37227, which is appended to the *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria,* 58 FR 37225 (July 9, 1993). However, in *British Steel plc* v. *United States,* 879 F. Supp. 1254 (CIT 1995) (*British Steel I*), the U.S. Court of International Trade (the Court) held that the IRS information did not necessarily reflect a reasonable period based on the actual commercial and competitive benefit of the subsidies to the recipients. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for non-recurring subsidies based on the average useful life (AUL) of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *See British Steel plc* v. *United States,* 929 F. Supp. 426, 439 (CIT 1996) (*British Steel II*). Thus, we are determining the allocation period for non-recurring subsidies using company-specific AUL data where reasonable and practicable. *See, e.g., Final Results of Countervailing Duty Administrative Review: Certain Cut-to-Length Carbon Steel Plate from Sweden,* 62 FR 16551 (April 7, 1997).

For the preliminary determination of this investigation, the Department followed the Court's decision in *British Steel I and II.* Using the AUL information which POSCO submitted, we calculated POSCO's AUL, excluding adjustments for special accelerated depreciation expenses and a depreciation of salvage value which the company reported. During verification, we reviewed POSCO's calculation of its average useful life of assets. In examining the company's calculations, we learned that the basis of the rates in the GOK's tax depreciation tables is the Japanese tax depreciation tables which were in existence at the time the GOK determined the useful life of assets in the 1950's. In order to determine whether the tax tables provide a reasonable estimation of POSCO's average useful life of assets, we examined POSCO's asset ledger. We verified through an examination of POSCO's asset ledgers that the depreciation schedule used by POSCO does not represent the actual useful life of the company's assets. *See* March 1, 1999 Supplement to the POSCO Verification Report, (public version on file in the CRU). For these reasons, we determine that it is not appropriate to use POSCO's AUL data to determine the average useful life of the company's assets. Therefore, for the final determination, as facts available, we have used the 15-year allocation period as reported in the IRS depreciation tables for the allocation of POSCO's non-recurring subsidies.

Treatment of Subsidies Received by Trading Companies: During the POI, POSCO, the only Korean steel producer of stainless steel plate in coils, exported the subject merchandise to the United

States through five trading companies: POSCO Steel Service & Sales Company, Ltd. (POSTEEL), Hyosung Corporation (Hyosung), Samsun, Samsung Corporation (Samsung), and Sunkyong Ltd. (Sunkyong). We required that the five trading companies provide responses to the Department's questionnaires with respect to the export subsidies under investigation. One of the trading companies, POSTEEL, is affiliated with POSCO within the meaning of section 771(33)(E) of the Act because POSCO owned 95.3 percent of POSTEEL's shares as of December 31, 1997. The other four trading companies are not affiliated with POSCO.

We required responses from the trading companies because the subject merchandise may be subsidized by means of subsidies provided separately to the exporter, in addition to any subsidies provided to the producer. All subsidies conferred on the production and exportation of the subject merchandise benefit the subject merchandise, even if it is exported to the United States by an unaffiliated trading company rather than by the producer itself. Therefore, the Department calculates countervailable subsidy rates on the subject merchandise by cumulating subsidies provided to the producer with those provided to the exporter.

Under § 351.107 of the Department's regulations, when the subject merchandise is exported to the United States by a company that is not the producer of the merchandise, the Department may establish a ''combination'' rate for each combination of an exporter and supplying producer. However, as noted in the ''Explanation of the Final Rules'' (the Preamble), there may be situations in which it is not appropriate or practicable to establish combination rates when the subject merchandise is exported by a trading company. In such situations, the Department will make exceptions to its combination rate approach on a case-by-case basis. *See Antidumping Duties; Countervailing Duties; Final Rule,* 62 FR 27296, 27303 (May 19, 1997).

In this investigation, we have determined that it is not appropriate to establish combination rates. This determination is based on two main facts: First, the majority of the subsidies conferred upon the subject merchandise were received by the producer, POSCO. Second, the difference in the levels of subsidies conferred upon the subject merchandise among the individual trading companies is insignificant. Therefore, combination rates would serve no practical purpose because the calculated subsidy rate for POSCO/Hyosung or POSCO/Sunkyong or POSCO and any of the other trading companies effectively would be the same rate. For these reasons, we have not calculated combination rates in this investigation. Instead, we have only calculated one rate for the subject merchandise, all of which is produced by POSCO.

To include the subsidies received by the trading companies, which are conferred upon the export of the subject merchandise, in the calculated *ad valorem* subsidy rate, we used the following methodology: For each of the five trading companies, we calculated the benefit attributable to the subject merchandise and factored that amount into the calculated subsidy rate for the producer. In each case, we determined the benefit received by the trading companies for each export subsidy and weight-averaged the benefit amounts by the relative share of each trading company's value of exports of the subject merchandise to the United States. This calculated *ad valorem* subsidy was then added to the subsidy calculated for POSCO. Thus, for each of the programs below, the listed *ad valorem* subsidy rate is cumulative of any countervailable subsidies received by both the trading companies and POSCO.

I. Programs Determined To Be Countervailable

A. Direction of Credit

In the 1993 investigation of *Steel Products from Korea,* the Department determined that (1) the GOK influenced the practices of lending institutions in Korea; (2) regulated long-term loans were provided to the steel industry on a selective basis; and (3) the selective provision of these regulated loans resulted in a countervailable benefit. *See Steel Products from Korea,* 58 FR at 37338. Accordingly, all long-term loans received by the producers/exporters of the subject merchandise were treated as countervailable. The determination in that investigation covered all long-term loans bestowed through 1991.

In the instant investigation, petitioners allege that the GOK continued to control the practices of lending institutions in Korea through the POI, and that the steel sector received a disproportionate share of low-cost, long-term credit, resulting in countervailable benefits being conferred on the producers/exporters of the subject merchandise. Petitioners assert, therefore, that the Department should countervail all long-term loans received by the producers/exporters of the subject merchandise that were still outstanding during the POI.

1. The GOK's Credit Policies Through 1991

As noted above, we previously found significant GOK control over the practices of lending institutions in Korea through 1991, the period investigated in *Steel Products From Korea.* This finding of control was determined to be sufficient to constitute a government program and government action. *See Steel Products from Korea,* 58 FR at 37342. We also determined that (1) the Korean steel sector, as a result of the GOK's credit policies and control over the Korean financial sector, received a disproportionate share of regulated long-term loans, so that the program was, in fact, specific, and (2) that the interest rates on those loans were inconsistent with commercial considerations. *Id.* at 37343. Thus, we countervailed all long-term loans received by the steel sector from all lending sources.

In this investigation, we provided the GOK with the opportunity to present new factual information concerning the government's credit policies prior to 1992, which we would consider along with our finding in the prior investigation. In the preliminary determination, we stated that respondents' information did not lead us to change our determination concerning the GOK's pre-1992 credit policies, as described in *Steel Products From Korea.* Moreover, respondents' arguments in their case brief have also not led us to change our preliminary determination concerning the GOK's pre-1992 credit policies. *See* the discussion under *Comment 1,* below (''The GOK's Pre-1992 Credit Policies: New Factual Information Concerning Foreign Currency Denominated Loans''). On this basis, we continue to find for this final determination that all regulated long-term loans provided to the producers/exporters of the subject merchandise through 1991, were provided to a specific enterprise or industry, or group thereof, within the meaning of section 771(5A)(D)(iii)(III) of the Act. This finding conforms with our determination in *Steel Products from Korea* (*see* 58 FR at 37342), which was upheld by the Court of International Trade in *British Steel plc* versus *United States,* 941 F. Supp 119 (CIT 1996) (*British Steel II*). Moreover, in accordance with section 771(5)(E)(ii) of the Act, a benefit has been conferred to the recipient to the extent that the regulated loans are provided at interest rates less than the benchmark rates

described under the ''Subsidies Valuation'' section, above.

POSCO was the only producer of the subject merchandise, and POSCO received long-term loans prior to 1992, that were still outstanding during the POI. These included loans with both fixed and variable interest rates. To determine the benefit from the regulated loans with fixed interest rates, we applied the Department's standard long-term loan methodology and calculated the grant equivalent for the loans. For POSCO's variable-rate loans, we compared the amount of interest paid during the POI on the regulated loans to the amount of interest that would have been paid at the benchmark rate. We then summed the benefit amounts from the loans attributable to the POI and divided the total benefit by POSCO's total sales. On this basis, we determine the net countervailable subsidy to be 0.17 percent *ad valorem*.

2. The GOK's Credit Policies From 1992 Through 1997

The Department's preliminary analysis of the GOK's credit policies from 1992 through 1997, is contained in the March 4, 1999, Memorandum Re: Analysis Concerning Post 1991 Direction of Credit, on file in the CRU (Credit Memo). As detailed in the Credit Memo, the Department preliminarily determined that the GOK continued to control directly and indirectly the lending practices of most sources of credit in Korea through the POI. The Department also preliminarily determined that GOK-regulated credit from domestic commercial banks and government-controlled banks such as the Korea Development Bank (KDB) was specific to the steel industry. This credit conferred a benefit on the producer/exporters of the subject merchandise in accordance with section 771(5)(E)(ii) of the Act, because the interest rates on the countervailable loans were less than the interest rates on comparable commercial loans. *See* Credit Memo at 15–17. Finally, we preliminarily found that POSCO's access to government-regulated foreign sources of credit did not confer a benefit to the recipient, as defined by section 771(5)(E)(ii) of the Act, and, as such, credit received by POSCO from these sources was found not countervailable. This determination was based on the fact that credit from Korean branches of foreign banks were not subject to the government's control and direction. Thus, POSCO's loans from these banks served as an appropriate benchmark to establish whether access to regulated foreign sources of funds conferred a benefit on respondent. On the basis of that comparison, we found that there was no benefit. *See id.* at 18. While some of the comments we received from the parties have led us to make minor modifications to our calculations, they have not led us to change the basic findings detailed in the Credit Memo.

In the preliminary determination we examined, as a separate program, loans provided under the Energy Savings Fund, and found that these loans were countervailable. *See Preliminary Determination,* 63 FR at 47256. However, on the basis of our findings detailed in the Credit Memo, we now determine that these loans are countervailable as directed credit, rather than as a separate program. These loans are policy loans provided by banks that are subject to the same GOK influence that is described in the Credit Memo. Accordingly, they are countervailable as directed credit, and we have included these loans in our benefit calculations. Thus, on the basis of our finding in the credit memo, and the modifications to the calculations discuss in the comments section, below, for the GOK's post-1991 credit policies, we determine a net countervailable subsidy of less than 0.005 percent *ad valorem*.

B. GOK Infrastructure Investments at Kwangyang Bay

In *Steel Products from Korea,* the Department investigated the GOK's infrastructure investments at Kwangyang Bay over the period 1983–1991. We determined that the GOK's provision of infrastructure at Kwangyang Bay was countervailable because we found POSCO to be the predominant user of the GOK's investments. The Department has consistently held that a countervailable subsidy exists when benefits under a program are provided, or are required to be provided, in law or in fact, to a specific enterprise or industry or group of enterprises or industries. *See Steel Products from Korea,* 58 FR at 37346.

No new factual information or evidence of changed circumstances has been provided to the Department with respect to the GOK's infrastructure investments at Kwangyang Bay over the period 1983–1991. Therefore, to determine the benefit from the GOK's investments to POSCO during the POI, we relied on the calculations performed in the 1993 investigation of *Steel Products from Korea,* which were placed on the record of this investigation by POSCO. In measuring the benefit from this program in the 1993 investigation, the Department treated the GOK's costs of constructing the infrastructure at Kwangyang Bay as untied, non-recurring grants in each year in which the costs were incurred.

To calculate the benefit conferred during the POI, we applied the Department's standard grant methodology and allocated the GOK's infrastructure investments over a 15-year allocation time period. See the allocation period discussion under the ''Subsidies Valuation Information'' section, above. We used as our discount rate the three-year corporate bond rate on the secondary market as used in *Steel Products from Korea.* We then summed the benefits received by POSCO during 1997, from each of the GOK's yearly investments over the period 1983–1991. We then divided the total benefit attributable to the POI by POSCO's total sales for 1997. On this basis, we determine a net countervailable subsidy of 0.29 percent *ad valorem* for the POI.

C. Short-Term Export Financing

The Department determined that the GOK's short-term export financing program was countervailable in *Steel Products from Korea* (*see* 58 FR at 37350). During the POI, POSCO was the only producer/exporter of the subject merchandise that used export financing.

In accordance with section 771(5A)(B) of the Act, this program constitutes an export subsidy because receipt of the financing is contingent upon export performance. A financial contribution is provided to POSCO under this program within the meaning of section 771(5)(D)(i) of the Act in the form of a loan. To determine whether this export financing program confers a countervailable benefit to POSCO, we compared the interest rate POSCO paid on the export financing received under this program during the POI with the interest rate POSCO would have paid on a comparable short-term commercial loan. See discussion above in the ''Subsidies Valuation Information'' section with respect to short-term loan benchmark interest rates.

Because loans under this program are discounted (*i.e.,* interest is paid up-front at the time the loans are received), the effective rate paid by POSCO on its export financing is a discounted rate. Therefore, it was necessary to derive from POSCO's company-specific weighted-average interest rate for short-term won-denominated commercial loans, a discounted benchmark interest rate. We compared this discounted benchmark interest rate to the interest rates charged on the export financing and found that the program interest rates were lower than the benchmark rate. Therefore, in accordance with section 771(5)(E)(ii) of the Act, we determine that this program confers a

countervailable benefit because the interest rates charged on the loans were less than what POSCO would have had to pay on a comparable short-term commercial loan.

To calculate the benefit conferred by this program, we compared the actual interest paid on the loans with the amount of interest that would have been paid at the applicable discounted benchmark interest rate. When the interest that would have been paid at the benchmark rate exceeded the interest that was paid at the program interest rate, the difference between those amounts is the benefit. Because POSCO was unable to segregate its production financing applicable to only subject merchandise exported to the United States, we divided the benefit derived from the loans by total exports. On this basis, we determine a net countervailable subsidy of less than 0.005 percent *ad valorem*.

D. Reserve for Export Loss

Under Article 16 of the Tax Exemption and Reduction Control Act (TERCL), a domestic person engaged in a foreign-currency earning business can establish a reserve amounting to the lesser of one percent of foreign exchange earnings or 50 percent of net income for the respective tax year. Losses accruing from the cancellation of an export contract, or from the execution of a disadvantageous export contract, may be offset by returning an equivalent amount from the reserve fund to the income account. Any amount that is not used to offset a loss must be returned to the income account and taxed over a three-year period, after a one-year grace period. All of the money in the reserve is eventually reported as income and subject to corporate tax either when it is used to offset export losses or when the grace period expires and the funds are returned to taxable income. The deferral of taxes owed amounts to an interest-free loan in the amount of the company's tax savings. During the POI, Samsun was the only exporter of the subject merchandise which used this program.

We determine that the Reserve for Export Loss program constitutes an export subsidy under section 771(5A)(B) of the Act because use of the program is contingent upon export performance. We also determine that this program provides a financial contribution within the meaning of section 771(5)(D)(i) of the Act in the form of a loan. The benefit provided by this program is the tax savings enjoyed by the company.

To determine the benefit conferred by this program, we calculated the tax savings by multiplying the balance amount of the reserve as of December 31, 1996, by the corporate tax rate for 1996. We treated the tax savings on these funds as a short-term interest-free loan. Accordingly, to determine the benefit, the amount of tax savings was multiplied by the company's weighted-average interest rate for short-term won-denominated commercial loans for the POI, as described in the "Subsidies Valuation Information" section, above. Using the methodology for calculating subsidies received by trading companies, which also is detailed in the "Subsidies Valuation Information" section of this notice, we determine a net countervailable subsidy of less than 0.005 percent *ad valorem*.

E. Reserve for Overseas Market Development

Article 17 of the TERCL operates in a manner similar to Article 16, discussed above. This provision allows a domestic person engaged in a foreign trade business to establish a reserve fund equal to one percent of its foreign exchange earnings from its export business for the respective tax year. Expenses incurred in developing overseas markets may be offset by returning from the reserve, to the income account, an amount equivalent to the expense. Any part of the fund that is not placed in the income account for the purpose of offsetting overseas market development expenses must be returned to the income account over a three-year period, after a one-year grace period. As is the case with the Reserve for Export Loss, the balance of this reserve fund is not subject to corporate income tax during the grace period. However, all of the money in the reserve is eventually reported as income and subject to corporate tax either when it offsets overseas expenses or when the grace period expires. The deferral of taxes owed amounts to an interest-free loan equal to the company's tax savings. The following exporters of the subject merchandise used this program during the POI: Hyosung, POSTEEL, Samsun, Samsung, and Sunkyong.

We determine that the Reserve for Overseas Market Development program constitutes an export subsidy under section 771(5A)(B) of the Act because use of the program is contingent upon export performance. We also determine that this program provides a financial contribution within the meaning of section 771(5)(D)(i) of the Act in the form of a loan. The benefit provided by this program is the tax savings enjoyed by the companies.

To determine the benefits conferred by this program during the POI, we employed the same methodology used for determining the benefit from the Reserve for Export Loss program. Using the methodology for calculating subsidies received by trading companies, which is detailed in the "Subsidies Valuation Information" section of this notice, we determine a net countervailable subsidy of 0.01 percent *ad valorem*.

F. Investment Tax Credits

Under the TERCL, companies in Korea are allowed to claim investment tax credits for various kinds of investments. If the tax credits cannot all be used at the time they are claimed, then the company is authorized to carry them forward for use in subsequent tax years. During the POI, POSCO used various investment tax credits to reduce its 1996 net tax liability. In *Steel Products from Korea,* we found that investment tax credits were not countervailable (*see* 58 FR at 37351); however, there were changes in the statute effective in 1995, which have caused us to revisit the countervailability of the investment tax credits.

At verification, we received clarification of the particular investment tax credits which POSCO used in its fiscal year 1996 tax return which was filed during the POI. We learned that the company used the following tax credits: (1) Tax credits for investments in facilities for research and experiment under Article 10(1)(a) and Article 10(1)(b); (2) tax credits for investments in productivity improvement under Article 25; (3) tax credits for specific facility investments under Article 26; and (4) tax credits for temporary investments under Article 27.

Under these TERCL Articles, if a company invested in foreign-produced facilities (i.e., facilities produced in a foreign country), the company received a tax credit equal to either three or five percent of its investment. However, if a company invested in domestically-produced facilities (*i.e.,* facilities produced in Korea) under the same Articles, it received a 10 percent tax credit. Under section 771(5A)(C) of the Act, which became effective on January 1, 1995, a program that is contingent upon the use of domestic goods over imported goods is specific, within the meaning of the Act. Because Korean companies received a higher tax credit for investments made in domestically-produced facilities, we determine that investment tax credits received under Articles 10(1)(a), 10(1)(b), 25, 26, and 27 constitute import substitution subsidies under section 771(5A)(C) of the Act. In addition, because the GOK is foregoing the collection of tax revenue otherwise

due under this program, we determine that a financial contribution is provided under section 771(5)(D)(ii) of the Act. The benefit provided by this program is a reduction in taxes payable. Therefore, we determine that this program is countervailable.

To calculate the benefit from this tax credit program, we examined the amount of tax credits POSCO deducted from its taxes payable for the 1996 fiscal year. POSCO deducted from its 1996 taxes payable, all remaining credits earned in the years 1992, 1993, 1994, and a portion of credits earned in 1995. Therefore, we first determined the amount of the tax credits claimed which were based upon investments in domestically-produced facilities. We then calculated the additional amount of tax credits received by the company because it earned tax credits of 10 percent on such investments instead of a three or five percent tax credit. Next, we calculated the amount of the tax savings earned through the use of these tax credits during the POI and divided that amount by POSCO's total sales during the POI. On this basis, we determine a net countervailable subsidy of 0.18 percent *ad valorem*.

G. Electricity Discounts under the Requested Load Adjustment Program

Petitioners alleged that POSCO is receiving countervailable benefits in the form of utility rate discounts. The GOK reported that during the POI the government-owned Korea Electric Power Company (KEPCO) provided POSCO with three types of discounts under its tariff schedule. These three discounts were based on the following rate adjustment programs in KEPCO's tariff schedule: (1) Power Factor Adjustment; (2) Summer Vacation and Repair Adjustment; and (3) Requested Load Adjustment. *See* the discussion below in ''Programs Determined To Be Not Countervailable'' with respect to the Power Factor Adjustment and Summer Vacation and Repair Adjustment discount programs.

The GOK introduced the Requested Load Adjustment (RLA) discount in 1990, to address emergencies in KEPCO's ability to supply electricity. Under this program, customers with a contract demand of 5,000 KW or more, who can curtail their maximum demand by 20 percent or suppress their maximum demand by 3,000 KW or more, are eligible to enter into a RLA contract with KEPCO. Customers who choose to participate in this program must reduce their load upon KEPCO's request, or pay a surcharge to KEPCO.

The RLA discount is provided based upon a contract of two months, normally July and August when the demand for electricity is greatest. Under this program, a basic discount of 440 won per KW is granted between July 1 and August 31, regardless of whether KEPCO makes a request for a customer to reduce its load. During the POI, KEPCO granted 44 companies RLA discounts even though KEPCO did not request these companies to reduce their respective loads. The GOK reported that because KEPCO increased its capacity to supply electricity in 1997, it reduced the number of companies with which it maintained RLA contracts in 1997. In 1996, KEPCO had entered into RLA contracts with 232 companies.

At the preliminary determination, we found that discounts provided under the RLA were distributed to a limited number of customers, *i.e.,* a total of 44 customers during the POI. Therefore, we preliminarily determined that the RLA program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. We also stated in the preliminary determination that, given the information the GOK provided on the record regarding KEPCO's increased capacity to supply electricity and the resulting decrease in KEPCO's need to enter into a large number of RLA contracts during the POI, we would further investigate the *de facto* specificity of this discount program at verification. We stated that it was the GOK's responsibility to demonstrate to the Department on what basis KEPCO chose the 44 customers with which it entered into RLA contracts during the POI.

Based on the information which we obtained at verification, we analyzed whether this electricity discount program is specific in fact (*de facto* specificity), within the meaning of section 771(5A)(D)(iii) of the Act. We find that the GOK failed to demonstrate to the Department a systematic procedure through which KEPCO selects those customers with which it enters into RLA contracts. The GOK simply stated that KEPCO enters into contracts with those companies which volunteer for the discount program. If KEPCO does not reach its targeted adjustment capacity with those companies which volunteered for the program, then KEPCO will solicit the participation of large companies. We note that KEPCO was unable to provide to the Department the percentage of 1997 RLA recipients which volunteered for the program and the percentage of those recipients which were persuaded to cooperate in the program. Therefore, we continue to find that the discounts provided under the RLA were distributed to a limited number of users. Given the data with respect to the small number of companies which received RLA electricity discounts during the POI, we determine that the RLA program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act. The benefit provided under this program is a discount on a company's monthly electricity charge. A financial contribution is provided to POSCO under this program within the meaning of section 771(5)(D)(ii) of the Act in the form of revenue foregone by the government.

Because the electricity discounts are not ''exceptional'' benefits and are received automatically on a regular and predictable basis without further government approval, we determine that these discounts provide a recurring benefit to POSCO. Therefore, we have expensed the benefit from this program in the year of receipt. *See GIA*, 58 FR at 37226. To measure the benefit from this program, we summed the electricity discounts which POSCO received from KEPCO under the RLA program during the POI. We then divided that amount by POSCO's total sales value for 1997. On this basis, we determine a net countervailable subsidy of less than 0.005 percent *ad valorem*.

II. Programs Determined To Be Not Countervailable

A. Electricity Discounts Under the Power Factor Adjustment and Summer Vacation and Repair Adjustment Programs

The GOK reported that KEPCO provided POSCO with three types of discounts under its tariff schedule during the POI. These three discounts were based on the following rate adjustment programs in KEPCO's tariff schedule: (1) Power Factor Adjustment; (2) Summer Vacation and Repair Adjustment; and (3) Requested Load Adjustment. *See* the separate discussion above in regard to the countervailability of the ''Requested Load Adjustment'' program.

With respect to the Power Factor Adjustment (PFA) program, the GOK reported that the goal of the PFA is to improve the energy efficiency of KEPCO's customers which, in turn, provides savings to KEPCO in supplying electricity to its entire customer base. Customers who achieve a higher efficiency than the performance standard (*i.e.,* 90 percent) receive a discount on their base demand charge.

The GOK stated that the PFA is not a special program, but a normal factor used in the calculation of a customer's electricity charge which was introduced in 1989. The PFA is available to all

general, educational, industrial, agricultural, midnight power, and temporary customers who meet the eligibility criteria. The eligibility criteria are that a customer must: (1) Have a contract demand of 6 KW or more; (2) have a power factor that exceeds the 90 percent standard power factor; and (3) have proper facilities to measure its power factor. If these criteria are met, a customer always receives a PFA discount on its monthly electricity invoice. During the POI, over 600,000 customers were recipients of PFA discounts.

With the aim of curtailing KEPCO's summer load by encouraging customer vacations or the repair of their facilities during the summer months, the GOK introduced the Summer Vacation and Repair Adjustment program (VRA) in 1985. Under this program, a discount of 550 won per KW is given to customers, if they curtail their maximum demand by more than 50 percent, or 3,000 KW, through a load adjustment or maintenance shutdown of their production facilities during the summer months.

The GOK stated that the VRA discount program is available to all industrial and commercial customers with a contract demand of 500 KW or more. The GOK stated that the VRA is one of several programs that KEPCO operates as part of its broad long-term strategy of demand-side management which includes curtailing peak demand. The GOK submitted information demonstrating that over eight hundred customers, from a wide and diverse range of industries, received VRA discounts during the POI.

We analyzed whether these electricity discount programs are specific in law (*de jure* specificity), or in fact (*de facto* specificity), within the meaning of section 771(5A)(D)(i) and (iii) of the Act. First, we examined the eligibility criteria contained in the law. The Regulation on Electricity Supply and KEPCO's Rate Regulations for Electric Service identify companies within a broad range of industries as eligible to participate in the electricity discount programs. With respect to the PFA, all general, educational, industrial, agricultural, midnight power, and temporary customers who have the necessary contract demand are eligible to participate in the discount program. The VRA discount program is available to a wide variety of companies across all industries, provided that they have the required contract demand and can reduce their maximum demand by a certain percentage. Therefore, based on our analysis of the law, we determine that the PFA and VRA electricity programs are not *de jure* specific under section 771(5A)(D)(i) of the Act.

We also examined evidence regarding the usage of the discount electricity programs and found no predominant use by the steel industry. The information on the record demonstrates that discounts under the PFA and VRA are distributed to a large number of firms in a wide variety of industries. Therefore, after analyzing the data with respect to the large number of companies and diverse number of industries which received electricity discounts under these programs during the POI, we determine that the PFA and VRA programs are not *de facto* specific under section 771(5A)(D)(iii) of the Act. Accordingly, we determine that the PFA and VRA discount programs are not countervailable.

B. GOK Infrastructure Investments at Kwangyang Bay Post-1991

The GOK has made the following infrastructure investments at Kwangyang Bay since 1991: Construction of a road from Kwangyang to Jinwol, construction of a container terminal, and construction of the Jooam Dam. The GOK stated that pursuant to Article 29 of the Industrial Sites and Development Act, it is the national and local governments' responsibility to provide basic infrastructure facilities throughout the country, and the nature of the infrastructure depends on the specific needs of each area and/or the types of industries located in a particular area. The GOK provides services to companies through the use of the infrastructure facilities and charges fees for the services based on published tariff rates applicable to all users.

With respect to the GOK's post-1991 infrastructure investments at Kwangyang Bay, the GOK argues that the construction of the infrastructure was not for the benefit of POSCO. The GOK reported that the purpose of developing the Jooam Dam was to meet the rising demand for water by area businesses and households. The supply capacity of the Sueochon Dam, which was constructed prior to 1991, cannot meet the area's water needs and, therefore, a second dam in the Kwangyang Bay area was built. The GOK further reported that the Jooam Dam does not benefit POSCO because POSCO receives all of its water supply from the Sueochon Dam. At verification, we obtained information which demonstrates that the Jooam Dam's water pipe line connects neither to the Sueochon Dam nor to POSCO's steel mill at Kwangyang Bay. Accordingly, POSCO cannot source any of its water supply from the Jooam Dam and, therefore, the company is not benefitting from the GOK's construction of the Jooam Dam.

The GOK also constructed a container terminal at Kwangyang Bay to relieve congestion at the Pusan Port and to encourage the further commercial development of the region. The GOK stated that, given the nature of the merchandise imported, produced, and exported by POSCO at Kwangyang Bay, this container terminal cannot be used by POSCO's operations. According to the responses of the GOK and POSCO and the information obtained at verification, neither steel inputs nor steel products can be shipped through the container terminal at Kwangyang Bay. Given the nature of steel inputs (*e.g.,* bulk products like scrap) and finished steel products (*e.g.,* bundled bars and plate), products such as these would or could not be loaded or unloaded from a ship through a container terminal and, therefore, the facility is not used by steel producers.

The road from Kwangyang to Jinwol was constructed in 1993. The GOK stated that this is a general service, public access road available for, and used by, all residents and businesses in the area of Kwangyang Bay. According to the GOK, the reason for building the public highway was not to serve POSCO, but to provide general infrastructure to the area as part of the GOK's continuing development of the country and to relieve a transportation bottleneck. At verification, we obtained information on the road and learned that, in fact, it is utilized by both industries in the area to transport goods and by residents living in the Kwangyang Bay area.

Based on the information obtained at verification regarding the GOK's infrastructure investments at Kwangyang Bay since 1991, we determine that the GOK's investments in the Jooam Dam, the container terminal, and the public highway were not made for the benefit of POSCO. Therefore, we find that these investments are not providing countervailable benefits to POSCO.

C. Port Facility Fees

In the 1993 investigation of *Steel Products from Korea,* the Department found that POSCO, which built port berths at Kwangyang Bay but, by law, was required to deed them to the GOK, was exempt from paying fees for use of the berths. POSCO was the only company entitled to use the berths at the port facility free of charge. The Department determined that because this privilege was limited to POSCO, and because the privilege relieved

POSCO of costs it would otherwise have had to pay, POSCO's free use of the berths at Kwangyang Bay constituted a countervailable subsidy. The Department stated that each exemption from payment of the fees, or "reimbursement" to POSCO, creates a countervailable benefit because the GOK is relieving POSCO of an expense which the company would have otherwise incurred. *See Steel Products from Korea,* 58 FR at 37347–348.

With respect to the instant investigation, since 1991, POSCO, at its own expense, has built new port facilities at Kwangyang Bay. Because title to port facilities must be deeded to the GOK in accordance with the Harbor Act, POSCO transferred ownership of the facilities to the GOK.

In return, POSCO received the right to use the port facilities free of charge, and the ability to charge other users a usage fee until the company recovers all of its investment costs. At the preliminary determination, we determined that because POSCO is exempt from paying port facility fees, which it otherwise would have to pay, and the government is foregoing revenue that is otherwise due, POSCO's free usage of the port facilities provided a financial contribution to the company within the meaning of section 771(5)(D)(ii) of the Act. We also preliminarily found that the exemption from paying port facility charges is specific under section 771(5A)(D)(iii) of the Act, because POSCO was the only company exempt from paying these port facility fees during the POI.

Since our preliminary determination, we have gathered further information with respect to the Harbor Act and the number and types of companies which have built infrastructure which, as required by law, were subsequently transferred to the government. At verification, we learned that, because the government does not have sufficient funds to construct all of the infrastructure a company may need to operate its business, the GOK allows a company to construct, at its own expense, such infrastructure. However, the Harbor Act prohibits a private company from owning certain types of infrastructure, such as ports. Therefore, the company, upon completion of the project, must deed ownership of the infrastructure to the government pursuant to Article 17–1 of the Harbor Act. Because a company must transfer to the government its infrastructure investment, the GOK, under Articles 17–3 and 17–4 of the Harbor Act, grants the company free usage of the facility and the right to collect fees from other users of the facility until the company recovers its investment cost. Once a company has recovered its cost of constructing the infrastructure, the company must pay the same usage fees as other users of the infrastructure facility.

We verified that under the Harbor Act, any company within any industrial sector is eligible to construct infrastructure necessary for the operation of its business provided that it receives approval by the Administrator of the Maritime and Port Authority to build the facility. We learned that if the ownership of the infrastructure, which the company built, must transfer to the government, then the company, by law, has the right to free usage of that facility and the ability to collect fees from other users of the facility. The right of free usage and the ability to collect user fees are granted to every company which has to deed facilities to the GOK. The free usage and collection of user fees continues only until the company which built the facility recaptures its cost of constructing the facility.

Further, at verification we learned that in permitting a company to build infrastructure subject to the Harbor Act requirements, the GOK has in place a procedure for approving a company's investment costs and for monitoring the company's free usage and collection of user fees. Because the GOK allows a company, for a period of time, to use for free the infrastructure it built, the GOK, through the respective port authority, reviews each infrastructure project to assess the cost. The port authority then approves a certain monetary amount for the infrastructure through a settlement process with the company. A company can only receive free usage of a facility up to the monetary amount approved by the port authority.

At verification, we obtained documentation which indicates that since 1991, a diverse grouping of private sector companies across a broad range of industrial sectors have made a number of investments in infrastructure facilities at various ports in Korea, including at Kwangyang Bay. In each case, the company which built the infrastructure was required to transfer it to the GOK, and received free usage of the infrastructure and the ability to collect user fees from other companies until they recover their respective investment costs. POSCO was not the only company entitled to use a particular port facility infrastructure, which it built, free of charge.

As a result of the information obtained at verification, we have revisited our preliminary determination that POSCO's exemption from paying port facility charges is specific under section 771(5A)(D)(iii) of the Act. As discussed above, we verified that since 1991, a diverse grouping of private sector companies representing a wide cross-section of the economy have made a large number of investments in infrastructure facilities at various ports in Korea, including numerous investments at Kwangyang Bay. Those companies which built infrastructure that was transferred to the GOK, as required by the Harbor Act, received free usage of the infrastructure and the ability to collect user fees from other companies which use the facilities, until they recover their respective investment costs. POSCO is one of a large number of companies from a diverse range of industries to use this program. Accordingly, we determine that this program is not specific under section 771(5A)(D)(iii) of the Act. Therefore, we find that this program is not countervailable.

III. Programs Determined To Be Not Used

Based on the information provided in the responses and the results of verification, we determine that the companies under investigation either did not apply for or receive benefits under the following programs during the POI:

A. Tax Incentives for Highly-Advanced Technology Businesses under the Foreign Investment and Foreign Capital Inducement Act

B. Reserve for Investment under Article 43–5 of TERCL

C. Export Industry Facility Loans and Special Facility Loans

D. Export Insurance Rates Provided by the Korean Export Insurance Corporation

E. Excessive Duty Drawback

Petitioners alleged that under the Korean Customs Act, Korean producers/exporters may have received an excessive abatement, exemption, or refund of import duties payable on raw materials used in the production of exported goods. The Department has found that the drawback on imported raw materials is countervailable when the raw materials are not consumed in the production of the exported item and, therefore, the amount of duty drawback is excessive. In *Steel Products from Korea,* we determined that certain Korean steel producers/exporters received excessive duty drawback because they received duty drawback at a rate that exceeded the rate at which imported inputs were actually used. *See*

Steel Products from Korea, 58 FR at 37349.

At verification, we learned that the refund of duties only applies to imported raw materials that are physically incorporated into the finished merchandise. Items used to produce a product, but which do not become physically incorporated into the final product, do not qualify for duty drawback. We confirmed that the National Technology Institute (NTI) maintains a materials list for each product, and only materials and subsidy-materials that are physically incorporated into the final product are eligible for duty drawback.

We verified that the NTI routinely conducts surveys of producers of exported products to obtain their raw material input usage rate for manufacturing one unit of output. With this information, the NTI compiles a standard usage rate table for imported raw material inputs which is used to calculate a producer/exporter's duty drawback eligibility. In determining an input usage rate for a raw material, the NTI factors recoverable scrap into the calculation. In addition, the loss rate for each imported input is reflected in the input usage rate. At verification, the GOK confirmed that the factoring of reusable scrap into usage rates is done routinely for all products under Korea's duty drawback regime. We further verified that the NTI most recently completed a survey of POSCO in 1993, and because POSCO is the only producer of the subject merchandise, the standard input usage rate table for the subject merchandise is based on POSCO's actual production data.

We also confirmed during our verification of POSCO that there is no difference in the rate of import duty paid and the rate of drawback received. The rate of import duty is based on the imported materials and the rate of drawback depends on the exported merchandise and the usage rate of the imported materials. POSCO pays import duties based on the rate applicable to and the price of the imported raw material. POSCO then receives duty drawback based on the amount of that material consumed in the production of the finished product according to the standard input usage rate. Accordingly, the rate at which POSCO receives duty drawback is the amount of import duty paid on the amount of input consumed in producing the finished exported product.

Based on the information on the record, we determine that POSCO has not received duty drawback on imported raw materials that were not physically incorporated in the production of exported merchandise. As in *Steel Products from Korea,* we also determine that POSCO appropriately factored recovered scrap into its calculated usage rates and that the duty drawback rate applicable to POSCO takes into account recoverable scrap. *See Steel Products from Korea,* 58 FR at 37349. Therefore, we determine that POSCO has not received excessive duty drawback.

VI. Program Determined To Be Terminated

Unlimited Deduction of Overseas Entertainment Expenses

We verified that Article 18–2(5) of the Corporation Tax Law which provided for unlimited deductions of overseas entertainment expenses was repealed by the revisions to the law dated December 29, 1995. In calculating their 1996 income tax (which was filed during the POI) Korean exporters could no longer deduct overseas entertainment expenses without any limits.

Interested Party Comments

Comment 1: The GOK's Pre-1992 Credit Policies: New Factual Information Concerning Foreign Currency-Denominated Loans. Respondents assert that the Department ignored new factual information on the record of this proceeding concerning domestic foreign currency loans. Specifically, respondents submitted information indicating that from 1986 through 1988, interest rates on domestic foreign currency loans were only subject to an interest rate ceiling, and that after 1988, banks and other financial institutions were free to set the interest rates on these loans subject only to the ceiling established by the Interest Limitation Act. Respondents claim that the Department ignored this information and incorrectly assumed that the reimposition of interest rate ceilings on Korean won loans after a failed attempt at liberalization in 1988, also applied to domestic foreign currency loans. Respondents further state that the Department found at verification that the interest rate liberalization program applied solely to lending rates in Korean won. Therefore, respondents state, for all domestic foreign currency loans received prior to 1992, there is no basis for the Department's determination that interest rates on these loans were regulated and that these loans provided countervailable subsidies.

According to petitioners, the Department's finding that pre-1992 direct foreign loans provided a countervailable subsidy was correct and supported by the evidence on the record. Petitioners further state that respondents have provided no new evidence to disprove this finding and nothing in the new law is contrary to the Department's 1993 determination.

Department's Position: The alleged ''new'' information cited by respondents in their brief concerning interest rates on domestic foreign currency loans was in fact considered by the Department in *Steel Products From Korea.* The discussion addressing the GOK's strict control of interest rates specifically states that ''[i]nterest rate ceilings on domestic foreign currency loans were also maintained until 1988.'' *See Steel Products From Korea,* 58 FR at 37341. Thus, the Department considered the fact that the *de jure* controls over domestic foreign currency loans were removed after 1988, in reaching its conclusion that these loans continued to be subject to indirect GOK influence. Moreover, respondents' contention that ''window guidance'' (*i.e.,* the GOK's indirect control over interest rates) applied only to domestic won loans is also without merit. The Department examined this issue and reached the opposite conclusion in *Steel Products From Korea.* Also, in this investigation, independent bankers stated that ''interest rates were once again regulated until the early 1990s, through a system of 'window guidance.' '' Under this system commercial banks were effectively directed by the government not to raise interest rates above a certain level. While this statement is contained within the discussion of the failed 1988 liberalization plan, the bankers did not distinguish between domestic and foreign rates of lending by domestic commercial banks. Finally, in calling for the prohibition of ''window guidance'' over financial institutions' loan rates, the Presidential Commission did not refer only to won-denominated rates. As noted above, the Department's finding in *Steel Products From Korea* took into account respondents ''new'' information. This finding has since been upheld by the Court in *British Steel plc* v. *United States,* 941 F. Supp 119 (CIT 1996) (*British Steel II*). For these reasons our finding concerning the countervailability of pre-1992 foreign currency denominated loans from domestic sources remains unchanged in this final determination.

Comment 2: The GOK's Pre-1992 Credit Policies: Whether Direct Foreign Loans Constitute a Financial Contribution Within the Meaning of the Act. According to respondents, the only government regulation of direct foreign loans consisted of an interest rate ceiling. Respondents state that the GOK could not, under its regulations, direct

or induce foreign lenders to provide loans to POSCO; nor could it regulate (and reduce) the interest rates these lenders would charge on such loans. Rather, these loans were negotiated directly between foreign banks and POSCO without the GOK's direct or indirect involvement. As such, respondents' state that the Department's preliminary finding that direct foreign loans are countervailable is in conflict with the ''financial contribution'' standard of section 771(5)(D)(i) of the Act. Respondents assert that direct foreign loans from foreign banks do not constitute countervailable subsidies because there is no government financial contribution. Respondents further claim that the Department did not explain in its preliminary determination how loans from foreign sources could constitute a financial contribution by the GOK. Moreover, respondents state that these loans do not meet the ''entrusts or directs'' standard of the Act, because (1) they can not be characterized as a contribution that ''would normally be vested in the government,'' and (2) the requirement that the practice of lending by the foreign entity ''does not differ in substance from practices normally followed by the government'' is not met in this instance. Furthermore, because access to direct foreign loans was restricted by the GOK on the basis of a borrowers' ability to access the market without a government or bank guarantee, POSCO would have been able to receive direct foreign loans at the interest rates obtained on its own and without government involvement.

Respondents also address the Department's assertion in the new countervailing duty regulations (and the Statement of Administrative Action) that its indirect subsidy standard remains unchanged under the ''financial contribution'' standard of the Post-Uruguay Round law, specifically referring to the indirect subsidy practices countervailed in *Steel Products from Korea.*[1] Respondent's state that to simply subsume direct foreign loans from foreign entities within the broad claim of an unchanged indirect subsidy standard (and the endorsement in the SAA of *Steel Products From Korea*) is ''overly simplistic and legally in error.''

Petitioners dispute respondents' assertion that the GOK's control over access to direct foreign loans does not constitute a financial contribution, within the meaning of the Act. Petitioners state that this question has been answered by the SAA, which specifically references the Department's indirect subsidy findings in *Steel Products From Korea* to illustrate that the indirect subsidy standard includes the GOK's control over access to direct foreign loans. Petitioners contend that to accept respondents' argument would be to repudiate the interpretation of the statute in the SAA. Petitioners note, moreover, that the Department preliminarily has found in the Credit Memo that the GOK's control over the Korean financial system continued through the POI and included the control of access to direct foreign loans.

Department's Position: As petitioners correctly note, respondents' arguments concerning this issue have been fully answered by the Congress through its approval of the SAA and the *CVD Final Rule*[2] In *Steel Products From Korea,* the finding of government control was determined to be sufficient to constitute a government program and government action, as defined by the Act. Moreover, in the preliminary determination, we did not revisit that prior determination, and also found that the subsidy identified meets the standard for a subsidy as defined by the post-URAA Act. *Preliminary Determination,* 63 FR at 47255.

While respondents contend that subsuming GOK-controlled access to direct foreign loans from foreign entities within the SAA's claim of an unchanged indirect subsidy standard is ''overly simplistic and legally in error,'' the clear and unambiguous language of the SAA is that Congress intended the specific types of indirect subsidies found to be countervailable in *Steel Products From Korea* to continue to be covered by the Act, as amended by the URAA. The Department's final countervailable duty regulations are equally clear on this issue, the preamble of which confirms that the standard for finding indirect subsidies countervailable under the URAA-amended law ''is no narrower than the prior U.S. standard for finding an indirect subsidy as described in *Steel Products from Korea.*'' *See CVD Final Rule,* 63 FR at 65349. For these reasons, we have not changed our preliminary determination concerning the countervailability of pre-1992 direct foreign loans.

Comment 3: The GOK's Pre-1992 Credit Policies: Whether Direct Foreign Loans Are Not Countervailable Pursuant to the Transnational Subsidies Rule. Respondents assert that pursuant to the so-called ''transnational subsidies rule,'' funds provided from sources outside a country under investigation are not countervailable. Specifically, respondents state that section 701(a)(1) of the Act applies only to subsidies provided by the government of the country in question or an institution located in, or controlled by, that country. In support of this contention, respondents cite *North Star Steel* v. *United States,* 824 F. Supp. 1074 (CIT 1993) (North Star), in which the Court upheld the Department's determination that an Inter-American Development Bank loan guaranteed by the Government of Argentina on behalf of the recipient was not subject to the countervailing duty law. In particular, the CIT stated that ''[t]his determination is consistent with the purpose of the countervailing duty law, which is ''intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from * * * subsidies paid by their government.' '' *North Star,* 824 F. Supp. at 1079 (quoting *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 456 (1978)). Respondents also cite a case in which the Department refused to initiate an investigation of private, foreign co-financing of a World bank project, stating that ''[f]or the same reasons (applicable to funds from the World Bank), a loan granted by a group of Japanese banks and insurance companies (in the Philippines) * * * would not be countervailable.'' *See Initiation of Countervailing Duty Investigation: Certain Textiles and Textile Products from the Philippines,* 49 FR 34381 (1984). Petitioners assert that the Department's determination does not contravene the transnational subsidy rule because the subsidy in this case is based on controlled access to credit, and not on a differential in interest rates. The fact that the payment of the funds comes from a private source outside of Korea is irrelevant. According to petitioners, the case law cited by respondents does not involve situations in which a foreign government conferred countervailable subsidies by controlling access to third country financial sources. In addition, petitioners note that these cases predate the changes in the statute that expressly recognize indirect subsidies provided through private actors.

Department's Position: Respondents' assertion concerning the transnational subsidies rule is without merit. Respondents made this same argument in *Steel Products From Korea* (*see,* 58 FR at 37344). In upholding the

[1] *Countervailing Duties; Final Rule,* 63 65348, 349 (November 25, 1998) (*CVD Final Rule*); SAA at 926.

[2] Although the *CVD Final Rule* are not controlling in this investigation, they do represent a statement of the Department's practice and interpretations of the Act, as amended by the URAA.

Department's determination in *Steel Products From Korea,* the Court did not find in any way that the Department's determination with respect to direct foreign loans was in conflict with the transnational subsidies rule, as argued by respondents in that prior investigation. The cases cited by respondents are also not relevant to the facts of this investigation because those cases deal with funds from foreign governments or international lending or development institutions. This investigation, however, concerns the Korean government's control over access to funds from overseas private sources of credit.

More specifically, however, the Department rejected respondents' argument in *Steel Products From Korea,* because the benefit alleged was not the actual funding of direct foreign loans, but rather the ''preferential access to loans that are not generally available to Korean borrowers.'' *Steel Products From Korea,* 58 FR at 37344. The GOK was found to control this access and because the steel industry received a disproportionate share of these low-cost funds, this preferential access was found to confer a countervailable benefit on the steel industry.

Nothing argued by respondents in this investigation would lead us to change that prior determination concerning direct foreign loans. Therefore, our preliminary determination remains unchanged.

Comment 4: The GOK's Pre-1992 Credit Policies: Benchmark Applied to Determine the Benefit From Foreign Currency-Denominated Loans. Respondents challenge the Department's use of a won-denominated benchmark to calculate the countervailable benefit from POSCO's outstanding pre-1992 long-term foreign currency-denominated loans. According to respondents, the Department's long established methodology is to compare countervailable loans with a benchmark in the same currency. Respondents cite the *Final Affirmative Countervailing Duty Determination: Certain Apparel from Thailand,* 50 FR 9818, 9824 (1985), which states that, the ''benchmark must be applicable to loans denominated in the same currency as the loans under consideration.'' Respondents also note that this standard was articulated in the *Final Affirmative Countervailing Duty Determination: Cold-rolled Carbon Steel Flat-rolled Products from Argentina,* 49 FR 18006 (1984) (*Cold-Rolled Steel From Argentina*). In that case, the Department stated:

> [f]or loans denominated in a currency other than the currency of the country concerned in an investigation, the benchmark is selected from interest rates applicable to loans denominated in the same currency as the loan under consideration (where possible, interest rates on loans in that currency in the country where the loan was obtained; otherwise, loans in that currency in other countries, as best evidence). The subsidy for each year is calculated in the foreign currency and converted at an exchange rate applicable for each year. *Id.* at 18019.

Respondents contend that this policy was reiterated in the Department's new regulations, the preamble to which refers to the currency of the loans as one of ''the three most important characteristics'' in determining the benchmark. *CVD Final Rule,* 63 FR at 65363. Thus, respondents assert that the Department (1) did not consider any other commercially-viable alternatives (such as those rates ''in other countries''); (2) ignored any reference to its long-standing policy of comparing loans in the same currency; and (3) provided no explanation for abandoning that policy. Accordingly, respondents state that the Department must revise its calculation of the benefit from foreign currency-denominated loans, using a benchmark that is in conformance with its policy and regulations.

Petitioners dispute respondents' benchmark argument, stating that respondents focused solely on currency and ignored the underlying principle of what the benchmark is intended to measure, namely the financing the company could have obtained on the market in lieu of the government-provided loans. In *Steel Products From Korea,* the Department had to determine what interest rate the company would have had to pay absent the GOK's policy and control over lending sources. Petitioners state that, because prior to 1992, all sources of foreign currency-denominated credit were found to be controlled by the GOK, these sources ''in other countries'' could not serve as a benchmark because they would not have been available to POSCO but for the approval by the Ministry of Finance and Economy (MOFE). Therefore, petitioners state, the Department chose the 3-year corporate bond rate. Record evidence in the current investigation also indicates that the bond market is the only commercial source (*i.e.,* free from GOK control) of long-term funding in Korea. Thus, petitioners assert, domestic bond rates reflect the most comparable, commercial financing that a company could obtain in the market absent the GOK's direction of credit and, therefore, are the most appropriate benchmark for POSCO's foreign currency loans and bonds both pre-and post-1992.

Department's Position: Respondents' arguments concerning the Department's methodology for measuring benefits from countervailable foreign currency-denominated long-term loans are partially correct. It is true that in most instances we measure the benefit from countervailable foreign currency loans by comparing such loans with a benchmark denominated in the same currency, provided the borrower would otherwise have had access to such foreign currency loans. However, in the context of the Korean financial system prior to 1992, this methodology is not appropriate. Specifically, in *Steel Products From Korea,* the Department found that all sources of foreign currency-denominated credit were subject to the government's control and direction. Therefore, these sources of foreign currency credit, including overseas markets, could not serve as an appropriate benchmark, as they were also found to be countervailable. In the absence of such a benchmark, the Department had to determine the rate that companies would have had to pay absent government control. That rate was the corporate bond yield on the secondary market. *See Steel Products From Korea,* 58 FR at 37346. Respondents assert that the Department did not consider any other commercially viable alternatives. Respondents ignore, however, the fact that the corporate bond yield on the secondary market was the only alternative, unregulated source and commercially viable source of financing in Korea. Accordingly, this was the only viable benchmark with which to measure the benefit from government-regulated sources of credit. Nothing argued by respondents in this investigation has led us to change our determination in *Steel Products From Korea.* Therefore, our finding concerning POSCO's pre-1992 foreign currency-denominated long-term loans remains unchanged in this final determination.

Comment 5: Post-1991 GOK Credit Policies: Whether Foreign Currency Loans From Domestic Branches of Foreign Banks are Countervailable. According to petitioners, the Department incorrectly found that domestic branches of foreign banks were not controlled and directed by the GOK. Petitioners state that the Department, in reaching its conclusion, relied only on a lack of any substantive discussion in the record concerning the influence of the GOK on foreign banks as affirmative evidence that no such controls exist. Petitioners further assert that there is little, if any, meaningful discussion

about the direct or indirect influence of GOK regulations and policies on the operation of foreign banks in Korea in the record, including the verification reports. Petitioners assert that record evidence in fact shows that foreign banks are subject to the same GOK controls and direction that applied to domestic commercial banks.

According to petitioners, the Department's assumption that, absent evidence to the contrary, GOK controls or influence over foreign commercial banks do not exist, is legally impermissible. In support, petitioners cite *Al Tech Specialty Steel* v. *United States,* where the CIT ruled that the Department may not simply infer the truth of certain facts from lack of any contradictory evidence on the record; rather, the Department is required to support or authenticate with record evidence (*i.e.,* verify) any factual assertion on which it relies. Slip Op. 98–136 at 9 (CIT 1998). Petitioners state that, in this case, the Department has violated that principle by failing to gather and verify the necessary facts in support of the conclusion reached. As such, the Department's conclusion is not based on substantial evidence on the record.

Petitioners further claim that the Department ignores record evidence that demonstrates GOK control over foreign banks in Korea. For example, petitioners state that foreign commercial banks are included within the OECD's analysis of commercial banks in its 1996 report. *OECD Economic Surveys: Korea 1996* at 41–42, submitted at Exhibit 20 of the March 31, 1998 Petition, on file in the CRU. Petitioners also claim that the Presidential Reports and the 1998 OECD Report recognize that foreign banks operating in Korea were subject to excessive control. Petitioners further state that the relevant banking legislation that restricts domestic commercial banks also restricts domestic branches of foreign banks operating in Korea. In particular, petitioners cite to the General Bank Act, the Bank of Korea Act, and the Foreign Exchange Management Law, noting that foreign banks are also subject to the provisions of these laws.

According to petitioners, foreign commercial banks must be subject to the same ''window guidance'' as domestic commercial banks to prevent interest rates from increasing. Petitioners point out that POSCO's interest rates from foreign commercial banks were lower than the company's rates for foreign securities. According to petitioners, risk-averse, profit-motivated foreign commercial banks would only charge such low interest rates in the Korean market if GOK policies restricted either the interest rates or borrowers' access to credit from those banks.

Moreover, petitioners state that foreign commercial banks in Korea could not have satisfied POSCO's demand for funds. In *Steel Products From Korea,* the Department specifically found that POSCO was unable to raise the large sums of money necessary for its credit needs from domestic banks. *See Steel Products From Korea,* 58 FR at 37345 (quoting, ''the domestic foreign loan market could not have adequately supplied POSCO with the volume of, and/or terms of payment on, loans that POSCO required.'') Petitioners note that foreign bank branches in Korea were responsible for less than 4 percent of total lending. *OECD 1996 Survey* at 42. According to petitioners, this is a direct result of government controls over the market.

Even if domestic branches of foreign commercial banks were not regulated by the GOK, petitioners state that they would be ''inescapably influenced by the controls on every other sector of the banking industry.'' As such, they could not behave in a free market manner. For example, foreign banks would be no less influenced than their Korean counterparts by the lead of the Korean Development Bank and the Bank of Korea to extend credit to certain government favored projects. In light of the GOK's complete dominance over the financial system, petitioners state that it would be impossible for foreign commercial banks to operate free of the same constraints and influences that domestic banks were subject to.

Respondents assert that the record evidence cited by petitioners amounts to (1) generalities and speculation about the operation of the Korean banking system, and (2) lists of normal regulatory provisions of how banks must operate in Korea and basic foreign exchange controls applicable to them. Respondents contend that this ''evidence'' was not relied upon by the Department in its finding of control and direction of credit from GOK-owned and domestic commercial banks, and has no relevance with respect to direction of credit to the steel industry.

Respondents also note that petitioners fail to reveal any record evidence which betrays the means by which the GOK controls the lending of foreign bank branches so as to direct credit where the GOK allegedly intends it to go, such as to the steel industry. For example, the Department cited the bank ownership rules and the GOK's intervention in the appointment of banking officials as means by which the government could influence domestic bank lending practices. Respondents note that foreign banks, in contrast, are wholly-owned by their parent banks and appoint their own officials. Thus, this was not a way in which the GOK could influence their lending decisions. Respondents also indicate that foreign banks' most important source of funds is from their head offices, which provide them with both greater autonomy from the Korean banking system and a lower cost of funds than available to Korean commercial banks which, due to their credit ratings, borrow at rates that are comparable to the rates POSCO can obtain on its own.

Respondents dismiss as empty speculation and unsupported inference petitioners claim that even if foreign bank branches were not regulated in the same manner as domestic banks, they would have nonetheless been ''influenced by the biases and controls built into the tightly controlled financial system.'' Respondents assert that such speculation is contradicted by the same OECD report cited by petitioners, which states that in the midst of a faltering economy, the foreign banks reportedly reduced their exposure. This indicates, respondents state, that foreign banks were acting not in a copycat manner, but prudently, and consistent with the GOK's view of the role of foreign banks in Korea, which ''play a leading role in motivating domestic banks to improve their banking practices and managerial skills.'' GOK July 1, 1998, Questionnaire Response, Exhibit A–7 at 32, on file in the CRU.

Respondents also reject petitioners' theory that foreign commercial banks' lending rates were lower than those of POSCO's foreign securities because GOK policies required them to charge such low rates. According to respondents, the rational explanation for this differential is market competition, of which they state there is clear record evidence. Specifically, respondents cite POSCO's loan documents collected as verification exhibits. One of these, a domestic foreign currency loan from the Seoul branch of Chase Manhattan Bank, states that POSCO chose Chase as the lead bank for the loan because it offered the lowest rate compared to two other foreign bank branches. Respondents state that there is no evidence of government control of interest rates or direction of credit by these banks with respect to this loan. Rather, the banks all competed to provide funds to POSCO at relatively low rates and chose to lend to POSCO because they saw it as good business and a solid asset in their portfolio. To conclude otherwise, respondents state, is to suggest that the

GOK can somehow manage the terms of a syndicated loan. Respondents state that this and other record evidence indicates that the GOK does not, and does not need to, influence these banks to lend to POSCO. Rather, as was repeatedly noted at verification, and specifically noted in the Bankers Verification Report, ''POSCO is one of the best companies in Korea and most commercial banks would like to lend to the company.'' Memorandum For David Mueller, Meetings with Commercial and Investment Banks and Research Institutes, 8 (February 2, 1999), on file in the CRU (Bankers Report).

Department's Position: Petitioners' contention that record evidence establishes that the Korean branches of foreign banks were subject to the same GOK controls and direction that applied to domestic commercial banks is not supported by the record. The record evidence cited by petitioners does not amount to GOK control and direction of these institutions' operations and lending practices.

First, the 1996 and 1998 OECD reports do not support petitioners' arguments. While the 1996 OECD report discusses funding levels by foreign banks in Korea, nowhere does that report state that these banks were subject to the GOK's control or direction. Moreover, the 1998 OECD Report, in discussing the weakness of the Korean banking system, and in attributing responsibility for that weakness partly to the government's direct and indirect intervention in the operations of commercial banks, mentions only domestic commercial banks, not foreign banks. In fact, the report discusses the inability of domestic commercial banks, after their privatization, to ''develop the autonomy (from the government) needed in a market economy.''

Petitioners reliance on the reports issued by the Presidential Commission for Financial Reform, quoted by the Department in the Credit Memo, is equally misplaced. The section of the Presidential Report titled ''Deregulation of Access to Foreign Capital Markets,'' cited by petitioners refers to regulations governing access to foreign capital markets, not regulations governing foreign currency-denominated loans from domestic branches of foreign banks in Korea.[3] Regulations governing access to foreign capital markets are quite separate from those governing domestic branches of foreign banks in Korea. To the extent that the Presidential Commission addressed domestic foreign currency loans, it addressed the lifting of restrictions on the usage of these funds, which is limited mostly to the importation of machinery from abroad. This has nothing to do with any GOK controls over the operations of domestic branches of foreign banks.

Petitioners also support their argument with the contention that foreign banks are subject to some of the same regulatory provisions contained in the General Bank Act that govern domestic commercial banks. However, the Department's analysis in the Credit Memo did not rely on these regulatory provisions but on the record evidence that the GOK continued to influence the lending practices of these domestic commercial banks indirectly, in part because these banks did not develop autonomy from the government. As we explained in the Credit Memo, the weakness of domestic banks vis-a-vis the government was in part an outgrowth of the government's historical role in allocating credit in accordance with policy objectives. Also, the corporate governance structure of Korea's commercial banks (weak ownership structure, lack of autonomy in appointing banking officials) only contributed to their weakness vis-a-vis the government. The fact that the GOK's indirect involvement in commercial banking operations continued into the 1990s merely exacerbated this problem. *See* Credit Memo at 8–9. Foreign banks in Korea, however, were not subject to this same influence. Their source of funds was from their head offices and, as respondents correctly illustrate, the appointment of their senior officials was not subject to influence by the GOK. Petitioners proffer no evidence that foreign banks in Korea were ''inescapably influenced by the controls on every other sector of the banking industry.'' Rather, they speculate that these banks would be no less influenced than their Korean counterparts by the lead of the Korean Development Bank and the Bank of Korea to extend credit to certain government-favored projects. This is not a conclusion reached by any of the commercial bankers at verification, and petitioners do not point to any evidence that would support this contention.

The fact that foreign banks in Korea did not account for a significant amount of total lending in Korea is not sufficient evidence to lead us to conclude that POSCO would not have been able to raise sufficient funds from this source. Rather, the record shows that benchmarks of foreign banks in Korea were a significant source of POSCO's borrowing, and credit from these banks was not regulated by the GOK. For these reasons, we disagree with petitioners' arguments that funding from domestic branches of foreign banks cannot serve as an appropriate benchmark to measure any potential benefit from regulated foreign currency-denominated sources of credit, *e.g.,* foreign securities from abroad.

Comment 6: Post-1991 GOK Credit Policies: Whether POSCO's Access To Foreign Securities Markets Results in Countervailable Benefits. According to petitioners, extensive record evidence, in particular the Department's findings at verification, shows that access to foreign sources of funds, including foreign securities, was strictly controlled by the GOK through the POI. Petitioners state that the Department in its Credit Memo recognized this control.

In addition, petitioners claim that the GOK's control over access to foreign funds constitutes a financial contribution within the meaning of the Act, in particular, the ''entrusts or directs'' standard of section 771(5)(B)(iii) of the Act. That this type of indirect program meets this standard was clearly stated in the SAA, petitioners note, which specifically referenced the Department's findings in *Steel Products From Korea* as an application of the ''entrusts or directs'' standard. Because the interest rates on foreign securities are lower than the rates charged on unregulated sources of credit in Korea, the GOK in effect is controlling access to preferential interest rates.

Finally, petitioners assert that access to foreign securities was provided on a specific basis to export and priority sectors in Korea. According to petitioners, statistics show that companies with substantial export earnings were given preferential access to foreign securities issuances. Therefore, petitioners claim that access to this source of funding is contingent, at least in part, on export performance. Even if the Department were to find that this access is not export contingent, petitioners argue that access was nonetheless *de facto* specific to the basic metals industry, which issued a disproportionate amount of foreign securities by Korean firms between 1992 and 1997.

Respondents dispute petitioners claim that access to foreign securities constitutes a financial contribution within the meaning of the Act, stating that petitioners' interpretation of the ''entrust or directs'' standard is unreasonable. Respondents state that this standard cannot encompass private actions by independent foreign parties that are consistent with market-oriented

[3] *Financial Reform in Korea: The First Report (Presidential Report I)* 22, (April 1997), Exhibit MOFE–9 of the MOFE Verification Report, on file in the CRU.

behavior at market-determined interest rates.

Respondents cite to *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 456 (1978), and section 701(a)(1) of the Act, for the proposition that the countervailing duty law does not apply to funds independently provided by foreign entities at market rates. Moreover, respondents note, the ''entrusts or directs'' standard on which petitioners rely includes the qualifier statement that such a practice ''would normally be vested in the government.'' According to respondents, this language is directed at circumstances where the government controls the provider of the benefit and used the provider as a surrogate for government functions. In this case, respondents argue, foreign securities markets, and the interest rates set therein, are not controlled by the GOK. Therefore, respondents state, the ''entrusts or directs'' standard of the Act does not apply to foreign securities issuances.

Respondents also state that petitioners provide no legal standard for a countervailable benefit from foreign securities issuances because none exists. Specifically, respondents state that because foreign securities issuances are essentially unregulated ''commercial loans'' with market-determined interest rates not subject to GOK influence, no comparison with ''a comparable commercial loan,'' within the meaning of section 771(5)(E)(ii) of the Act, is necessary to determine whether a benefit was conferred. According to respondents, this is supported by Article 14 of the SCM Agreement which states that it is a ''loan by a government'' that is to be compared to a commercial loan.

Respondents next assert that even without the GOK's approval regulations, POSCO would have obtained access to these foreign sources of funds. According to respondents, it is POSCO's excellent credit rating that allowed it to ''get practically unrestricted access to these funds.'' Bankers Report at 10.

Respondents also take issue with petitioners' characterization of interest rates on foreign currency-denominated bonds as ''preferential,'' which is based on the assertion that the appropriate comparison for these foreign-currency bonds issued in foreign markets is to domestic-currency bonds issued in the Korean market. However, respondents note that the Department rejected the comparison of foreign currency-denominated bonds to the interest rates on bonds issued in Korean won in its Credit Memo. As argued by respondents in *Comment 4,* above, the Department's own policy and regulations require, for benchmark purposes, the comparison of interest rates on loans under investigation be with a benchmark in the same currency. According to respondents, interest rates in different currencies are not directly comparable.

To illustrate the problem of making benchmark comparisons across currencies, respondents explain that if the Department were to adopt petitioners' methodology, it would find that bonds issued at market rates in Japanese yen provided greater subsidies (because of a greater interest rate differential) than bonds issued at market rates in U.S. dollars for no other reason than that the market interest rates for Japanese yen are lower. Respondents also note an additional problem with comparing the cost of funds in different currencies, namely the sometimes drastic change in the rates of exchange between currencies over the life of loans. Respondents explain that while the rate of change and even the direction of change may be unpredictable, the consequences of such changes can be considerable, as illustrated by the sharp depreciation in the exchange rate of the Korean won in late 1997. This depreciation made all liabilities, such as loans in foreign currencies incurred before the drop, far more costly than companies originally could have anticipated.

Department's Position. In the Credit Memo, we stated that there are three elements required to find a potential subsidy countervailable: (1) A financial contribution is made by a government or public body; (2) a benefit is conferred on the recipient; and (3) it is specific. If one of these three elements is not met, the subsidy is not countervailable. In accordance with section 771(5)(E)(ii) of the Act, we examined whether a benefit has been conferred on the recipient, POSCO, from foreign securities issued in overseas markets. We also preliminarily determined that POSCO's access to government-regulated foreign sources of credit did not confer a benefit to the recipient, as defined by section 771(5)(E)(ii) of the Act, and, as such, is not countervailable. *See* Credit Memo at 18. As discussed in *Comment 5,* above, we continue to find that branches of foreign banks are not subject to the GOK's control and direction. Therefore, we continue to find that POSCO's access to government-regulated foreign sources of credit did not confer a benefit to the recipient, because the rates obtained on foreign securities, even though limited in access, were not less than foreign currency loans available to POSCO in Korea. As such, there is no need to address the specific comments raised by petitioners and respondents above.

Comment 7: Post-1991 GOK Credit Policies: Whether POSCO's Direct Foreign Loans Received in 1997 Should be Countervailed in This Investigation. Petitioners argue that the Department incorrectly found in its preliminary determination that there was no benefit to POSCO from regulated direct foreign loans received in 1997. According to petitioners, the Department did not examine direct foreign loans received in 1997, because the company ''did not pay interest on these loans until after the POI.'' According to petitioners, the Department should determine that the benefit to POSCO and the financial contribution are received in the year of the receipt of the loan rather than the year the interest is paid. Petitioners contend that this is consistent with the Department's policy on the valuation of subsidies as it was applied in this case for pre-1992 loans.

Respondents argue that contrary to petitioners' contentions, the interest rates on these loans are variable. Therefore, respondents contend that the Department correctly did not examine these loans, because no interest was paid during the POI. According to respondents, this approach is consistent with the Department's variable rate loan methodology.

Department's Position. We agree with respondents' contention that petitioners have incorrectly characterized these loans as fixed rate loans. Because these loans have variable interest rates, our methodology is to calculate the benefit at the time the interest on the loan is paid. For these reasons, we have not changed our preliminary findings concerning direct foreign loans received by POSCO in 1997.

Comment 8: Post-1991 GOK Credit Policies: The Appropriate Benchmark Interest Rate for POSCO's Long-Term Financing. Petitioners assert that, even if the Department determines in the final determination that the GOK's control over foreign commercial banks in Korea is not sufficient to constitute direction for purposes of section 771(5)(B)(iii) of the Act, the Department should conclude that the interest rates charged by those banks are not appropriate benchmarks. Petitioners claim that the maturity and the structure of the foreign bank loans, the other factors (apart from currency) the Department treats as being of primary importance, are not comparable commercial instruments to POSCO's foreign securities. Petitioners assert that the Department in its comparison has ignored this. Therefore, the Department should use the corporate bond rate as a source of capital apparently not under the GOK's direction.

Respondents' arguments concerning domestic branches of foreign banks, and the appropriate use of lending rates from these banks, are summarized under *Comment 6,* above. Respondents also dismiss petitioners' contention that bonds issued in domestic currency are more comparable in terms of their maturity and structure than the foreign currency benchmark chosen by the Department. Respondents note that domestic currency bonds are of shorter duration than POSCO's domestic foreign currency loans, which generally have maturities of five years or more. While petitioners correctly note that domestic and foreign bonds are similar in terms of structure (*i.e.,* fixed rate), respondents assert that this one common criterion is not a superior or sufficient basis for departing from the Department's long-standing practice of comparing loans with benchmarks in the same currency.

Department's Position. The fact that the maturity and structure of foreign securities may not be identical to long-term lending rates from foreign banks in Korea is not a reason to reject these rates as benchmarks and default to the won-denominated three-year corporate bond rate. In fact, contrary to petitioners's assertion, in terms of duration, foreign securities are closer in structure to long-term foreign currency loans from Korean branches of foreign banks than to domestic bonds, which have a maturity of three years, shorter than the duration of POSCO's foreign securities. As outlined by respondents, it is appropriate to compare government-regulated credit to a benchmark denominated in the same currency, if such a benchmark is available. This is in accordance with Department policy and past practice. *See e.g., CVD Final Rule,* 63 FR at 65363; *see also, Certain Apparel from Thailand,* 50 FR at 9824 (quoting, ''benchmark must be applicable to loans denominated in the same currency as the loans under consideration),'' and *Cold-Rolled Steel From Argentina,* 49 FR at 18019 (quoting, ''the benchmark is selected from interest rates applicable to loans denominated in the same currency as the loan under consideration''). For these reasons, we have not changed our benchmark in this final determination.

Comment 9: Post-1991 GOK Credit Policies: Errors in POSCO's Loan Calculations. Petitioners claim that the Department understated the benefit conferred upon POSCO. First, petitioners state the Department applied the 1997 benchmark to all of POSCO's outstanding loans, which contradicts Department policy of using a fixed rate benchmark for variable rate loans in the year the loan was provided if a variable rate was not extended (19 CFR 351.505(a)(2)(iii) (1998)). Petitioners next state that the Department failed to include the relevant fees in the benchmark interest rate. Citing the Department's regulations, petitioners explain that it is appropriate to compare the effective interest rate on the government-provided loan, with an effective rate benchmark (19 CFR 355.44(8); 19 CFR 351.505(a)(1)(1998)). Because POSCO failed to provide fee information between 1992 and 1996, the Department should, petitioners state, apply the 1997 fee to all previous years; alternatively, the Department should use the higher of the company-specific rate and the national average in each year between 1992 and 1996, as adverse facts available. Finally, petitioners note several minor calculation errors that they state the Department should correct, *i.e.*, a ''negative benefit'' from one loan, which then was deducted from the total benefit provided to POSCO through these loans, and the exclusion of another loan from the Department's calculations.

Department's Position. We agree with the corrections recommended by petitioners. For the fees, we have applied 1997 fee to all years, as suggested by petitioners. *See also* the discussion under *Comment 13,* below.

Comment 10: Post-1991 GOK Credit Policies: Whether POSCO Received Disproportionate Benefits From GOK Regulated Long-Term Loans. According to respondents, the Department's Credit Memo analyzes lending to the basic metals sector as a whole but fails to directly analyze lending to POSCO, the producer of the subject merchandise. This analysis, respondents state, does not take into account the fact that POSCO borrowed very little from commercial banks during this period and its borrowings from the KDB declined and then stopped completely after 1995, so that POSCO's share of long-term loans was at or lower than its share of GDP during this whole period.

Rather than addressing this data, respondents assert that the Department merely relies on the GDP test to demonstrate that loans were provided disproportionately to the steel industry.

According to respondents, the GDP test was not a sufficient measure of disproportionality for the Department (citing *British Steel I,* 879 F. Supp. at 1323), and the Court was also unconvinced by the Department's finding of disproportionality in *Steel Products from Korea.* The Court remanded the case to the Department on the basis that ''Commerce does not sufficiently explain in the *Korean Final Determination* the connection between the government *de facto* program and the steel industries' alleged preferential access to specific sources of credit.'' *British Steel I,* 879 F. Supp at 1325. Respondents note that the Department was upheld by the Court on its finding only after making additional claims that there was ''aggressive targeting'' of lending to POSCO for the construction of POSCO's Kwangyang mill. [4]

Respondents characterize the Department's conclusion of disproportionate use by the steel industry as ''collective guilt,'' whereby even one long-term loan to POSCO, no matter how small, would be countervailable if the steel industry as a whole had received a disproportionately large share of long-term loans. However, respondents state that the appropriate legal standard is whether a domestic subsidy ''is a specific subsidy, in law or in fact, to an enterprise or industry * * * .'' (quoting section 771(5A)(D) of the Act). Because POSCO is ''an enterprise, as defined by the statute, and constitutes ''the industry'' for which the Department must make a determination concerning the existence of a domestic subsidy from the purported directed credit, the Department must find that the subsidy is not specific to POSCO.

Respondents further assert that if the Department has sufficient data to determine whether a company received disproportionate benefits under a program, it must use that data. The fact that other companies' benefits were disproportionate, respondents state, can not be ascribed to a company whose benefits were not. Respondents link this analysis to certain Department methodologies that are also based on company-specific data, including benchmarks, average useful life of depreciable assets calculations, and the calculation of company-specific countervailing duty rates.

According to petitioners, respondents' contention that the Department must examine whether disproportionate benefits have been provided to POSCO is a misinterpretation of the law. In particular, petitioners state that the statute dictates that the Department will find *de facto* specificity when either an enterprise *or* an industry receives disproportionate benefits. The record, petitioners note, shows that the Korean iron and steel industry received a disproportionate amount of a subsidy. *See, e.g.,* Credit Memo at 15–16.

[4] *See Final Results of Redetermination Pursuant to Court Remand, British Steel plc* v. *United States, Consol. Ct. No. 93–0900550–CVD* at 49–50(April 20, 1995) (*Remand); British Steel PLC* v. *United States,* 914 F. Supp. 119, 130 (CIT 1995) (*British Steel II*) (''the nature of the nexus Commerce found in this case (was) purposeful targeting'').

Accordingly, petitioners assert that the Department correctly found that POSCO, as a member of the iron and steel industry, has benefitted from the GOK's direction of credit in the form of access to preferred sources of credit.

In petitioners' view, the fact that POSCO may have received only one loan, as argued by respondents, is irrelevant. When a company receives a subsidy that confers a benefit that is *de facto* specific to its industry, that subsidy is countervailable. According to petitioners, the very purpose of the specificity analysis is to determine whether certain companies benefit when an enterprise or industry receive a *de jure* or *de facto* specific subsidy.

Petitioners also reject respondents assertion that POSCO's long-term loans declined during the 1992–97 period, because this is irrelevant to whether such loans were subsidies, specific to the steel industry, and countervailable as to POSCO. Moreover, petitioners state, the quantification of the subsidy rate for individual companies and the calculation of the amount of the benefit are unrelated to the specificity to a particular industry.

Petitioners further assert that the record in this investigation demonstrates disproportionality and targeting of the steel industry in the post-1992 period, in the same manner that was established in *Steel Products From Korea*. For example, petitioners refer to the lending practices of the Korea Development Bank as a demonstration of the GOK's policy of directed credit and the disproportionate lending to the steel sector. Petitioners also note that the KDB's business plans and lending guidelines, which are negotiated with and subject to the MOFE's final approval, reflect the GOK's policy objectives. Petitioners also cite statements by Korean bankers that the KDB's ''business plans'' serve as lending models for other banks in the Korean market, and that KDB funded projects represent an implicit guarantee for other domestic banks to follow the KDB's lead. Thus, petitioners state, the KDB is an important tool for the GOK's direction of credit in the Korean financial system, and record statistics illustrate that the iron and steel or basic metals sectors received a disproportionate amount of the KDB's lending.

Department's Position: We disagree with respondents' arguments. The fact that POSCO borrowed very little from those sources of credit that were found to be *de facto* specific to the steel industry during the relevant period is irrelevant. The clear language of the statute is that a subsidy is specific when ''an enterprise *or* an industry receives a disproportionately large amount of the subsidy.'' Section 771(5A)(D)(iii)(III) of the Act (emphasis added). Thus, when a subsidy is specific to an industry, even if it is not specific to an enterprise that is part of that industry, the Department will find that subsidy to be countervailable, even if the actual subsidy to the enterprise is very small. While respondents may characterize this approach as ''collective guilt,'' the Department has in numerous cases found countervailable relatively small subsidies to a respondent firm on the basis of disproportionate use by the industry to which the respondent belongs. Indeed, this is not an unusual fact pattern for *de facto* specificity findings, for example under large research and development programs. As such it is not surprising that under respondents' suggested approach, the Department would rarely find a subsidy to be *de facto*, because subsidies under a program are frequently not received on a disproportionate basis by an enterprise. Finally, we agree with petitioners that respondents' attempt to link certain methodologies that are conducted on a company-specific basis to the specificity analysis is also without merit. The quantification of the benefit is simply not germane to the Department's analysis concerning specificity.

Comment 11: Post-1991 GOK Credit Policies: Whether Long-Term Loans From the KDB Were Provided at Favorable Interest Rates. Respondents argue that the Department incorrectly used a domestic won-denominated benchmark to calculate the benefit from POSCO's countervailable foreign currency-denominated loans from domestic sources, including the KDB. Respondents' reasons for the appropriateness of comparing, in accordance with the Department's own policy and regulations, the interest rates on loans under investigation with a benchmark in the same currency, are discussed above under *Comment 4*. Respondents further note that the Department asserted and applied this principle in its Credit Memo when it compared the interest rates on POSCO's foreign securities with the interest rates on POSCO's foreign currency loans from foreign banks in Korea, which were found not to be not controlled or directed by the GOK during the years 1992 and 1997.

Accordingly, respondents assert, the Department should have used the dollar-based interest rates on these loans from foreign banks as benchmarks for POSCO's foreign currency loans from Korean banks. If this were done, the Department would find that there was no benefit to POSCO from the foreign currency loans it received from domestic banks, including the KDB. All of the loans at issue were variable rate loans, based on a spread above a base rate of either LIBOR or the KDB's own rate. This proves, respondents state, that loans from the KDB had become too expensive for POSCO compared to the alternatives.

Petitioners note that they have previously noted the errors in the Department's preliminary finding (that foreign banks in Korea are not subject to the GOK's control and direction and, therefore, the foreign bank interest rates are not an appropriate benchmark). *See Comment 5*, above. Therefore, petitioners state, the Department must not use this rate as a benchmark to determine the benefit from POSCO's access to foreign currency loans. Moreover, petitioners argue that the currency in which the loan is denominated is only one factor that the Department examines in determining an appropriate benchmark. The Department also examines the structure, maturity, principle amount, and availability of funds of the potential benchmark compared to the subsidized loan. Based on all these criteria, the Department should use the corporate bond rate in Korea as the only appropriate available benchmark. Accordingly, the Department should use the domestic corporate bond rate as the benchmark for all long-term financing. In so doing, the Department should find in its final determination that POSCO's foreign currency loans do provide a quantifiable and countervailable benefit.

Department's Position. We agree with respondents that the appropriate benchmark to use to determine the benefit from POSCO's foreign currency-denominated loans from the KDB and domestic commercial banks are the interest rates from unregulated foreign banks in Korea. As discussed under *Comment 8*, above, it is appropriate to compare countervailable foreign currency-denominated loans to a benchmark in the same currency. Accordingly, we have revised our calculations to reflect this change.

Comment 12: Average Useful Life. Petitioners note that, in the preliminary determination, the Department used a 12-year AUL, based on several adjustments to POSCO's calculations for certain special depreciation charges. They assert that the calculated AUL for POSCO remains distorted, however, in a way that cannot be rectified and, therefore, it should not be used in the final determination. Petitioners argue that the Department should use the 15-

year allocation period found in the IRS depreciation tables as the AUL for the final determination.

Petitioners state that POSCO's reported AUL remains distorted because of the company's revaluation of property, plant, and equipment under the Asset Revaluation Law. They argue that the information gathered at verification suggests that POSCO's AUL does not reflect the actual useful life of its assets, because assets which had been fully depreciated several years before remained in service. The Department, therefore, should reject POSCO's reported AUL, in accordance with its practice regarding distorted company-specific data. *See, e.g., Final Affirmative Countervailing Duty Determination: Steel Wire Rod From Germany*, 62 FR 54990, 54991 (Oct. 22, 1997) (*Steel Wire Rod From Germany*).

According to respondents, in applying an AUL for POSCO of 12 years at the preliminary determination, instead of the 9 years calculated by POSCO, the Department misunderstood the nature of the special depreciation claimed by POSCO and, therefore, disallowed it when performing its own AUL calculation. Respondents state that, at verification, POSCO explained and demonstrated the legal basis for the reported salvage value, special depreciation, and 1989 revaluation. Therefore, having addressed the Department's concerns, the Department should use POSCO's calculation of its AUL for allocating the benefits from any non-recurring subsidies.

In response to petitioners' argument, respondents state that any misunderstanding the Department manifested in the preliminary determination concerning POSCO's company-specific AUL data was resolved at verification. Therefore, petitioners' allegation of distortions with the company's data is incorrect. Further, they assert that the company-specific AUL data provided by POSCO permits calculation of an allocation period that is more reflective of any commercial and competitive benefit to POSCO than the arbitrary 15-year IRS period.

Department's Position. We agree with petitioners that it is not appropriate to use POSCO's AUL data to determine the average useful life of the company's assets. During verification, we reviewed POSCO's calculation of the company's average useful life of assets. In examining the company's calculations, we learned that the basis of the rates in the GOK's tax depreciation tables is the Japanese tax depreciation tables which were in existence at the time the GOK determined the useful life of assets in the 1950's. In order to determine whether the tax tables provide a reasonable estimation of POSCO's average useful life of assets, we examined POSCO's asset ledgers. We verified through an examination of POSCO's asset ledgers that the depreciation schedule used by POSCO does not represent the actual useful life of the company's assets. Therefore, we determine that it is not appropriate to use POSCO's AUL data. The available data does not permit the calculation of an accurate company-specific AUL in this investigation. In previous cases, the Department has recognized instances in which the company-specific AUL information cannot be used based on distortions in the data. *See, e.g., Steel Wire Rod from Germany*, 62 FR at 54991. Therefore, for the final determination, we used the 15-year allocation period as reported in the IRS depreciation tables for the allocation of POSCO's non-recurring subsidies.

Comment 13: Long-Term Interest Rate Benchmark. Petitioners state that POSCO failed to provide to the Department information on the fees applied to its bonds prior to 1997, stating that ''the data on the bond issuance fees for the prior years (*i.e.*, 1992–1996) are difficult to retrieve from POSCO's records.'' Petitioners note that the Department's practice is to include all fees associated with debt obligations in order to compare effective interest rates on the subsidized loan or bond with an effective rate benchmark.

Petitioners assert that POSCO did not demonstrate that it was unable to provide the requested information; it merely asserted that providing the information would be ''difficult.'' Accordingly, petitioners argue that the Department should find that POSCO did not act to the best of its ability to provide fee information for the 1992–1996 period and apply adverse facts available. As adverse facts available, petitioners argue that the Department should use the higher of (1) the national average rate or (2) add the percentage fees that POSCO reported in 1997, for each of the bonds issued in the years 1992 through 1996.

Respondents state that in POSCO's submission to the Department regarding the company's bond issuances, POSCO stated that ''the average percentage cost of bond issuance fees is essentially the same for all years.'' Respondents contend that POSCO was clearly suggesting to the Department that adding the 1997 percentage fees to the average effective interest rates on its corporate bonds for each of the prior years was appropriate given that the relatively small bond issuance fees were difficult to obtain for the period 1992 through 1996.

Department's Position. In their submissions to the Department, respondents concede that the bond issuance fees which POSCO paid in 1997, are the appropriate basis for the adjustment to construct a long-term interest rate benchmark for the years 1992 through 1996. Therefore, in constructing the long-term interest rate benchmarks for the final determination, we have added to POSCO's average interest rate on its corporate bonds for each year 1992 through 1996, the bond issuance fees POSCO paid in 1997. *See* ''Benchmarks for Long-term Loans and Discount Rates'' section above for a further discussion of the Department's analysis.

Comment 14: Energy Savings Fund Loans. In their case brief, petitioners argue that while the Department accurately derived the grant equivalent for each of POSCO's Energy Savings Fund Loans (ESF loans), it miscalculated its allocation of the grant benefits by (1) not using the life of the loan as the allocation period, and (2) not starting the allocation of the loans in 1994. Petitioners assert that the Department should correct these errors in the final determination.

Petitioners also state that the Department is correct in countervailing the ESF loans provided to POSCO as the preferred terms of the loans were specific to POSCO and provided a benefit. Further, as policy loans, the ESF loans were monitored and implemented by the GOK. The GOK, in keeping with its policy of maintaining stringent controls on the Korean financial system, controlled the ESF loan program and determined the maximum interest rate for ESF loans. Therefore, the Department should affirm its preliminary determination that the ESF loans are countervailable because (1) the loans provided a benefit to POSCO, and (2) the loans were specific, in that POSCO was the only recipient of the preferential rate.

Respondents note that in the preliminary determination, the Department found that POSCO received two ESF loans and that the interest rates paid by POSCO on these loans were less than the 7.0 percent rate purportedly prescribed by the program. On this basis, the Department determined that these loans to POSCO were specific and, thus, countervailable. However, based on the Department's findings at verification with respect to the maximum interest rate prescribed by the program and the interest rates charged to POSCO, the respondents contend that

the Department should revisit its preliminary determination.

Respondents claim that the record evidence demonstrates that POSCO was treated in accordance with the lending guidelines set by the Korea Energy Management Corporation (KEMC), and in accordance with the commercial lending practices of the Korea Exchange Bank (KEB). Respondents state that while POSCO did receive an interest rate slightly lower than the ceiling amount set by the KEMC, this rate was set based upon the KEB's desire to induce future business from POSCO, and not upon any government-directed preferential basis. Moreover, the respondents state that the record demonstrates that ESF loans were not specifically provided to POSCO, as 80 percent of the ESF loans recommended by the KEMC each year were for small- and medium-size enterprises, not for POSCO or the steel industry. Accordingly, the Department should determine that ESF loans are not specific and thus not countervailable.

Department's Position. In the preliminary determination, we treated the ESF Loans as a separate program because, at that time, we required additional information on the GOK's credit policies during the period 1992 through 1997. As noted above in the ''Direction of Credit'' analysis section, we have determined that the GOK maintained direct control over many sources of long-term credit, including lending from government-owned and/or controlled banks during the years 1992 through 1997. We, therefore, find that all loans, including policy loans, such as the ESF loans, which POSCO received from government-owned and controlled banks are countervailable.

Given that the KEB, the bank from which POSCO received the ESF loans, is a government-owned bank, and the fact that loans under the ESF program are government policy loans, we have determined that it is not appropriate to treat the ESF loans as a separate program. Accordingly, ESF loans are countervailable based upon our analysis of the GOK's direction of credit. *See* ''Direction of Credit'' section above for a further discussion of the Department's analysis. The benefit from the ESF loans is included in the benefit calculation under the ''Direction of Credit'' program. In determining the benefit the loans provided to POSCO during the POI, we used the life of the loan as the allocation period and began the allocation in 1994, for the final calculations.

Comment 15: The GOK's Pre-1992 Investments Constitute Non-Countervailable ''General Infrastructure''. Respondents state that in the preliminary determination, the Department relied exclusively upon its decision in *Steel Products from Korea*, to find that the GOK's investments at Kwangyang Bay during the period 1983–1991, provided countervailable subsidies to POSCO. Respondents note that the final determination of *Steel Products from Korea*, however, was made under the Pre-Uruguay Round law and on a different factual record. Therefore, in order to carry out its statutory mandate, the Department must apply the Post-Uruguay Round law to the facts presented in this instant investigation, and revisit its preliminary determination. Under section 771(5)(B) of the Act, there is now a requirement that a financial contribution must be provided by the government in order for a countervailable subsidy to exist. Respondents further argue that under section 771(5)(D)(iii) of the Act, the term ''financial contribution'' does not include the provision of general infrastructure.

Respondents state that, although the Department's administrative determinations, and the statute itself, are silent as to the definition of ''general infrastructure'' under the new law, the Department's new CVD regulations are instructive. Respondents note that § 351.511(d) of the new regulations defines ''general infrastructure'' as ''infrastructure that is created for the broad societal welfare of a country, region, state, or municipality.'' *See CVD Final Rules*.

Respondents explain that the GOK has established a system of national industrial estates as part of a broad plan for the efficient development of Korea. The Kwangyang Bay industrial estate, one of 200 industrial estates, was established under this national industrial estate program. They contend that when analyzed within the context of this national industrial estate system that is planned, created, and administered under central government control, it becomes obvious that these infrastructure investments constitute ''general infrastructure.'' They assert that the record evidence demonstrates that these infrastructure investments are: (1) Generally available to all industries and companies in Korea, and (2) are provided to aid public welfare by advancing the economic development of Korea. Further, they note, as stated in Article 1 of the Industrial Sites and Development Act, ''The purpose of this Act is to promote the balanced development of national land and sustained industrial progress through the efficient supply of industrial locations and appropriate placement of industry, thereby contributing to the sound development of the national economy.'' Therefore, respondents argue that under the Post-Uruguay Round law and the basic standard for general infrastructure articulated in § 351.511(d) of the new regulations, the GOK's pre-1992 infrastructure investments at Kwangyang Bay constitute non-countervailable ''general infrastructure.''

Petitioners note that the Department in the past has found that the Kwangyang Bay investments do not constitute general infrastructure. *See Preliminary Determination,* 63 FR at 47257, and *Steel Products from Korea,* 58 FR at 37346–47. Petitioners note that in *Steel Products from Korea,* the Department found that because the infrastructure provided to POSCO at the Kwangyang Bay Industrial Estate failed at least two of the three prongs of the infrastructure test, the provision of the infrastructure is specific. Petitioners argue that POSCO remains the primary user of the Kwangyang Bay port facilities, accounting for approximately 40 percent of all incoming and outgoing traffic between 1992 and 1997 and, therefore the Department should affirm its preliminary finding.

Department's Position. Respondents are correct when they assert that general infrastructure is not considered to be a financial contribution under 771(5)(D)(iii) of the Act. However, they are incorrect when they state that the infrastructure development at Kwangyang Bay constitutes general infrastructure. As respondents have acknowledged, the statute is silent as to the definition of ''general infrastructure;'' however, they note that the Department's new CVD regulations are instructive. *See CVD Final Rules,* 63 FR at 65412. While the new CVD regulations are not applicable to this case because this investigation was initiated before the effective date of these regulations, we are referring to them, in part, for guidance as to what constitutes ''general infrastructure.''

The new CVD regulations define general infrastructure as ''infrastructure that is created for the broad societal welfare of a country, region, state or municipality.'' Thus, any infrastructure that does not satisfy this public welfare concept is not general infrastructure and is potentially countervailable. Therefore, the type of infrastructure *per se* is not dispositive of whether the government provision constitutes ''general infrastructure.'' Rather, the key issue is whether the infrastructure is developed for the benefit of the society as a whole. For example, interstate highways, schools, health care facilities, sewage systems, or police protection

would constitute general infrastructure if we found that they were provided for the good of the public and were available to all citizens and members of the public. Infrastructure, such as industrial parks and ports, special purpose roads, and railroad spur lines that do not benefit society as a whole, does not constitute general infrastructure within the meaning of the new CVD regulations, and is countervailable if the infrastructure is provided to a specific enterprise or industry and confers a benefit.

The infrastructure provided at Kwangyang Bay was not provided for the good of the general public; instead, it was built to support POSCO; therefore, it does not constitute ''general infrastructure.'' It is clear from the record that the infrastructure provided for POSCO's benefit at Kwangyang Bay is *de facto* specific, and that POSCO is the dominant user. *See Steel Products From Korea,* 53 FR at 37346–47. Therefore, the infrastructure at Kwangyang Bay is countervailable. Indeed, the ''Explanation of the Final Rules'' (the Preamble) to the new CVD regulations, which respondents assert are instructive on this issue, specifically cites to the infrastructure provided at Kwangyang Bay in *Steel Product From Korea* as an example of industrial parks, roads, rail lines, and ports that do not constitute ''general infrastructure,'' and which are countervailable when provided to a specific enterprise or industry. *See CVD Final Rules,* 63 FR at 65378–79.

Comment 16: GOK's Pre-1992 Investments Are Not Countervailable Because They Are ''Tied' To Kwangyang Bay. Respondents state that, in the preamble to the new regulations, the Department has adopted the practice of attributing subsidies that can be ''tied'' to particular products to those products. *See CVD Final Rules,* 63 FR at 65400. With respect to the instant investigation, respondents argue that the alleged subsidies are ''tied'' to the products that are produced at POSCO's Kwangyang Bay facility. Since the subject merchandise is not produced at the Kwangyang Bay facility, the subject merchandise does not benefit in any way from the allegedly subsidized general infrastructure at Kwangyang Bay. Respondents contend that it would run counter to the Department's practice, and common sense, to attribute countervailable benefits to products that cannot benefit from the alleged subsidies. They also note that under the Department's past practice, where a subsidy is ''tied'' only to non-subject merchandise, that subsidy is not attributed to the merchandise under investigation. *See Final Results of Countervailing Duty Administrative Review: Certain Iron-Metal Castings from India,* 62 FR 32297, 32302 (June 13, 1997).

Respondents argue that the Department was faced with a similar factual situation as the instant case in the *Final Affirmative Countervailing Duty Determination: Iron Ore Pellets from Brazil,* (*see,* 51 FR 21961, 21966 (June 17, 1986) (*Iron Ore Pellets from Brazil*)). In that case, petitioners argued that infrastructure and regional tax benefits provided to the Carajas mine project should be attributed to the respondent even though respondent did not produce (or intend to produce) subject merchandise at the Carajas mine project. The Department rejected petitioners' argument finding that the infrastructure and tax benefits were, by definition, only for the Carajas mine project. Because the respondent did not produce subject merchandise at the Carajas mine project, the Department did not consider this program countervailable with respect to subject merchandise.

Respondents contend that, rather than directly addressing the fact that the alleged subsidies are tied to Kwangyang Bay, the Department has instead mis-cited to its earlier finding in *Steel Products from Korea.* They note that in the preliminary determination of the instant investigation the Department claims that the alleged subsidy in *Steel Products from Korea* was treated as ''untied.'' However, respondents state that nowhere in *Steel Products from Korea* does it state that the alleged subsidy was being treated as ''untied.'' In fact, respondents state that the issue of whether the subsidies were tied or untied never arose in that investigation because the subject merchandise was produced at both of POSCO's steel facilities and, therefore, it was unnecessary for the Department to characterize the alleged subsidy as either ''tied'' or ''untied.'' They argue that in mischaracterizing its finding in *Steel Products from Korea,* the Department is attempting to bootstrap that finding into the instant investigation.

In their rebuttal brief, petitioners reject the respondents' argument that the Department is attempting to bootstrap its finding in *Steel Products from Korea* into the instant investigation. In *Steel Products from Korea,* petitioners state that the Department, by dividing the benefit attributable to the POI by POSCO's total sales, clearly treated the grants as untied benefits. *See Steel Products from Korea,* 58 FR at 37347. Therefore, petitioners argue the Department should continue to find Kwangyang Bay infrastructure investments ''untied'' in the final determination.

Department's Position. First, we note that the attribution, or ''tying,'' of a subsidy to a particular product or market is a long-standing policy of the Department, not one recently adopted in the new CVD regulations. Also, it has been the practice of the Department to attribute the benefit conferred from an ''untied'' domestic subsidy to the recipient's total sales. (This is how the subsidy rate was calculated for the Kwangyang Bay subsidy in *Steel Products from Korea.*) By contrast, if the subsidy was, for example, tied to export performance, then the Department would only attribute the benefit of the subsidy to the recipient's export sales.

Respondents' argument that the infrastructure subsidy provided to POSCO is tied to only certain of POSCO's production is flawed. Part of respondents' argument rests upon the premise that a regional subsidy can be tied to only the subsidy recipient's production in that region. If this allocation methodology were adopted and the Department tied regional subsidies to production in a particular region, the Department would essentially be forced to calculate factory-specific subsidy rates. In addition, if such a methodology were applied, then foreign companies could easily escape collection of countervailing duties by selling the production of a subsidized region domestically, while exporting from a facility in an unsubsidized region. This allocation methodology has been clearly rejected by the Department. *See, e.g., Final Negative Countervailing Duty Determination: Fresh Atlantic Salmon from Chile,* 63 FR 31437, 31445–46 (June 9, 1998) (stating, ''[T]he Department does not tie the benefits of federally provided regional programs to the product produced in the specified regions.'') Indeed, the Department has explicitly rejected this argument in the new CVD regulations cited by respondents in support of their argument on this issue. *See CVD Final Rules,* 63 FR at 65404. The infrastructure development at Kwangyang Bay provided a benefit to POSCO and, as discussed further below, the benefit from the subsidy is untied and is attributed to POSCO's total sales.

Respondents' argument is also flawed because respondents have misinterpreted the attribution methodology. Attribution of the benefit of a subsidy is based upon the information available at the time of bestowal. The concept of ''tying'' a

subsidy at the time of bestowal can be traced back to *Certain Steel Products from Belgium. See Final Affirmative Countervailing Duty Determination: Certain Steel Products from Belgium,* 47 FR 39304, 39317 (September 7, 1982). At the time of bestowal of the subsidy conferred by the Kwangyang Bay infrastructure, the benefit of the subsidy was to POSCO, not to a specific product line. Thus, the benefit cannot be tied to any specific product, but instead, is an untied benefit provided by the GOK to POSCO. *See Final Results of Redetermination Pursuant to Court Remand* (April 20, 1995) *in British Steel PLC,* v. *United States* Slip Op. 95–17 (February 9, 1995) at 35 and 36. Once it is determined that an untied subsidy has been provided to a firm, the Department will attribute that untied subsidy to the firm's total sales, even if the products produced by the firm differ significantly from the time when the subsidy was provided. The Department will not examine whether product lines have been expanded or terminated since the time of the subsidy's bestowal.

Finally, we note that respondents' reliance on *Iron Ore Pellets from Brazil* is misplaced. First, in both *Iron Ore Pellets from Brazil* and in the Kwangyang Bay subsidy at issue in this investigation, the determination of attribution of a subsidy was made at the time of bestowal, which is consistent with Department policy. Thus, in both cases, the Department applied the same standard in determining whether a subsidy was tied or untied. Second, the subsidy alleged in *Iron Ore Pellets from Brazil* was alleged to have been provided to an input into the subject merchandise, an issue distinct from the issue in the instant investigation. We further note that the treatment of input subsidies at issue in *Iron Ore Pellets from Brazil* has changed since 1986. *See e.g.,* § 351.525(b)(6)(iv) of the *CVD Final Rules and Final Results of Countervailing Duty Administrative Review: Industrial Phosphoric Acid from Israel,* 63 FR at 13626 (March 20, 1998). Thus, if the identical subsidy issue cited in *Iron Ore Pellets from Brazil* were before the Department today, it is uncertain whether the same decision would be made in 1999 as was made in 1986.

Comment 17: The Department Erred In Treating The Alleged Benefit To POSCO As A Grant. Respondents note that, in the preliminary determination, the Department determined that the GOK's costs of constructing the infrastructure at Kwangyang Bay constituted grants to POSCO. In treating these costs as grants to POSCO, respondents argue, the Department has ignored the fact that the GOK owns these facilities and charges POSCO the normal user fees for the services provided. They assert that it is erroneous as a matter of law and contrary to Department precedent to countervail as grants infrastructure that the respondent does not own and where normal user fees are paid to use the infrastructure services. (*Citing,* sections 771(5)(D)(i) and (E)(iv) of the Act, and the *Final Affirmative Countervailing Duty Determination: Industrial Phosphoric Acid from Israel,* 52 FR 25447, 25451 (July 7, 1987) (*Industrial Phosphoric Acid from Israel*).)

Respondents contend that rather than treating the infrastructure investments as grants, the Department should have analyzed the issue as one of whether the infrastructure services were provided "for less than adequate remuneration," citing section 771(5)(E)(iv) of the Act. They note that adequacy of remuneration is the new statutory provision for determining whether the government's provision of a good or service constitutes a countervailable subsidy. According to section 771(5)(E) of the Act, the adequacy of remuneration with respect to a government's provision of a good or service shall be determined in relation to prevailing market conditions (*i.e.,* price, quality, availability, marketability, transportation, and other conditions of purchase or sale) for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review.

Respondents state that the Department addressed a similar issue in *Industrial Phosphoric Acid from Israel.* At issue in that case were certain rail lines built (and owned) by the Israeli government for "the almost exclusive use of a few chemical companies. *See Industrial Phosphoric Acid from Israel,* 52 FR at 25447. The Department recognized that any benefit to be derived from the infrastructure was related to the use of that infrastructure, and since the respondent in question paid for such use, the question was whether the payments for such use were higher or lower than those paid by other users for similar services. The Department determined that the rates paid were not preferential and, therefore, that no benefit or subsidy existed.

Respondents also state that in *Certain Steel Products from Brazil,* the Department applied a similar analysis. In that case, the Department determined that "The fees charged . . . reflected standard fees applied to all users of port facilities, thus, they are non-specific." *Final Affirmative Countervailing Duty Determination: Certain Steel Products from Brazil,* 58 FR at 37295 (July 9, 1993) (*Certain Steel Products from Brazil*), and *Final Affirmative Countervailing Duty Determination: Carbon Steel Wire Rod from Trinidad and Tobago,* 49 FR 480, 486 (Jan. 4, 1984) (*Carbon Steel Wire Rod from Trinidad and Tobago*).

Respondents argue, in the alternative, that if the Department continues to treat these benefits as "grants," then these grants must be pro-rated based upon the actual benefit to POSCO. They note that the GOK provided information on the use of these facilities and, where possible, POSCO's portion of the total usage during the POI. Since POSCO is not the only company that benefits from the infrastructure investments at Kwangyang Bay, the Department cannot simply attribute the entire benefit from the GOK's infrastructure investments to POSCO. The benefit found must be allocated proportionate to POSCO's use of these facilities at Kwangyang Bay during the POI.

In their rebuttal brief, petitioners state that respondents are blurring the distinction between the original provision of specific infrastructure investments and the adequacy of remuneration of fees charged for the future use of the infrastructure. In addition, petitioners argue that the investment grants should not be "pro-rated" based on POSCO's use of the facilities, because POSCO is the dominant beneficiary. Petitioners note that in *Steel Products from Korea,* the Department determined that Kwangyang Bay was specifically designed for POSCO. *See Steel Products from Korea,* 58 FR at 37347.

Department's Position. The Kwangyang Bay infrastructure subsidy under investigation in *Steel Products from Korea* and in this investigation is not the fee charged by the government for use of rail and port facilities, as was the issue in the cases cited by respondents. Indeed, we found an alleged program providing "preferential" port charges to the Korean steel industry not to exist in *Steel Products from Korea.* Therefore, the cases cited by respondents are not relevant to the treatment of the Kwangyang Bay subsidy.

The benefit under this subsidy program to POSCO was the creation of Kwangyang Bay to support POSCO's construction of its second integrated steel mill. The building of this infrastructure to support POSCO's expansion, which was planned years before POSCO commenced production at Kwangyang Bay, was the benefit

countervailed in *Steel Products from Korea* and in this investigation. Thus, the benefit conferred by this subsidy program to POSCO, and the benefit that must be measured, is the construction of these facilities, rather than the fees charged to POSCO for their use. Therefore, it is reasonable to measure the benefit from this program by treating the costs of constructing the Kwangyang Bay facilities for POSCO as nonrecurring grants.

In addition, we also disagree with respondents' argument that we pro-rate this subsidy between POSCO and to other companies currently located at Kwangyang Bay. Again, respondents have misinterpreted the nature of the benefit. The infrastructure at Kwangyang Bay was built to support POSCO's expansion and its creation of its second integrated steel mill. Therefore, the program is a subsidy provided to POSCO, and the benefit from the program is properly attributed to POSCO.

Comment 18: POSCO'S Exemption From Port Facility Fees. Respondents note that in the preliminary determination, the Department determined that POSCO's exemption from paying port facility fees provides a countervailable subsidy to POSCO. In reaching this conclusion, respondents argue that the Department incorrectly determined that: (1) A ''financial contribution'' had been provided to POSCO because it was exempt from paying port facility fees that it otherwise would have to pay; and (2) that the subsidy was ''specific'' because POSCO was the only company exempt from paying port facility fees during the POI. Respondents also argue that in reaching this preliminary determination, the Department failed to address section 771(5)(B) of the Act, which requires that a government action must confer a benefit in order to be considered a countervailable subsidy.

As to the ''financial contribution'' requirement, the respondents argue that but for the existence of a law (*i.e.,* Article 17–1 of the Harbor Act) compelling POSCO to cede title to the port facilities it built to the GOK, the issue of these fees would not arise because POSCO would simply own the facilities outright (and not have to pay fees to itself). Because POSCO ceded title to the port facilities to the GOK, the Department claims that a benefit arises because POSCO does not currently pay fees to use the facilities it built. Respondents, however, argue that the GOK is merely recognizing POSCO's costs and the statutorily-authorized payment for construction costs incurred by a private party. Therefore, according to respondents, the port fee exemption does not constitute a ''financial contribution'' under the new law.

Moreover, respondents state that the Department verified that port fee exemptions are not limited to companies at Kwangyang Bay. Rather, this program is commonly used by the GOK with respect to all ports in Korea as a means of encouraging private companies to raise the capital to develop port facilities throughout the country. Respondents also argue that this verified information demonstrates that fee exemptions, *i.e.,* free usage, was not specific to POSCO because a variety of companies which built and reverted port facilities to the GOK under Article 17(1) of the Harbor Act received comparable exemptions. Therefore, the Department should find that POSCO's exemption from port fees does not constitute a countervailable subsidy.

Petitioners argue that the benefit conferred upon POSCO is the fact that at the end of its fee exemption and fee collection period, POSCO will have paid nothing to use the facilities which furthered the company's business interests. Moreover, petitioners argue that more than half of the fee exemptions provided at Kwangyang Bay were conferred upon POSCO. Petitioners assert that under the Department's *de facto* specificity analysis, POSCO has been the predominant beneficiary of fee exemptions at Kwangyang Bay.

Department's Position. We agree with respondents that the port fee exemption is not specific to POSCO because POSCO was not the only company exempt from paying port facility fees during the POI. At verification, we obtained information which indicated that port fee exemptions are not limited to companies at Kwangyang Bay. Moreover, the verified information demonstrates that fee exemptions were not specific to POSCO as a large number of companies from a diverse and broad range of industries built and transferred port facilities to the GOK under Article 17(1) of the Harbor Act received comparable exemptions. For a further discussion of the Department's analysis see the section ''Port Facilities Fees'' above.

Comment 19: Port Facility Fees Collected by POSCO. Petitioners state that in the preliminary determination the Department failed to countervail port facility fees which POSCO collected from other users during the POI. Petitioners state that in addition to the revenues foregone by the GOK for POSCO's free use of the facilities, the GOK authorized POSCO to collect fees from other users. They note that the Department confirmed at verification, the amount of fees which POSCO collected from other users during the POI. Petitioners argue that as with the exemption of port fees, POSCO has received a financial contribution that is recurring and specific to POSCO since no other company is eligible for this benefit with regard to these facilities. Therefore, in the final determination, the Department should countervail fees collected by POSCO.

Respondents state that Article 17(3) of the Harbor Act and the Regulations on 20-year Repayment of Investment provide that companies shall be reimbursed for their investments through the temporary exemption from paying port facility fees and the right to collect fees from other users. They assert that the fees collected from other users simply serve as an additional form of reimbursement permitted by the GOK until POSCO recoups its investment costs. They stress that this option is available to all companies that revert port facilities to the GOK. Moreover, as argued in POSCO's case brief, these fees do not constitute a financial contribution or benefit to POSCO.

Department's Position. The Department disagrees with petitioners and finds that the fees which POSCO collected from other users of the infrastructure facilities which the company build are not countervailable. For the same reasons as outlined above in the *Department's Position* to *Comment 18,* we determine that POSCO's ability to collect fees from other users is not specific under section 771(5A)(D)(iii) of the Act.

At verification, we learned that Article 17(3) of the Harbor Act and the companion Presidential Decree provide that companies shall be reimbursed for their investments through the temporary exemption from paying port facility fees and the right to collect fees from other users. All companies which build infrastructure that has to be transferred to the GOK receive free usage of the infrastructure and the ability to collect user fees from other companies which use the facilities, until the investment cost of the facility is recovered. The fees which POSCO collected from other users simply serve as an additional form of reimbursement permitted by the GOK until POSCO recoups its investment costs. This option is available to all companies that transfer port facilities to the GOK. Because, POSCO was only one of a large number of companies from a diverse and broad range of industries which was authorized to collect users fees, we determine that this program is not specific under section 771(5A)(D)(iii) of the Act. *See* the ''Port

Facilities Fees'' section above for a further discussion of the Department's analysis.

Comment 20: Adjustment of the Gross Countervailable Subsidy from the Investment Tax Credits. Respondents do not dispute the Department's preliminary finding that certain investment tax credits received by POSCO conferred countervailable subsidies during the POI, because the level of benefits received was contingent upon the use of domestic goods instead of imported goods. However, as a result of verification, the respondents argue that the Department needs to adjust the gross subsidy amounts calculated for certain years. In the preliminary determination, the Department noted that POSCO deducted from its tax return for fiscal year 1996 (filed during the POI in 1997) tax credits earned in the years 1992 through 1995, which had been carried forward and used in fiscal year 1996. As discussed in the preliminary determination, the Department ''calculated the additional amount of tax credits received by the company because it earned tax credits of 10 percent on investments in domestically-produced facilities' rather than at the regular rates for the respective tax credits. The Department then calculated the portion of the total tax credits earned in each year attributable to the 10 percent rate and applied that percentage to the total of all tax credits claimed for that year during fiscal year 1996. On this basis, the Department calculated the countervailable subsidy from these investment tax credits for the POI.

Respondents presume that the Department chose this methodology for calculating the amount of the countervailable tax credits attributable to fiscal year 1996, because, although it knew the total amount of the tax credits from each year that were used in fiscal year 1996, it could not determine for every year which tax credits were being used. Respondents note that this problem was resolved at verification when POSCO provided a detailed breakdown, by TERCL article, of the amounts claimed for each tax credit in fiscal year 1996. With this verified information, they state, the Department need only determine the amount to be allocated to fiscal year 1996, for one tax credit earned in 1992, Article 26, and for one tax credit earned in 1995, Article 25. Respondents propose that in calculating the benefit conferred by the investment tax credits, the Department should use the subsidy amounts calculated in the Department's August 28, 1998 Calculation Memo for Article 71 in 1993, Articles 10(1)(a), 25, 26 and 27 in 1994, and Articles 10(1)(a), 10(1)(b) and 26 in 1995, in conjunction with the allocable amounts for Article 26 in 1992 and Article 25 in 1995, to calculate the total gross subsidy from investment tax credits which POSCO used in its fiscal year 1996 tax return.

Department's Position. We agree that, as a result of the information obtained at verification with respect to those specific investment tax credits which POSCO utilized in its 1996 tax return, the calculations for determining the benefit conferred by the investment tax credits during the POI should be revised. However, we disagree with the respondents' proposed methodology for calculating the benefit. Respondents have not demonstrated to the Department that their proposed methodology would more accurately calculate the benefit POSCO received through the use of investment tax credits, than the methodology employed by the Department in the preliminary determination.

As discussed above in the section ''Investment Tax Credits,'' to calculate the benefit from this tax credit program, we examined the amount of tax credits POSCO deducted from its taxes payable for the 1996 fiscal year. POSCO deducted from its 1996 taxes payable all remaining credits earned in the years 1992, 1993, 1994, and a portion of credits earned in 1995. With this information, we first determined the amount of the tax credits claimed which were based upon the investment in domestically-produced facilities. We then calculated the additional amount of tax credits received by the company because it earned tax credits of 10 percent on investments in domestically-produced facilities instead of a three or five percent tax credit. Next, we calculated the amount of the tax savings earned through the use of these tax credits during the POI and divided that amount by POSCO's total sales for the POI. On this basis, we calculated the countervailable subsidy from these investment tax credits for the POI. *See* ''Investment Tax Credits'' section above for a further discussion of the Department's analysis.

Comment 21: Deduction of the Amount of the STRD Tax POSCO Paid On Certain Investment Tax Credits. Respondents explain that, pursuant to the Special Tax for Rural Development (STRD), certain investment tax credits are subject to a 20 percent surtax on the amount of tax exemptions claimed from the corporation income tax as a result of receiving tax credits. Respondents state that POSCO provided copies of its tax schedule from its fiscal year 1996 income tax return calculating the amount of the surtax and a copy of the law governing the STRD tax. As demonstrated in POSCO's calculation of its applicable STRD tax for fiscal year 1996, respondents state the total amount of tax credits claimed under TERCL Articles 25, 26, 27, and 88 in that year were subject to the STRD tax at the rate of 20 percent.

Respondents note that according to section 771(6) of the Act, the Department:

> may subtract from the gross countervailable subsidy the amount of—(A) any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy, * * *

Thus, respondents argue, section 771(6) of the Act, provides the legal basis for determining the amount of the net countervailable subsidy arising from the investment tax credits used by POSCO in fiscal year 1996.

Respondents state that POSCO was required to pay the 20 percent STRD tax in conjunction with its receipt of investment tax credits under TERCL Articles 25, 26 and 27. In the absence of these tax credits (as well as the tax credit under TERCL Article 88, which respondents claim the Department found to be not countervailable), POSCO would not have had to pay any STRD tax. Therefore, consistent with section 771(6), POSCO's receipt of the benefit from these tax credits was contingent upon its payment of the STRD tax. They argue that the obligation to pay the STRD tax is not a situation where there is any uncertainty as to the amount of the STRD tax due or the net benefit to POSCO from the tax credits. The payment of the STRD tax is not a secondary consequence of a tax program, where the effects ''are too uncertain to be a necessary part of a subsidy calculation.'' (*Quoting, Michelin Tire Corp.* v. *United States,* 6 CIT 320, 328 (1983), vacated on other grounds, 9 CIT 38 (1985) (*Michelin Tire*).) They assert that the full tax consequences of using these investment tax credits are direct, known, and quantifiable at the time the tax credits are used. Respondents further note that a company can claim the tax credits only insofar as it has taxable income and, when it claims certain tax credits, there is a clear legal obligation to pay the STRD tax at a fixed percentage rate.

Petitioners argue that respondents' suggestion that the amount of STRD tax paid qualifies as a statutory offset to the investment tax credit benefits should be rejected by the Department. Petitioners assert that this type of ''after-the-fact'' tax does not qualify as a permissible

offset. They note that the statute specifically defines the type of offsets that can be subtracted from a countervailable benefit, (*i.e.,* application fee, deposit, or similar payment in order to qualify for, or receive the benefit). However, they note, the STRD is not mandatory prior to receipt of the subsidy, but rather, is a surtax levied post-receipt of the benefit.

Petitioners argue that respondents are asking the Department to examine the secondary tax effects of subsidies. Petitioners note that the Court has affirmed the Department's policy to disregard any secondary effect of a direct subsidy on a company'' financial performance. (*Citing, Saarstahl AG* v. *United States,* 78F.3d 1539, 1543 (Fed. Cir. 1996); *Final Results and Partial Rescission of Countervailing Duty Administrative Review: Certain Iron-Metal Castings from India,* 63 FR 64050, 64054 (Nov. 18, 1998).) Therefore, petitioners argue that the Department must countervail in full the investment tax credit benefits.

Department's Position. We agree with petitioners. Not only is it the Department's long-standing policy to disregard secondary tax consequences of countervailable benefits, but the statute is also clear with regard to permissible offsets to subsidies. Section 771(6) of the Act provides an exclusive list of offsets which may be deducted from the amount of a gross subsidy, and a tax which is payable upon receipt of a benefit is not included in that list. For purposes of determining the net subsidy, the Department, pursuant to section 771(6), may subtract from the gross countervailable subsidy the amount of:

(A) Any application fee, deposit, or similar payment paid in order to qualify for, or to receive, the benefit of the countervailable subsidy,

(B) Any loss in the value of the countervailable subsidy resulting from its deferred receipt, if the deferral is mandated by Government order, and

(C) Export taxes, duties, or other charges levied on the export of merchandise to the United States specifically intended to offset the countervailable subsidy received.

In *Michelin Tire,* the Court upheld the Department's policy of disregarding secondary tax consequences, rejecting a claim that after-tax considerations should be included in the calculation of a subsidy. In its decision the Court stated that: ''(T)hese effects (secondary tax effects) are too uncertain to be considered a necessary part of a subsidy calculation in these circumstances.'' *See Michelin Tire,* 6 CIT 328. We note that the receipt of the investment tax credits are not contingent upon the payment of the STRD tax. The payment of STRD tax is a secondary tax effect. Thus, the payment of the STRD does not qualify as an offset which may be deducted from the amount of the gross subsidy. Therefore, based on the statute, case precedent, and the Department's policy to disregard secondary tax effects on subsidies, we have not altered our calculation of the countervailable subsidy which POSCO received from the investment tax credits during the POI.

Comment 22: Requested Load Adjustment Electricity Discount Program. Respondents note that, in the preliminary determination, the Department determined that discounts under the Requested Load Adjustment (RLA) program were countervailable because they were distributed to a limited number of customers during the POI. The Department stated, however, that it was going to further investigate the *de facto* specificity of this program at verification. Based upon the information that was obtained at verification, respondents argue, it is now clear that the RLA program is not *de facto* specific. Accordingly, in the final determination the Department should determine that the RLA program is not countervailable.

According to respondents, it is clear that Korea Electric Power Company (KEPCO) does not limit the availability of the RLA program. The Department learned at verification that some companies volunteer to participate in the RLA program, while KEPCO calls upon other companies to solicit their cooperation. In soliciting participants, KEPCO does not have a preference for companies in any particular industry sector as KEPCO contracts with any company willing to participate in the RLA program. The only limitations placed on availability arise from the threshold requirement that customers have a contract demand of 5,000 KW or more.

Second, respondents state that the verified record evidence demonstrates that during the 1995–1997 period a wide variety of users from various industries and all regions in Korea received benefits under the RLA program. While the number of recipients decreased significantly from 1996 to 1997, KEPCO officials explained that this was because KEPCO foresaw an increased ability to meet demand for electricity in 1997 and, therefore, decreased its targeted adjustment capacity, reducing the number of RLA participants needed. In 1997, 44 customers from various industries including textiles, electronics, cement and steel received benefits under the RLA during the POI.

Respondents state that another reason for the reduction in the number of participants was KEPCO's policy for reducing the administrative burdens of the RLA program by seeking out larger companies to participate in the RLA program so it can reach its targeted adjustment capacity with fewer participants. This policy, respondents explain, is why it may appear that a disproportionate number of the users are from the steel industry. In comparison to many other industries, steel companies require a large amount of electricity to power their machinery, plants, and furnaces. Since KEPCO is seeking to reduce the administrative burden of this program, it is only logical that they are going to seek out large electricity-intensive companies.

Accordingly, on the basis of the verified record evidence, respondents contend, the Department should determine that the RLA program is not *de facto* specific to POSCO or the steel industry, and thus not countervailable.

Petitioners state that of the 44 companies which received RLA discounts in 1997, a disproportionate amount of those benefits went to the iron and steel manufacturers. The second most represented industry which received discounts was the textile industry. Petitioners question why other ''electricity-intensive companies'' were not included in the list of the 44 companies which received discounts. Petitioners also note that KEPCO was unable to indicate what percentage of the 44 discount recipients were volunteers and what percentage was composed of selected participants. Petitioners assert that KEPCO must use discretion in allocating RLA discounts because of the limited number of users and the disproportionate use of the program by iron and steel manufacturers. Therefore, petitioners assert that the Department should uphold its preliminary determination and find that the RLA program is a *de facto* specific subsidy.

Department's Position. We disagree with the respondents and continue to find that the Request Load Adjustment electricity discount program is countervailable. We stated in the preliminary determination that, given the information the GOK provided on the record regarding KEPCO's increased capacity to supply electricity and the resulting decrease in KEPCO's need to enter into a large number of RLA contracts during the POI, we would further investigate the *de facto* specificity of this discount program at verification. We stated that it was the

GOK's responsibility to demonstrate to the Department on what basis KEPCO chose the 44 customers with which it entered into the RLA contracts during the POI.

However, at verification the GOK failed to demonstrate to the Department a systematic procedure through which KEPCO selects those customers with which it enters into RLA contracts. The GOK simply stated that KEPCO enters into contracts with those companies which volunteer for the discount program. If KEPCO does not reach its targeted adjustment capacity with those companies which volunteered for the program, then KEPCO will solicit the participation of large companies. We note that KEPCO was unable to provide to the Department the percentage of 1997 RLA recipients which volunteered for the program and the percentage of those recipients which were persuaded to cooperate in the program. Therefore, we continue to find that the discounts provided under the RLA were distributed to a limited number of users. Given the data with respect to the small number of companies which received RLA electricity discounts during the POI, we determine that the RLA program is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act. *See* "Requested Load Adjustment Program" section above for the Department's complete analysis.

Verification. In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with the government and company officials, and examining relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the CRU of the Department of Commerce (Room B–099).

Summary

In accordance with section 705(a)(3) of the Act, we determine that the total estimated net countervailable subsidy rate is 0.65 percent *ad valorem* which is *de minimis.* Therefore, we determine that no countervailable subsidies are being provided to the production or exportation of stainless steel plate in coils in Korea. Pursuant to section 705(c)(2) of the Act, this investigation will be terminated upon publication of the final negative determination in the **Federal Register**.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7529 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–791–806]

Final Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from South Africa

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Robert Copyak, Kathleen Lockard or Dana Mermelstein, Office of CVD/AD Enforcement VI, Group II, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–2786.

Final Determination

The Department of Commerce (the Department) determines that countervailable subsidies are being provided to producers and exporters of stainless steel plate in coils from South Africa. For information on the estimated countervailing duty rates, please see the "Suspension of Liquidation" section of this notice.

Petitioners

The petition in this investigation was filed by Allegheny Ludlum Corporation, Armco, Inc., J&L Specialty Steel, Inc., Lukens, Inc., and United Steelworkers of America, AFL-CIO/CLC, Butler Armco Independent Union, and Zanesville Armco Independent Organization (the petitioners).

Case History

Since the publication of our preliminary determination in this investigation on September 9, 1998 (63 FR 47263), the following events have occurred.

We conducted verification of the countervailing duty questionnaire responses from November 2 through November 13, 1998. On January 2, 1999, we terminated the suspension of liquidation of all entries of the subject merchandise entered or withdrawn from warehouse for consumption on or after that date, pursuant to section 703(d) of the Act. *See* the "Suspension of Liquidation" section of this notice. Because the final determination of this countervailing duty investigation was aligned with the final antidumping duty determination (*see* 63 FR 47263), and the final antidumping duty determination was postponed, the Department extended the final determination of the countervailing duty investigation until no later than March 19, 1999 (*see Countervailing Duty Investigations of Stainless Steel Plate in Coils from Belgium, Italy, the Republic of Korea, and the Republic of South Africa: Notice of Extension of Time Limit for Final Determinations*, 64 FR 2195 (January 13, 1999)). Petitioners, the Government of South Africa, and Columbus Stainless (the operating unit of Columbus Joint Venture) filed case briefs on January 11, 1999, and rebuttal briefs on January 19, 1999. A public hearing was held on January 21, 1999.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act effective January 1, 1995 (the Act). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations codified at 19 CFR 351 (1998).

Scope of Investigation

For purposes of this investigation, the product covered is certain stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further

processed (e.g., cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the *Harmonized Tariff Schedule of the United States* (HTS) at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Injury Test

Because South Africa is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (ITC) is required to determine whether imports of the subject merchandise from South Africa materially injure, or threaten material injury to, a U.S. industry. On May 28, 1998, the ITC published its preliminary determination finding 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 South Africa of the subject merchandise (*See Certain Stainless Steel Plate in Coils From Belgium, Canada, Italy, Korea, South Africa, and Taiwan*, 63 FR 29251).

Period of Investigation

The period for which we are measuring subsidies (the POI) is calendar year 1997.

Company History

In 1988, Samancor Limited (Samancor) and Highveld Steel and Vanadium (Highveld) formed the Columbus Joint Venture (CJV) to explore the possibility of establishing a 500,000-ton capacity, stainless steel facility in South Africa. In 1991, the partners examined the option of building a plant in South Africa and made a proposal to the Industrial Development Corporation of South Africa (IDC) that it take a capital stake in the joint venture. The IDC is a state-owned corporation, established in 1940 to further the economic development goals of the Government of South Africa (GOSA). The partners approached the IDC because it provides equity investments, and facilitates and guarantees financing for projects which contribute to the GOSA's economic development objectives. After being approached by the partners, the IDC performed a detailed analysis of the 1991 proposal and decided that it would participate in the investment subject to certain conditions: That the project be based on the expansion of an existing facility rather than on the construction of a new plant; and, that its implementation be delayed pending the establishment of a program providing tax benefits for capital investments.

To meet the IDC's condition, in October 1991, Samancor and Highveld purchased an existing stainless steel facility, the Middelburg Steel & Alloys (MS&A) company. In 1992, the partners again approached the IDC. Based on a revised proposal, the IDC conducted a detailed feasibility study to analyze the prospects for the venture. Based on the feasibility study, the IDC made a counterproposal which was accepted by the partners. (The counterproposal is detailed in the proprietary feasibility study. In general, it addresses the technical financial details of the IDC's participation in the CJV.) Samancor, Highveld, and the IDC entered into a new partnership agreement which is the basis for the current structure of the CJV. Effective January 1, 1993, the IDC became a one-third and equal partner in the venture.

The implementation of the CJV expansion project began in 1993 and was undertaken over the course of two and one-half years. The expansion was completed in 1995. Columbus Stainless, the operating unit of the CJV, produces a range of stainless steel products including subject merchandise.

Subsidies Valuation Information

Discount Rates: In identifying a discount rate, the Department's options are, in the following order of preference: (1) The cost of long-term fixed-rate debt of the firm in question, excluding loans found to confer a countervailable subsidy; (2) the average cost of long-term fixed-rate debt in the country in question; and (3) a rate which we consider to be most appropriate. *See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comments* 54 FR 23336, 23384 (May 31, 1989) (*1989 Proposed Regulations*). With respect to the Department's first preference, the only loans which Columbus had outstanding during the relevant period were loans guaranteed by the IDC/Impofin. *See* ''IDC/Impofin Loan Guarantees'' section below. With respect to the average cost of long-term fixed-rate debt in South Africa, because we were unable to obtain information about such debt for the purposes of the preliminary determination, we used the long-term government bond rate. We considered this rate to be the most appropriate rate as it was the only long-term fixed interest rate for which we had information during the relevant period. In the preliminary determination, we stated that we would seek a rate for the final determination that better reflects an average long-term commercial fixed interest rate in South Africa. Although we discussed commercial interest rates at length during our meetings with the IDC, the South African Reserve Bank, and commercial bankers, no information was provided that would enable us to determine a commercial long-term interest rate that could be used as the discount rate. As such, because the government bond rate does not represent a commercial rate, for purposes of this final determination, we have constructed a discount rate which we believe is more appropriate. For each of the years 1993 through 1997, we have averaged the government bond rate as reported by respondents with the ''Lending Rate'' reported in *International Financial Statistics*, December 1998, published by the International Monetary Fund. This publication indicates that the ''Lending Rate'' represents financing that ''meets the short- and medium-term needs of the private sector.'' By averaging these two rates, we believe that we have identified a rate more appropriate than the rate used for the purposes of the preliminary determination, a rate which includes the necessary characteristics of both long-term borrowing and commercially-available interest rates. *See Department's Position* on *Comment 9* below.

Allocation Period: In the past, the Department has relied upon information from the U.S. Internal Revenue Service on the industry-specific average useful life of assets (AUL) in determining the allocation period for non-recurring subsidies. *See General Issues Appendix (GIA)*, 58 FR 37225, 37227, appended to the *Final Countervailing Duty Determination; Certain Steel Products*

from Austria, et al., 58 FR 37217 (July 9, 1993). However, in *British Steel plc* v. *United States*, 879 F. Supp. 1254 (CIT 1995) (*British Steel I*), the U.S. Court of International Trade (the Court) ruled against this allocation methodology. In accordance with the Court's remand order, the Department calculated a company-specific allocation period for non-recurring subsidies based on the AUL of non-renewable physical assets. This remand determination was affirmed by the Court on June 4, 1996. *See British Steel plc* v. *United States*, 929 F. Supp. 426, 439 (CIT 1996) (*British Steel II*). In accordance with our new practice following *British Steel II*, we intend to determine the allocation period for non-recurring subsidies using company-specific AUL data where reasonable and practicable. *See, e.g., Certain Cut-to-Length Carbon Steel Plate from Sweden; Final Results of Countervailing Duty Administrative Review*, 62 FR 16551, 16552 (April 7, 1997). When such data are not available (or are otherwise unusable), our practice is to rely upon the IRS depreciation tables.

Columbus did not provide the information necessary to calculate a company-specific AUL. Therefore, we are relying on the Internal Revenue Service's 1977 Class Life Asset Depreciation Range System (Rev. Proc. 77–10, 1977–1, C.B. 548 (RR–38) (*IRS Tables*), which report a schedule of 15 years for the productive equipment used in the steel industry. *See* the *Department's Position* on *Comment 10* below.

I. Programs Determined To Be Countervailable

A. Section 37E Tax Allowances

The GOSA enacted Section 37E of the Income Tax Act in 1991 to promote capital investment and thereby foster long-term economic development. This program was intended as a ''kick-start'' for the South African economy and was limited to investments made between September 1991 and September 1993. The purpose of the program was to encourage investment in large industrial expansion projects in value-added sectors of the economy. For projects approved as valued-added processes, Section 37E allows for depreciation of capital assets and the deduction of pre-production interest and finance charges in advance, that is, in the year the costs are incurred rather than the year the assets go into use. The program also allows taxpayers in loss positions to receive ''negotiable tax credit certificates'' (NTCCs) in the amount of the cash value of the Section 37E tax deduction (*i.e.*, deduction multiplied by the tax rate). The NTCCs can be sold (normally at a small discount) to any other taxpayer, who then can use them to pay taxes. The program does not provide for accelerated depreciation, nor does it provide for additional finance charge-related deductions beyond those available under the South African tax code. The advantage to users of this program is the receipt of these tax deductions in advance, *i.e.*, when the expenses are incurred rather than when the equipment is put into use.

According to the questionnaire response, eligibility for Section 37E benefits was determined on a project-by-project basis by a committee appointed by the Minister of Finance in concurrence with the Minister of Trade and Industry. To demonstrate that their projects qualified for Section 37E, applicants were required to show: (1) That the project would add at least 35 percent to the value of the raw material or intermediate product processed; (2) that the project would be carried out on an internationally competitive scale; and (3) that the taxpayer would utilize foreign term credits, where possible, when financing the import of capital goods for the project. In addition, qualifying investments had to be made between September 12, 1991 and September 11, 1993.

The CJV began receiving Section 37E benefits in 1993, two years before the 1995 completion of the plant expansion. Because the CJV is a partnership rather than a tax-paying corporation, Section 37E benefits earned by the CJV are claimed by the partners.

When determining whether a program is countervailable, we must examine whether it is an export subsidy or whether it provides benefits to a specific enterprise, industry, or group thereof, either in law (*de jure* specificity) or in fact (*de facto* specificity). *See* Sections 771(5A)(A), (B), and (D) of the Act. For the *Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Countervailing Duty Determination with Final Antidumping Determination: Stainless Steel Plate in Coils from South Africa*, 63 FR 47263, 47265 (September 4, 1998) (*Preliminary Determination*), we determined that Section 37E provided benefits which were *de facto* specific, in accordance with section 771(5A)(D)(iii)(I) of the Act, because the number of users of the program was limited. (63 FR at 47265.) However, in the memorandum accompanying our preliminary determination, we noted that ''. . . information on the record suggests that an applicant's export performance may have been considered during the approval process. While there is not enough information in the record at this time to conclude that benefits provided under Section 37E constitute a *de facto* export subsidy, we will continue to examine this question for the final determination.'' *See* August 28, 1998, Memorandum to Maria Harris Tildon, Acting Deputy Assistant Secretary for AD/CVD Enforcement II, ''Decision Memorandum: Countervailing Duty Investigation of Stainless Steel Plate in Coils from South Africa'' at 7, public version on file in the Central Records Unit, room B–099 of the main Commerce Building (CRU) (*Decision Memorandum*). Under section 771(5A)(B) of the Act, a subsidy is an export subsidy if it is, ''in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions.''

We now have a fuller understanding of the legislation which implemented the program, amendments which were made to that legislation, and the timing of Columbus' application and approval for benefits under the program. At verification, we learned that Section 37E amending the Tax Act of 1962 was published in the *Official Gazette* on July 17, 1991 and became effective September 12, 1991. To be eligible for Section 37E, an applicant had to show that the planned investment was in a ''beneficiation process,'' which was defined as a process which: ''(a) Substantially adds to the value of the product processed; (b) is carried on on such a scale that it is competitive in the international market; and (c) is carried on with the intention of exporting at least 60 percent (or such lesser percentage as the committee may determine) by value of the product produced to countries outside the customs union.'' *See* the December 16, 1998, ''Memorandum to David Mueller, Director, Office of CVD/AD Enforcement VI, on Countervailing Duty Investigation of Stainless Steel Plate in Coils from South Africa: Verification Report of the Government of South Africa,'' at 15 and Verification Exhibit SARS–1 at 3, public version on file in the CRU (*Government Verification Report*).

In 1992, the law was amended for the first time; the amendment was published on July 15, 1992, in the *Official Gazette* and was effective retroactively to March 18, 1992. The amendment broadened the definition of beneficiation of minerals in certain material respects and removed the committee's discretion to approve applicants intending to export less than 60 percent of production.

On July 20, 1993, the second amendment to Section 37E was

published in the *Gazette.* This amendment was effective retroactively to September 12, 1992. This amendment made a material change to the law because it removed the export performance eligibility criterion. The deletion of this requirement is documented in the *Explanatory Memorandum on the Taxation Laws Amendment Bill, 1993. See* Verification Exhibit SARS–1 at 11. Although this amendment was retroactive, companies that applied before July 20, 1993, addressed the export performance criterion in their applications for Section 37E benefits. Columbus' application for Section 37E benefits, which was filed on August 11,1992, specifically addressed this criterion and specified the portion of Columbus' production that was intended for export. Based on this application, Columbus was approved for Section 37E benefits on December 8, 1992, prior to the July, 20, 1993, amendment.

Although approved for Section 37E assistance on December 8, 1992, the exact amount of assistance to be provided was revised as the financial and technical aspects of the project developed (*e.g.,* contracts for the supply of equipment and financing arrangements were being finalized, enabling Columbus to identify the related costs and expenditures more accurately than they had in the initial August, 1992 application package). Columbus was in close communication with the relevant authorities throughout this period, and submitted an amended application on July 19, 1993. This application did not address any of the eligibility criteria, under the original law or the amended law, rather, it finalized information about the categorization of equipment and the costs of financing and amended the projected value of the Section 37E benefits.

The Inland Revenue authority notified Columbus of its approval of the exact amount of its Section 37E benefits on August 20, 1993. Nevertheless, when Columbus was initially approved for Section 37E benefits (on December 8, 1992), the approval was based on consideration of the export performance criterion, which was in effect at that time. Even though the law was subsequently amended to remove the export criterion, and this amendment was retroactive to September 12, 1992, Columbus was approved for Section 37E benefits before this amendment was implemented. Making the amendment to remove the export criterion retroactively effective does not undo the fact that when Columbus was approved, it had to meet an export performance criterion.

Moreover, even though Columbus amended its application on July 19, 1993, that submission was not a revised application package. It did not address all of the criteria that had to be met in order to be approved and that were addressed in the initial application (of August 11, 1992). Moreover, it did not remove the export performance information that was in the original application; rather, it contained a refinement of previously-provided financial and technical information, which was required by Inland Revenue to establish the final value of the Section 37E benefits Columbus would receive. Accordingly, based on these facts, we must conclude that the Section 37E assistance provided to Columbus constitutes an export subsidy within the meaning of section 771(5A)(B) of the Act.

The Section 37E program provides a financial contribution within the meaning of section 771(5)(D)(ii) of the Act as it constitutes revenue foregone by the GOSA. Because Section 37E allows companies to claim depreciation and finance-related deductions in advance of when such deductions would normally be allowed, the benefit within the meaning of section 771(5)(E) of the Act, is the value to the company of being able to claim the depreciation in advance. The Department normally considers that a benefit arises from a tax program in the amount of the difference between the taxes paid and the taxes that would have been paid absent the program. However, the Section 37E program does not operate as a normal tax program. According to the IDC, ''[t]he accelerated tax allowances reduce the peak funding requirements of major capital investment projects.'' *See IDC 1992 Annual Report,* Annexure 7 of the July 31, 1998 Questionnaire Response, public version on file in the CRU. Through this program, capital requirements for investments are reduced, as evidenced by the partners' views that the program was essential in reducing the start-up costs of the venture. *See* Petition at Exhibit S–8, public version on file in CRU. Furthermore, there is a cash flow impact regardless of the company's tax position. As such, we consider that, although the Section 37E program is a ''tax'' program, it functions more like a capital contribution.

Since the Section 37E program reduces a company's capital requirements, and because the receipt of Section 37E benefits required express government approval, we determine that it is more appropriate to treat the benefits provided under Section 37E as a non-recurring subsidy. *See GIA,* 58 FR at 37226. Therefore, we determine that the Section 37E program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act.

To determine the benefit, we ascertained the value of the Section 37E allowances to the company. First, we calculated the cash value of each 37E claim by multiplying the total allowance claimed in each year by the relevant tax rate. Then, we determined the time value of obtaining the allowance in advance; in the preliminary determination, we used two years for discounting purposes, however, at verification we discovered that it was appropriate to use two years for one-third of the value of the allowances and three years for the remaining two-thirds. This change reflects the fact that since Columbus Stainless was commissioned October 1, 1995, and the IDC and Samancor's tax year ends June 30, these partners would have had to wait until June 30, 1996, *i.e.,* three years to take depreciation under the normal system (section 12(c)) while Highveld, which has a December 31 year-end, would have had to wait until December 31, 1995, *i.e.,* only two years. *See Department's Position* on *Comment 5* below. The difference between the tax value of the allowances and the tax value discounted to reflect the time-value of money is the benefit to the company, for each year in which Section 37E benefits are claimed. Finally, because we consider that the Section 37E assistance should be allocated over time as a non-recurring subsidy, we treated each year's benefit as a non-recurring grant using our standard grant methodology. Since Columbus did not report its AUL, we are relying on the *IRS Tables* for purposes of establishing the allocation period. The *IRS Tables* show a depreciation schedule of 15 years for the steel industry. *See Department's Position* on *Comment 10* below. We summed the benefit amounts allocated to the POI and divided by CJV's total export sales. Accordingly, we determine the net countervailable subsidy to be 3.84 percent *ad valorem.*

B. IDC/Impofin Loan Guarantees

The IDC and its wholly-owned subsidiary, Impofin, Ltd., facilitate and guarantee foreign credits for the importation of capital goods into South Africa. The program was established in 1989, and was designed to facilitate foreign lending to South African firms; the availability of foreign credit in South Africa was extremely limited at that time. The IDC/Impofin maintain

blanket credit lines with banks in numerous countries which are used in two ways. First, the IDC may act as an intermediary lending authority, borrowing funds through these credit lines from the foreign bank and then re-lending them to the South African firm. Second, based on these credit lines, the South African firm may negotiate its own financing directly with the foreign lender which is then guaranteed by the IDC. Any company seeking financing for the purchase of foreign capital equipment may apply to Impofin to use the program. Whether the financing is arranged through the IDC/Impofin or directly with the foreign lender, it is guaranteed through the IDC/Impofin program. The IDC charges a fee for its guaranteeing and facilitating services.

Columbus used the IDC/Impofin program to facilitate and to guarantee the financing of all of its foreign capital equipment sourcing. In the preliminary determination, we analyzed this program using our standard methodology for examining government-guaranteed loans and compared the benchmark interest rate to the interest rate charged by the lender on the guaranteed loans. However, based on information collected at verification, we now have a better understanding of this program and have revised our analysis of the program from the preliminary determination. Because these loans originate either with foreign government export credit agencies or offshore foreign banks in coordination with foreign government export credit agencies, which are not under the direction or control of the GOSA, the loans themselves are not countervailable. Thus, we find that it is not appropriate to compare the interest rates charged by offshore foreign banks to commercial interest rates in order to determine whether the program provides a financial contribution. However, the IDC did provide guarantees on these loans for a fee. This guarantee could constitute a financial contribution if the IDC charged less than what would have been charged by a commercial bank for a similar guarantee.

At verification, we sought information about commercial loan guarantee practices in South Africa at the time Columbus received the IDC/Impofin guarantees. We learned that such guarantees were available on only a limited basis in South Africa at the time. However, a commercial banker informed us that the rates for providing these types of guarantees would range between 0.25 and 0.50 percent; the banker further stated that the fee would vary based on the quality of the borrower and the size of the credit (a high-quality borrower would likely pay fees at the low end of the range; a borrower seeking guarantees for large credits would likely pay fees at the high end of the range). *See* December 17, 1998, ''Memorandum for David Mueller, Director, Office of CVD/AD Enforcement VI, on Discussions with Private Sector and South African Reserve Bank'' (*Banker's Verification Report*), a public document on file in the CRU. Since Columbus is a ''high-quality'' borrower but the size of the credits is large, we determine that the middle of this range, 0.375 percent, is a reasonable approximation of what a commercial bank would have charged Columbus for similar guarantees. Thus, when we compare what Columbus paid the IDC for the provision of guarantees, 0.25 percent, and what it would have paid a commercial bank, 0.375 percent, we find that the IDC did provide a financial contribution that confers a benefit within the meaning of the Act.

Next, we analyzed whether the program is specific in law (*de jure* specificity), or in fact (*de facto* specificity), within the meaning of subsections 771(5A)(D)(i) and (iii) of the Act. The enacting legislation for the IDC/Impofin program does not explicitly limit eligibility for these financing programs to an enterprise, industry, or group thereof. Thus, we find that the law is not *de jure* specific, and we must analyze whether the program meets the *de facto* criteria defined under section 771(5A)(D)(iii). In our *Preliminary Determination,* we examined information provided by the GOSA and found that since 1990, the ''fabricated metal products'' and ''basic metal manufacture'' industries have been predominant users of the program. These industries have received more than fifty percent, by value, of the total guaranteed loans awarded over the life of the program. Information provided by the GOSA in its case brief demonstrates that the steel industry (including stainless steel) has received more than half the total value of loan guarantees awarded over the life of the program, while all of the rest of the users of the program (industries including, but not limited to mining, agriculture, pulp and paper, oil, gas, chemical, vehicles, telecommunications, and aluminum smelting and fabrication) together accounted for less than half of the total value of loan guarantees awarded over the life of the program. This information clearly indicates that the steel industry is a predominant user of this program. On this basis, we find IDC/Impofin loan guarantees to be *de facto* specific within the meaning of section 771(5A)(D)(iii) of the Act. Therefore, we determine that the IDC/Impofin guarantees constitute a countervailable subsidy within the meaning of section 771(5) of the Act. (*See* the *Department's Position* on *Comment 6* below.)

Since the guarantee fees are paid every year the loan is outstanding, we calculated the benefit by subtracting what Columbus paid the IDC under this program from what it would have paid on a comparable commercial guarantee during the POI. We then divided the result by Columbus' total sales during the POI. Accordingly, we determine the net countervailable subsidy to be 0.09 percent *ad valorem* for Columbus.

II. Program Determined to be Non-Countervailable

IDC Participation in the Columbus Joint Venture

As discussed in the ''Company History'' Section above, in 1988, Highveld and Samancor formed the Columbus Joint Venture to explore the possibility of establishing a stainless steel facility in South Africa. In 1991, the partners proposed that the IDC make a capital investment in the venture. The IDC performed a detailed analysis of the 1991 proposal and decided to participate in the investment subject to certain conditions: that the project would be based on the expansion of an existing facility and that its implementation would be delayed pending the establishment of the Section 37E program. In 1992, after the partners acquired an existing facility for the purpose of implementing the IDC's recommendations, the partners approached the IDC with a revised proposal. Based on this proposal, the IDC and the two partners conducted a detailed feasibility study to identify the prospects for the venture. The IDC made a counterproposal which the partners accepted. Effective January 1, 1993, the IDC became a one-third and equal partner in the venture. Samancor, Highveld, and the IDC entered a new partnership agreement which is the basis for the current structure of the CJV.

The Department considers the government's provision of equity or start-up capital to constitute a benefit ''if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made.'' *See* section 771(5)(E)(i) of the Act. The Department applies this standard in a case-by-case analysis of the commercial context in

which the investment decision is made. Thus, we must determine whether the IDC's decision to participate in the CJV was consistent with the usual investment practices of private investors in South Africa.

While Samancor and Highveld are both private investors, their participation in the venture, *per se,* is not an appropriate basis for determining whether the IDC's participation is consistent with usual investment practices. By the time the IDC decided to invest, Samancor and Highveld had been partners in this investment for five years. Both already had substantial stakes in the project, including the purchase of the MS&A facility in 1991. Thus, their evaluation of the CJV expansion project was affected by their interest in protecting their existing investment and they may have been willing to accept a higher level of risk than another private investor would. Therefore, their continued participation is not the appropriate background against which to examine the IDC's decision, and we have focused our analysis on the factors considered by the IDC in making its decision in order to determine whether it was consistent with the investment practices of a private investor.

As discussed above, in 1991 and 1992, the partners made detailed presentations to the IDC of the risks and projected returns of the project. The IDC agreed to participate in the venture subject to modifications designed to increase the rate of return of the project by lowering its initial capital requirements. In 1992, the IDC conducted a detailed feasibility study to analyze the strengths and weaknesses of the venture and to project its financial performance, based upon the expansion of the MS&A facility. This detailed analysis, which Columbus submitted for the record, is the primary basis for the IDC's decision to invest in the CJV.

Given the proprietary nature of the feasibility study, the specific analysis and projections contained in the study cannot be addressed in this public notice. At verification, we discussed at length this study and the analysis which preceded it. IDC officials explained how the IDC conducted its extensive analysis, and tested its projections for various changes in forecast market and economic circumstances. *See Government Verification Report* at 8–9. The study is based on reasonable assumptions and concludes that the CJV was a viable venture which would provide a positive real rate of return on the IDC's investment. The study concludes that the average nominal rate of return for the project would be 19.13 percent over an appropriate period.

We compared the projected return on the investment to information available for other investments in South Africa during this period. Because of the proprietary nature of the feasibility study, this analysis cannot be detailed in this public notice. *See Preliminary Determination,* 63 FR at 47262; *Decision Memorandum.* The nominal rate of return of 19.13 percent exceeds government bond yields. The projected real rate of return is comparable to returns provided by other investment instruments at the time. We examined the dividend yields on industrial and commercial shares as reported in the *Quarterly Bulletin* of the South Africa Reserve Bank (appended to the August 28, 1998 ''Memorandum to the File on Calculations for the Preliminary Affirmative Countervailing Duty Determination: Stainless Steel Plate in Coils from South Africa'' (*Preliminary Calculation Memo*) public version on file in the CRU). We also examined the return on assets of non-financial private incorporated businesses as reported by the Reserve Bank of South Africa on its website: http://www.resbank.co.za (a printout of the information we examined is appended to *Preliminary Calculation Memo*). At verification, we gathered more information about the commercial investment climate in South Africa in order to inform our analysis for this final determination. *See Banker's Verification Report.* The information on the record indicates that the projected return was adequate and it supports a finding that the IDC's investment decision was consistent with the behavior of a reasonable private investor.

Finally, we examined the structure of the partnership itself, to determine whether the IDC assumed more than its share of the risks involved in the venture or less than its share of the potential earnings. The three partners contributed capital to the venture equally. They all account for one-third of the project's year-end results in their financial statements, in accordance with the normal practice for partnerships. They each hold the same number of seats on the CJV's board. To the extent that the IDC's commitments and obligations to the joint venture differ from the other partners, these differences reflect the IDC's role as an investor, in contrast to the other partner's experience in industrial operations. Furthermore, the IDC took steps to protect its level of risk from the investment. For example, where the IDC has assumed more than its pro-rata share of the risk, it has required commitments from the other two partners which result in the risk being shared equally.

While the partnership is structured so that the IDC's role in the CJV is slightly different from that of the other two partners, the agreement stipulates equal cash participation, equal representation on the Board of Directors, and equal distribution of any returns on the investments. In addition, the IDC protected its investment by requiring measures to ensure that the risks would be equally distributed among all of three partners. The IDC recommended ways to increase the project's earnings potential and negotiated safeguards in the partnership agreement. The IDC appears to have assumed only an amount of risk that is commensurate with its level of participation as a partner.

The IDC's decision to invest in the CJV appears to be based upon a reasonable analysis that the project was viable, an informed assessment that the IDC would realize a positive real rate of return on its investment, and a partnership based on the equal distribution of the risks. On this basis, we determine that the IDC's capital contribution into the CJV was not inconsistent with the normal practice of private investors in South Africa, and thus, does not constitute a countervailable subsidy within the meaning of the Act.

III. Programs Determined to be Not Used

Based on the information provided in the responses and the results of verification, we determine that Columbus did not apply for or receive benefits under the following programs during the POI:

A. Low Interest Rate Finance for the Promotion of Exports (which is the same program as the Low Interest Rate Scheme for the Promotion of Exports)
B. Competitiveness Fund
C. Export Assistance Under the Export Marketing Assistance and the Export Marketing and Investment Assistance Programs
D. Regional Industrial Development Program (RIDP)

IV. Programs Determined to be Terminated

Based on information obtained at verification, we determine that the following programs have been terminated.

A. Export Marketing Allowance
B. Multi-Shift Scheme

Interested Party Comments

Comment 1: IDC Participation in the Columbus Joint Venture: Petitioners contend that the Department did not adequately address all five factors of the test developed in Final Affirmative Countervailing Duty Determination: Certain Corrosion Resistant Carbon Steel Flat Products from New Zealand, 63 FR 37366 (July 9, 1993)(*New Zealand Steel*). Petitioners contend that the Department must examine the following five factors: (1) The (un)willingness of private sector participants to invest in the project; (2) the relative contributions of the partners and the expected returns; (3) the feasibility study; (4) the nature of the project (*i.e.,* the existence of non-commercial considerations); and, (5) the economic environment prevailing at the time in South Africa. In addition, petitioners urge the Department to consider the implementation of Section 37E as a factor which affected the IDC's investment. Petitioners argue that a full examination of the five factors must lead the Department to the conclusion that the IDC's investment was not consistent with commercial considerations, and therefore constitutes a countervailable subsidy. While petitioners urge the Department to apply all five factors, and to do so completely, petitioners suggest that the test be modified to account for the relevant facts of record and to comport more closely with commercial reality.

In examining the first factor, petitioners contend that record evidence shows that the private sector was unwilling to participate in the CJV project. With respect to the second factor, petitioners further argue that the Department should consider the expected returns from the project in the context of its associated risk, and this examination leads to the conclusion that the returns were relatively low. Petitioners also argue that the structure of the investment agreement itself, in particular Highveld and Samancor's option to buy out a portion of the IDC's ownership, was needed to protect the two partners from the significant risks at the outset of the project. With respect to *New Zealand Steel* factor three, petitioners argue that the IDC's feasibility study was flawed because it was not an independent analysis and includes consideration of government actions. In support of this contention, petitioners cite *Steel Wire Rod from Saudi Arabia* 51 FR 4206, 4209 (February 3, 1986) and *Steel Wire Rod from Trinidad & Tobago,* 49 FR 480, 483 (January 4, 1984), in which the Department established that only an independent feasibility study provides an objective analysis of a project's potential returns. According to petitioners, the fourth factor shows that the parties to the CJV made non-commercial decisions when they structured the venture as a partnership in order to maximize the tax benefits, despite statements in the feasibility study that advocate the contrary. Further, petitioners contend that the record shows that the CJV expansion would not have gone forward without the IDC's investment. With respect to the fifth factor, petitioners maintain that the Department should not consider the difficult economic conditions in the post-Apartheid era in which the investment was made, as this could create a loophole allowing foreign governments to subsidize without consequence simply by claiming that unique or difficult economic conditions exist. Finally, petitioners argue that the Department should consider an additional factor, that the investment was conditioned upon the receipt of Section 37E benefits which, petitioners argue, creates a rebuttable presumption that the investment is inconsistent with commercial considerations. For these reasons, petitioners conclude that the IDC's investment is inconsistent with commercial considerations.

The GOSA and Columbus (respondents) claim that the first *New Zealand Steel* factor addresses whether private-sector participants are willing to invest and not whether private-sector participants in addition to those already participating are willing to invest in a project. With respect to the second factor, respondents maintain that the record does not support petitioners' contention that the risk was extremely high. When considering the third factor, respondents argue that it is incorrect to liken the IDC's feasibility study with that analyzed in *New Zealand Steel,* because Section 37E had already been implemented unlike the commitments of the government in *New Zealand Steel.* In addition, respondents argue that the IDC feasibility study was objective and contained full analysis of the relevant considerations including a realistic projection of the stainless steel market. With respect to the ''nature of the project,'' the structure and capitalization of the CJV, respondents note that it is common in South Africa to structure an undertaking as a joint venture rather than a company, and the IDC has often used this structure for other projects in which it is involved. Respondents argue that there is no evidence to conclude that the project would not have gone forward absent the IDC's participation. Lastly, respondents maintain that the final project study and the IDC's decision to participate in the CJV were not conditioned on the receipt of Section 37E benefits, as verification documents indicate.

Department's Position: As a threshold matter, the analysis conducted in *New Zealand Steel* does not constitute a ''test,'' or establish a standard that the Department must follow in analyzing every joint venture in which a government or government entity participates, as petitioners suggest, and therefore their reliance on *New Zealand Steel* is misplaced. Petitioners' identification of the ''five factors'' is an inaccurate interpretation of the analysis in *New Zealand Steel.* Furthermore, the facts in this case are sufficiently different from those in *New Zealand Steel* to support a conclusion different from the one reached in that case, *i.e.,* that the IDC's investment in the CJV is not countervailable (*see* the ''IDC Participation in the Columbus Joint Venture'' section above). Nevertheless, we address the elements of petitioners' arguments below.

In *New Zealand Steel,* the Department did not directly address the unwillingness of the private sector to participate in the project. Rather, the Department determined that ''the participation of NZS (the private sector participant) was not dispositive that the GONZ's investment was consistent with commercial considerations.'' *New Zealand Steel* at 37368. We made a similar finding in our preliminary determination: The continued participation of Highveld and Samancor ''is not the appropriate background against which to examine the IDC's decision'' because of the substantial resources the two partners already had at stake by this time. *Preliminary Determination* at 47266. We stand by this finding and therefore disagree with respondents' position that the participation of Highveld and Samancor by itself satisfies this factor. However, we also disagree with petitioners that the inability of Highveld and Samancor to secure a foreign partner (efforts to conclude a partnership arrangement with a Taiwanese company were unsuccessful) is dispositive of private sector unwillingness to invest in the project. At verification, we discussed the Taiwanese investor, and the record shows that the existing two partners were willing to use their substantial resources to provide certain guarantees for the Columbus project, but that the Taiwanese investor was unwilling to provide the same guarantees in return. The two existing partners were interested in finding another partner to share the risk equally. *See* December 18,

1998, ''Memorandum to David Mueller, Director, Office of CVD/AD Enforcement VI, on Verification of Information Submitted by Columbus Stainless, Ltd. and the Columbus Joint Venture in the Countervailing Duty Investigation of Stainless Steel Plate in Coils from South Africa (C–791–806)'' (*Company Verification Report*) at 10, public version on file in the CRU. Furthermore, despite the general optimism nascent in South Africa at the time, there were still very few companies with the resources necessary for the project, and two of those companies were already involved in the project through their subsidiaries, Highveld and Samancor.

As with the first factor, the second factor, the relative contributions and the expected returns, is not clearly identified or addressed in *New Zealand Steel.* Regardless, we reject petitioners' contention that we overlooked the risk and focused unduly on the return. Our preliminary determination stated that we found the returns projected in the IDC feasibility study were acceptable, and adequate to support the IDC's investment (*Preliminary Determination* at 47266). The feasibility study also contains an extensive analysis of the risk, which we discussed at length at verification. *Company Verification Report* at 9–10. In preparing the feasibility study, the IDC performed numerous sensitivity analyses to determine the result on projected returns of changes in variables related to the technical, marketing, and financial aspects of the project, including future demand for stainless steel, and world capacity for stainless steel production. The IDC determined that the investment provided acceptable returns even in the event of these contingencies. In addition, the IDC was deliberate and objective in evaluating the project and prepared more conservative projections (higher funding requirements and lower projected returns) than the two partners had, and still determined the project's risk/return profile to be within its investment parameters, parameters which we find to be comparable to those that a private investor would accept. In short, there is nothing about the project's risk vs. return that indicates the IDC's investment is inconsistent with the usual investment practice of private investors. Furthermore, it is not appropriate, as petitioners urge, to conclude that the lack of willingness on the part of the private sector indicates that the risks outweighed the returns. The appropriate focus of our analysis is the basis for the IDC's decision, the feasibility study. We also disagree with petitioners' contention that the buy-out provision is one which affords Highveld and Samancor undue protection from the project's risk. To the contrary, we believe this provision protects the IDC's investment and enables the IDC to recover most of its investment with a guaranteed return, an option not available to the other two partners. (At verification, IDC officials indicated that the IDC commonly seeks to recover its capital in the medium term so it can use its resources elsewhere. The IDC has begun to formalize this strategy, as indicated in the CJV Agreement. *See Government Verification Report* at 6.)

Unlike the first two ''factors'' petitioners identify in *New Zealand Steel,* the third factor, the feasibility study, is clearly identified and addressed in *New Zealand Steel* (58 FR at 37368). However, we find that the facts in *New Zealand Steel* differ considerably from those presented here. In that case, the Department discounted the objectivity of the feasibility study because so many of its assumptions and conclusions were premised on ''the implementation of specific commitments by the GONZ, such as the assurance of certain financing, domestic market share, supply of raw materials, and favorable tax treatment, in their projections of the revenues of the project. Therefore, we find that the studies did not present an objective assessment of the viability of the project, based on market conditions.'' *Id.* The commitments of the GONZ were made solely for the benefit of the steel producer. In other words, a private investor, considering the same investment, would not have been able to control the variables as the GONZ could (market share, tax treatment, raw materials supply), and the projections in the feasibility study were premised on controlling those variables.

In this case, as discussed above, we find that the IDC's feasibility study was objective, and the availability of Section 37E benefits was objectively accounted for in the feasibility study. (As a tax-paying entity, the IDC appropriately analyzed the effects of this tax program.) As IDC officials explained at verification, ''[a]lthough the absence of 37E would have meant a higher level of capital expenditures, the projections were still within the range of what the IDC was prepared to undertake.'' *Government Verification Report* at 10. Furthermore, we disagree with petitioners' assumption that the feasibility study was not objective because it was not independently prepared. At verification, an independent third party noted that ''many commercial interests respect the IDC for its expertise in conducting feasibility studies.'' *Banker's Verification Report* at 2. As we noted in the *Preliminary Determination,* the IDC withheld its decision to participate subject to modifications in the proposed project. 63 FR at 47266. This IDC action supports a conclusion that the IDC was actively engaged in shaping the financial and operational structure of the project, in order to protect its investment, as a commercial investor would do. Thus, we determine that the analyses and conclusions contained in the feasibility study are objective, and support a determination that the IDC's investment was not inconsistent with the usual investment practice of private investors.

We disagree with petitioners that the ''nature of the project,'' *i.e.,* its structure as a joint venture partnership, rather than as a corporation, indicates that the IDC's investment was inconsistent with commercial considerations. To the contrary, we agree with respondents that this structure supports a conclusion that the investment was not countervailable. Record evidence shows that the tax advantages of the partnership structure are clear, particularly for a capital-intensive start-up company expected to sustain tax losses for several years. The partners' interest in maximizing those tax advantages shows all three of them to be acting as commercial actors, and making commercially-consistent financial decisions. Furthermore, since we find that the feasibility study which provided the basis for the IDC's investment decision was objective and commercially consistent, it is not relevant to our analysis whether the project would have gone forward without the IDC's participation. However, we note that record evidence indicates that the two partners had enough at stake and the resources to go forward without the IDC; they ultimately had no reason to do so.

With respect to the fifth factor, we agree with respondents that we do not have before us any arguments with respect to the economic environment as a factor for analyzing the IDC's investment in Columbus. Furthermore, in *New Zealand Steel,* we stated that ''analysis of the economic environment is irrelevant,'' 58 FR at 37369, and we find no reason to address that factor here.

Finally, we disagree with petitioners' argument that the IDC's investment was conditioned on the receipt of Section 37E benefits. While record evidence shows that this tax program enabled the partners to reduce their capital outlays, and that the IDC deferred its participation until that program was

implemented, the record also shows that the IDC did consider its investment in the absence of Section 37E and found that it provided acceptable returns nevertheless. The IDC's deferral was a commercially sound action taken to ensure that the IDC would be able to both consider all variables prior to making a final commitment and maximize its projected return.

Comment 2: Specificity of Section 37E and IDC/Impofin Programs: Respondents argue that, although the Department correctly found that both the Section 37E and the IDC/Impofin lending programs were not *de jure* specific, the Department's finding that the programs were *de facto* specific was incorrect. Respondents contend that the Department failed to satisfy the preconditions of any inquiry into the possibility of *de facto* specificity, which is only to be made when ''there are reasons to believe that a subsidy may be specific as a matter of fact.'' *See* section 771(5A)(D)(iii) of the Act (implementing Article 2.1(c) of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement)). Respondents contend that the Department made no effort to satisfy this precondition in its preliminary determination and ''leaped'' from a determination of no *de jure* specificity to an application of the *de facto* specificity criteria without first identifying the reasons to believe that such specificity might exist. Thus, the Department's specificity finding is invalid as a matter of law.

Petitioners argue that respondents have overstated the statutory requirements. While both the statute and the SCM Agreement contain the ''reasons to believe'' language, the law does not require the Department to make or publish findings with respect to the ''reasons to believe'' that a subsidy may be *de facto* specific. Respondents' arguments read a requirement into the law that does not exist. In addition, petitioners argue that the Department's analysis of a domestic subsidy inherently demonstrates the agency's reasons to believe that a subsidy may be *de facto* specific. Petitioners cite the initiation standard (section 702(b)(1) of the Act) which instructs the Department to initiate an investigation when the elements necessary for the imposition of a countervailing duty are alleged, and conclude that a decision to initiate an investigation of a program implies that the Department has a reason to believe the subsidy may be *de facto* specific. Furthermore, petitioners note that the petition contained information which provided the Department with reasons to believe that both the Section 37E and the IDC/Impofin programs may be *de facto* specific.

Petitioners contend that respondents ignore the fact that a *de jure* specificity analysis necessarily involves examining whether there are reasons to believe that a subsidy may be specific as a matter of fact; in the context of specificity in general, the Department examines the same factual information: eligibility criteria, application process, program records, and the identity of recipients. Finally, petitioners note, and cite numerous examples of, the Department's longstanding practice of first examining whether a subsidy is *de jure* specific and then proceeding to the *de facto* analysis. Petitioners argue that if this practice conflicted with the SCM, this conflict would have been addressed in the Statement of Administrative Action (SAA), which instead affirms the Department's practice in analyzing the *de facto* specificity of domestic subsidies. Thus, petitioners reject respondents' argument that the Department's analyses and determinations that Section 37E and IDC/Impofin are *de facto* specific are inconsistent with both the statute and the SCM.

Department's Position: We disagree with respondent's interpretation of the ''reasons to believe'' language in section 771(5A)(D)(iii) of the Act. It is not stated as a precondition to a *de facto* analysis and we do not interpret it as such. While the language is part of the definition of *de facto* specificity it is not presented as a threshold requirement for positive evidence to justify an inquiry into how widely available a subsidy, in fact, is. The type of program itself (*e.g.,* a development loan program) may be sufficient reason to believe that it may, in fact, be limited to a specific industry or group of industries. In contrast, there is normally no reason to believe that other types of programs (*e.g.,* standard tax deductions) that are, *de jure*, available to all businesses would, in fact, be specific. Thus, the Department would not be required to perform a *de facto* analysis of such a program. The nature of the subsidy at issue here warrants a *de facto* analysis. Moreover, we note that the allegations in the petition would be sufficient to meet even the higher standard that respondent would have us employ.

Comment 3: de facto Specificity of Section 37E: Respondents argue that in finding Section 37E to be *de facto* specific, on the basis that the actual recipients of the subsidy, whether considered on an enterprise or an industry basis, are limited, the Department also ignored its statutory obligation to ''take into account the extent of diversification of economic activities within the jurisdiction of the authority providing the subsidy, and the length of time during which the subsidy program has been in operation.'' *See* Section 771(5A)(D)(iii) of the Act. Respondents argue that the Department's failure to consider these conditions renders invalid the Department's finding that Section 37E is *de facto* specific. Respondents contend that if the Department takes these two factors into account, the Department will find that the recipients of Section 37E are not limited in number.

Respondents cite the verification report, which shows that nine industries in six (of eleven) provinces, have benefitted from Section 37E. Respondents argue that economic sanctions led to the diversification of the South African economy in the early 1990s, but that many of the industries were not world-competitive, relied on outdated technology, and were oriented to the domestic market, *i.e.,* these industries would not be viable in an open economy. Thus, very few companies were in a position to take advantage of Section 37E. Respondents note that the applicants for Section 37E were further limited by statutory criteria (to add at least 35 percent to the raw material value, to be internationally competitive, to use foreign credits to import capital goods), reflecting the GOSA's objective to encourage growth in capital investment and employment. Thus, the most likely projects to receive approval were ''mega-projects'' in terms of capital, cost, timing and output, and such projects were rare.

In addition, respondents note that Section 37E was in operation for only two years. The program's brief lifetime, therefore, further restricted the pool of potential claimants. Respondents have provided a letter from a former official of the Department of Trade and Industry (DTI) who was involved in the development and administration of Section 37E. This letter demonstrates, according to respondents, that given the economic conditions in South Africa at that time, 19 applications and 13 approvals were considerably more than had been expected. The 13 approved companies, according to the DTI official, reflected a spread of activity, size and geographic location, and viewed in the South African context, were not limited in number.

Petitioners argue that the GOSA's concession that the statutory criteria limited the number of companies that could receive Section 37E benefits supports a conclusion that Section 37E is *de jure* specific, regardless of the extent of economic diversification in

South Africa. Petitioners note that verification documents show that the original purpose of Section 37E was to benefit mineral beneficiation projects, including Columbus. Petitioners further note that the GOSA's statement that the number of applicants was ''considerably more than had been expected'' implies that, contrary to GOSA's claim, the statute was implemented to assist a few select industries and was not intended as a broad-based economic stimulus. Thus, the Department should find not that the limited economic diversification curtailed the potential number of program beneficiaries, but that the law itself limited access to Section 37E, making it *de jure* specific.

Petitioners also argue that Section 37E is *de facto* specific. In making this argument, petitioners reject the GOSA's statement that because nine different industries benefitted, the program was widely used. Petitioners believe that the industrial breakdown provided by the GOSA incorrectly disaggregates the industry groups and that stainless steel, steel, aluminum, and ferrochrome should be considered as the ''metals'' industry, reducing to six the number of industries benefitting from Section 37E. Finally, petitioners cite to the IDC's 1997 Annual Report, which shows the IDC's involvement in many different sectors, in rejecting the GOSA's claim that there were few viable and diversified sectors in the South African economy.

Finally, petitioners maintain that the short operation period of Section 37E did not necessarily limit the number of program users. Petitioners argue that since not all of the companies that were approved for the program actually used it, some of the approved companies may have applied without any definite investment plan, merely to keep open the option to use the program in the future. Petitioners conclude that, paradoxically, the narrow window of 37E operation may have actually increased the number of applicants, rather than limiting it.

Department's Position: We note, as explained in the ''Section 37E Tax Allowances'' section above, that we have reconsidered our treatment of Section 37E and find, for purposes of our final determination, that it is specific because it constituted an export subsidy for purposes of section 771(5A) of the Act at the time the CJV partners applied and received approval for its benefits. Therefore, we need not address respondents' arguments with respect to the *de facto* specificity of Section 37E benefits.

Comment 4: Benefits Under Section 37E: Petitioners contend that the Department should recognize the benefit under the Section 37E program as the full amount of the tax allowances claimed by Columbus, rather than use the time-value of money approach which the Department used for the preliminary determination. Petitioners advance two arguments in support of this proposed approach. First, petitioners contend that the verified record questions whether the Columbus expansion project would have gone forward without the availability of the 37E program to reduce the expansion's capital requirements. This, in turn, raises doubts about the potential receipt by the CJV partners of section 12C depreciation allowances. In other words, petitioners argue that if the CJV expansion had not gone forward (which it did, petitioners contend, only because of the existence of the 37E program), then the CJV partners would never have claimed any tax allowances related to Columbus, even the depreciation allowances normally available to all taxpayers under section 12C. Thus, petitioners contend that the Department's preliminary determination was inappropriately premised on the assumption that Columbus was clearly otherwise entitled to receive normal depreciation allowances under section 12C. Petitioners also contend that the Department erroneously calculated the benefit as the difference between the depreciation allowances allowed under Section 37E and those normally available under section 12C (reducing the benefit to the time-value of money difference), rather than assuming that the full value of the allowances constituted a countervailable subsidy. In support of this argument, petitioners cite to the recently published countervailing duty regulations, which acknowledge the problems inherent in speculating upon future tax benefits to a company in relation to accelerated depreciation.

Second, petitioners argue that the Section 37E program provides for the accelerated write-off of assets and therefore should be treated as an accelerated depreciation program by the Department, that is, the full amount of the allowances should be treated as a grant in the year of receipt consistent with the Department's practice. Petitioners reject the Department's time-value of money approach with respect to Section 37E, claiming that the Department itself has consistently rejected such an approach to accelerated depreciation programs, and treated the benefits provided by those program as grants in the full amounts of the accelerated depreciation claims. The Department's rejection of this approach is explicit in the new countervailing duty regulations. *See Countervailing Duties; Final Rule,* 63 FR 65348, at 65376 (November 25, 1998) *New Regulations.* In conclusion, petitioners note that without Section 37E, there would have been no Columbus expansion, and therefore no depreciation allowances, either under Section 37E or 12C. Thus, the Department should not discount the value of these benefits based upon speculation about what Columbus may have received in the future under the South African tax code and should treat the full amount of the Section 37E allowances as grants in the years of receipt.

In addition, petitioners support the Department's treatment of benefits under Section 37E as non-recurring benefits.

Respondents argue that to capture the full amount of the Section 37E benefits, without recognizing the applicable time-value of money discount, is to ignore record evidence which shows that in the absence of Section 37E, deductions in the same value were fully allowable under section 12C from the date of Columbus' commissioning, October 1, 1995. This record evidence clearly shows, according to respondents, that the benefit is merely a matter of timing: under Section 37E, the Columbus partners were able to claim the depreciation allowances (available under both sections 37E and 12C) beginning at the time the relevant expenses were incurred, rather than waiting nearly two years until the equipment was in use.

Department's Position: We disagree with both of petitioners' arguments for treating the total value of Section 37E allowances as grants. First, whether the Columbus project would have gone forward absent the existence of the countervailable depreciation allowances under Section 37E is not relevant to our examination of the program and its benefits. While petitioners are correct in noting that, without the investment in the CJV, Columbus' partners would have claimed no depreciation allowances, either under Section 37E or the otherwise governing section 12C, it is not appropriate to speculate about the tax positions of the partners absent the investment which gave rise to the depreciation allowances (regardless of which provision of the tax code governed). It is the Department's long-standing practice to recognize that ''a benefit exists to the extent that the taxes paid by a firm as a result of the program are less than the taxes a firm would have paid in the absence of the

program.'' *See 1989 Proposed Regulations* 54 FR at 23372. In other words, the Department appropriately focused on the Columbus expansion project, and compared the tax experience (in this case of the partners) under the countervailable Section 37E program with the experience which would have prevailed absent the program. In the factual circumstances in this case, the Columbus partners' tax experiences in the absence of the investment are not relevant in quantifying the benefit provided to respondents from the Section 37E program.

Furthermore, petitioners' statement that the Department wishes to avoid speculating on the future tax benefits to a company is misplaced for two reasons. In general, and consistent with the Department's practice of recognizing a benefit at the time that it is received, the Department avoids calculating tax benefits which are contingent on a company's future tax position—if a company is in a tax loss position during the POI or for a prolonged period, benefits from countervailable tax deductions or tax credit programs may not materialize. In particular, petitioners overlook two details in this case which remove any speculation from the Department's analysis: the existence of the Section 37E program reduced the partners' projection of the project's capital requirements and therefore resulted in a cash flow impact at the time the partners' investments were made (*see Preliminary Determination* at 47265); and, the provision of the Negotiable Tax Credit Certificates (NTCCs) which the users of the program could receive and convert into cash if they were in a tax-loss position (depreciation allowances under Section 12C can only be used as deductions to taxable income and therefore have no immediate value to taxpayers in tax-loss positions). Thus the cash-flow of the Section 37E benefits to the CJV partners is immediately measurable, and its timing is easily pinpointed; there is no speculation about the value of the countervailable allowances as there would be if the allowances were available only as deductions to taxable income and we were examining a company in a tax-loss position.

We also disagree with petitioners that it would be appropriate to treat the tax benefits under Section 37E as accelerated depreciation. As a threshold matter, Section 37E does not operate like an accelerated depreciation program, which allows its users to depreciate assets over an accelerated (*i.e.,* shorter) period of time. For example, where companies are normally allowed to depreciate equipment over 20 years, accelerated depreciation would allow for depreciation over ten years. Such a program would provide tax savings, vis-á-vis the normal depreciation schedule, over the period of the accelerated depreciation, in this example ten years. We would normally treat this tax savings as a recurring subsidy and allocate the benefits to the year in which tax savings were achieved.

However, we note that Section 37E does not function like an accelerated depreciation program. As respondents reported, and as was confirmed at verification, users of this program depreciate their capital equipment, buildings and machinery, over the same five-year period allowed under section 12C, the tax code provision governing depreciation. We agree with respondents that the advantage which Section 37E allows is that companies can begin depreciating equipment, buildings and machinery, in the year in which the purchases of the equipment are made, rather than having to wait until the equipment is in use, as they would under section 12C. As we verified in the case of Columbus, a large, capital-intensive project with a necessarily long construction period, the use of Section 37E enabled the partners to claim depreciation allowances two or three years in advance (depending on the partner's tax year). (Capital equipment purchases began in 1993 and the plant was officially commissioned on October 1, 1995. The plant's commissioning date was established by the South African tax authorities, as equipment purchases made beyond that date were not eligible for Section 37E depreciation.)

Thus, the benefits under this program are twofold: the opportunity to claim the depreciation allowances in advance of the time a company would otherwise be able to do so—that is, the time value of receiving the allowances in advance; and, the ability to turn the allowances into cash, through the use of the NTCCs, if a company has no tax liabilities to reduce with the depreciation allowances which would otherwise constitute tax deductions. Therefore, we will continue to use the calculation methodology we used for the purposes of the preliminary determination, with only the modifications indicated in the discussion of the program above and in the *Department's Position* on *Comment 5* below.

Comment 5: Calculation Methodology for Section 37E: Respondents note that if the Department persists in finding Section 37E benefits countervailable, the Department must correct errors in the calculation of the subsidy rate. Respondents argue that the Department should calculate the time-value of money, and thus the grant equivalents of Columbus' Section 37E advanced depreciation claims, only for Section 37E allowances claimed prior to the date of Columbus' official commissioning—October 1995. Respondents contend that depreciation claims for years after that date do not result in countervailable benefits to Columbus' partners because, after commissioning, the partners would have begun claiming depreciation of Columbus' assets under section 12C; these claims would have been in the same value as and contemporaneous to depreciation allowances claimed under Section 37E. Therefore, respondents contend that Columbus only benefitted from advanced depreciation under Section 37E for the years 1995/1996 (depending on the partners' respective tax years) and earlier. They propose that the benefit is limited to the time-value of money realized by the depreciation claims made for years for which Columbus otherwise could not have claimed depreciation.

Petitioners reject respondents' proposed corrections to the calculations on two accounts. First, petitioners reiterate their argument that the time-value of money treatment is flawed and has been rejected by the Department (*see Department's Position* on *Comment 4* above). Second, petitioners argue that respondents' proposed correction rests on an erroneous analytical assumption with respect to the timing of depreciation claims (the details of which are proprietary).

Department's Position: We disagree with respondents that Columbus benefitted from Section 37E only to the extent that the partners claimed depreciation allowances for years for which they otherwise could not have claimed depreciation allowances under section 12C. As explained above, by claiming depreciation in advance, Columbus' partners were able to realize capital savings which directly reduced the projects's financing requirements. Section 37E benefits were more than just a tax benefit. Therefore, the advanced depreciation claimed under Section 37E results in an ongoing benefit to the company, and the Department correctly found a benefit to Columbus in the advanced depreciation claimed under Section 37E throughout the length of the depreciation schedule. In other words, for each of the five years of the depreciation schedule, we calculated a grant equivalent; we then allocated each grant equivalent over the AUL of 15 years.

With regard to the contentions that the preliminary calculations contained errors, we have reviewed the calculation methodology used for our preliminary determination and have made corrections. For the preliminary determination, we incorrectly used two years as the sole basis for determining the time value, and thus the grant equivalent, of the advanced depreciation claimed under Section 37E by the three Columbus partners in each year of the depreciation schedule. We have adjusted our final calculations to reflect two years as the basis for calculating the time value of the yearly claims made by Highveld and three years as the basis for calculating the time value of the yearly claims made by Samancor and the IDC. This adjustment reflects the different tax years of the companies, the actual timing of the companies' tax claims, and their actual receipt of benefits under the program.

Comment 6: De Facto Specificity of IDC/Impofin Lending: Notwithstanding what respondents view as the Department's failure to satisfy the statutory preconditions to a *de facto* specificity analysis, discussed in *Comment 2* above, respondents argue that the IDC/Impofin program is not *de facto* specific. The preliminary determination was based on the fact that the ''fabricated metal products'' and the ''basic metal products'' industries are predominant users of the program and that these industries have received more than fifty percent, by value, of the total loan guarantees awarded over the life of the program. *Preliminary Determination* at 47266. Respondents argue that by examining value, the Department did not account for the three ''mega projects'' in the basic metal manufacture industries; these huge and extraordinary projects necessarily skew the results of any analysis based on value. Respondents note that in order to properly evaluate whether there is a predominant user of a program, one must analyze the number of loans and their distribution by industry, not the value of the loans and the distribution of that value by industry. Respondents cite verification documents which show no predominant user on this basis: 12 percent of approvals were for the basic metal manufacturing and fabricated metal products industries; the mining industry received 14.7 percent; the pulp and paper industry and the engine and vehicle industry each received 11.2 percent.

Respondents further note that the South African economy is dependent on the beneficiation of local raw materials for economic growth. The abundance of minerals and energy resources present competitive advantages for large-scale beneficiation; thus, investment in industrial infrastructure, in value terms, favors large beneficiation projects. These competitive advantages are centered in South Africa's basic metal manufacture industry. The fact that industrial development initiatives and the accompanying IDC/Impofin financing are weighted by value toward this industry does not indicate disproportionate use; rather, respondents conclude, it is a valid reflection of the sources available for beneficiation.

Petitioners note that respondents' comparison of the number of users, without examining the distribution of benefits, suggests not that the program was disproportionately used but rather that the steel industry was a dominant user of the program. Petitioners argue that the statute does not require the Department to make an exception for ''mega projects'' which may skew the distribution of benefits, and that this factor would necessarily lead the Department to a *de facto* specificity finding based on disproportionate use. According to petitioners, the Department cannot view only the number of projects without considering the relative weights of assistance by enterprise, industry, or group thereof. In addition, petitioners note that the Department's examination of IDC/Impofin financing over a seven-year period accounts for any ''skewed'' result caused by a mega-project in a particular year. Petitioners also note that the sectoral distribution of benefits was confirmed at verification.

Department's Position: We stand by our preliminary determination that the IDC/Impofin loan guarantee program provides benefits which are *de facto* specific to an enterprise, industry, or group thereof within the meaning of section 771(5A)(D)(iii) of the Act. We disagree with respondents' suggestion that the appropriate basis for our analysis is the number of loan guarantees and their distribution by industry and we note the Department's practice of examining the distribution of benefits, by value, when analyzing whether a program is *de facto* specific because an industry or group of industries is the predominant user of the program or receives a disproportionate share of the benefits granted under a program. *See, e.g., Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod from Italy,* 63 FR 40474, 40485 (July 29, 1998). Respondents' statement that there were three ''mega-projects'' which necessarily skewed the distribution of benefits in fact supports the Department's specificity finding. In our preliminary determination, we found that the information provided by the IDC regarding the distribution of benefits (by value) over the life of the program showed that the ''basic metals manufacture industry'' (which includes the manufacture of stainless steel) and the ''fabricated metal products industry'' together received more than half of the loan guarantees awarded over the life of the program. *See Preliminary Determination,* 63 FR at 47266. In fact, information which respondents submitted with their brief enables us to refine our finding of *de facto* specificity for this final determination. This information shows that, by value, the steel industry (including stainless steel) received more than half of all loan guarantee approvals (the rest of the industries using the program—including the mining, agriculture, and chemical industries, among others—together accounted for less than half of the loan approvals by value). This is clear evidence that the steel industry is a predominant user of this program and thus it is *de facto* specific. Furthermore, if we perform an analysis of the information which respondents presented in their case brief parallel to the analysis in our preliminary determination, this information shows that the basic metals manufacture and the fabricated metal products industries received more than three-quarters of all loan guarantee approvals, by value. Thus, these two industries together are clearly predominant users of the program.

By examining the distribution of benefits over time, the Department accounts for any anomalous industry-specific activity in a particular year. The fact that three mega-projects received the bulk of the loan guarantees supports our finding of *de facto* specificity based on predominant use, as these three projects are in the basic metal manufacture industry (basic iron and steel, stainless steel and aluminum). Finally, the information which respondents have provided with respect to the South African economy's dependence on the beneficiation of raw materials is not relevant to our analysis.

Comment 7: Calculation Methodology for IDC/Impofin Lending: Respondents argue that the interest rates which Columbus paid for IDC/Impofin financing were not preferential, as they were established by reference to independently-prescribed rates that reflected prevailing market conditions. The interest rates for the loans were either the Commercial Interest Reference Rate (CIRR) or the London Interbank Offered Rate (LIBOR) plus a

margin. The CIRR were fixed by the foreign export credit agency (ECA) for the full loan term at the time of the loan negotiation and contract; the LIBOR-based rates were variable rates.

For all of the loans, respondents note, Columbus paid to the foreign banks management and commitment fees, typically 0.5 percent and 0.25 percent, respectively, and to the IDC/Impofin a facility (guarantee) fee of 0.25 percent. Respondents argue that these fees were comparable to fees paid by other borrowers. In addition, for some of the loans, Columbus paid export credit insurance premiums to the banks, which in turn paid these fees to their respective export credit agencies. Respondents argue that there is no evidence in the record that the various fees and premiums paid by Columbus were preferential.

Petitioners argue that regardless of how the interest rates were established (by the CIRR or LIBOR), the verification report indicates that the rates were clearly not based upon loans to Columbus; rather they were ''based on the risk associated with lending to the IDC.'' (*Government Verification Report* at 11–12.) Since, as the verification report indicates, ''foreign banks like to use the IDC as a borrower because they do not have to investigate the credit of each borrowing firm,'' *id.,* petitioners argue that the interest rates paid by Columbus program are preferential.

Petitioners also contend that Columbus would not have received financing without the IDC and GOSA guarantees. Petitioners note that, because the IDC was a partner, Columbus did not have to formally apply for financing or undergo the IDC's risk assessment; foreign lenders required the IDC to guarantee the loans because Columbus had no established credit history; and, some countries required an additional back-up guarantee from the GOSA. *Id.* at 13. Petitioners contend that this information further demonstrates that IDC financing conferred a benefit.

Department's Position: As discussed in the ''IDC/Impofin Loan Guarantee Program'' section above, the Department has revised the analysis of the program from the preliminary determination. Because these loans originate either with foreign government export credit agencies or offshore foreign banks in coordination with foreign government export credit agencies, which are not under the direction or control of the GOSA, the loans themselves are not countervailable and it is inappropriate to compare the interest rates charged by offshore foreign banks to commercial interest rates in order to determine whether the program provides a benefit to Columbus. For the same reason, an examination of the fees paid to the foreign government banks is inappropriate. Thus, respondent's and petitioners' comments on the benchmark, fees to foreign government banks, and whether the program provides a benefit using this type of analysis, need not be addressed. Instead, we have determined that it is appropriate to focus on the fee charged by the IDC for the guarantee on these loans.

With respect to respondent's comment that there is no evidence that the fees charged by the IDC were preferential, we disagree. As discussed in greater detail in the ''IDC/Impofin Loan Guarantee Program'' section above, we have determined, based on conversations with an independent banker in South Africa, that a commercial bank would offer Columbus similar guarantees at a slightly higher rate, 0.375 percent. Thus, when we compare what Columbus paid the IDC for the provision of guarantees, 0.25 percent, and what it would have paid a commercial bank, 0.375 percent, we find that the IDC did provide a financial contribution that confers a benefit within the meaning of the Act.

Comment 8: IDC/Impofin Financing Calculation Adjustments: Petitioners argue that the Department's calculations for the IDC/Impofin financing understate the benefits to Columbus from this program. First, petitioners urge the Department to adhere to the preliminary determination, in which the Department stated that it would gather information about commercial fees and add an appropriate amount to the benchmark for the purposes of calculating the benefit for the final determination. Second, petitioners urge the Department to treat interest capitalizations not as interest payments but as increases in principal and to avoid double-counting the payment of capitalized interest in calculating the net present value. Third, in the absence of any record information regarding grace periods on loans in South Africa, petitioners argue that the Department should capture any countervailable benefits associated with the grace periods granted to Columbus for its IDC/Impofin financing. Fourth, the Department should correct errors which resulted in the finding of no benefit for some of the loan tranches examined. Finally, the Department should include in its loan calculations several loans, outstanding during the POI, which were omitted from Columbus' questionnaire responses and which were discovered at verification.

Respondents argue that since the Department's *de facto* specificity finding is in error, and the interest rates provided on the IDC/Impofin financing are not preferential, there is no need to comment on the manner in which the benefit should be calculated.

Department's Position: As discussed above, we have changed our analysis of the IDC/Impofin loan program. Thus, we need not address petitioners' comments with respect to adding fees to the benchmark, interest capitalization and grace periods. The Department did collect information about the guarantee fees that commercial banks charged, and based on this information, we have calculated a benefit comparing what Columbus paid the IDC to guarantee the loans under this program and what Columbus would have paid on comparable commercial guarantees. We have included the fees paid during the POI on loan tranches that were discovered at verification in our calculation of the benefit from the program.

With respect to Respondent's comment, we disagree. As discussed in the program description above and the *Department's Position* on *Comment 6* above, we find that the IDC/Impofin loan guarantee program is *de facto* specific.

Comment 9: Discount Rate: Petitioners argue that the Department should adjust the discount rate used in the preliminary determination because, although the Department relied on the long-term South African government bond rate as the discount rate, the Department noted its interest in finding a more appropriate rate for the final determination. Petitioners contend that discussions at verification of the Prime Overdraft rate (the rate at which commercial banks lend to their best customers), and the spreads added to it, support the use of this rate plus 50 to 60 basis points as the discount rate for the final determination.

Respondents note that the CIRR and LIBOR are the appropriate benchmark interest rates, and that application of these rates yields no countervailable benefits from the IDC/Impofin loans. Therefore, a benchmark based on South African lending rates is irrelevant.

Department's Position: Petitioners are correct that the Department expressed interest in finding an alternative discount rate for use in the final determination. However, as discussed in the section entitled ''Discount Rates'' above, we did not find an alternative long-term fixed interest rate. Thus, for the purposes of this final determination, we have constructed a discount rate by averaging the government bond rate as

reported by respondents with the ''Lending Rate'' reported in *International Financial Statistics,* December 1998, published by the International Monetary Fund. By averaging these two rates, we believe that we have identified a rate more appropriate than the rate used for the purposes of the preliminary determination, a rate which includes the necessary characteristics of both long-term borrowing and commercially-available interest rates.

We disagree with petitioners' suggestion of using the Prime Overdraft rate plus 50 to 60 basis points, as that rate is not a long-term fixed interest rate. Respondents' comment is misplaced as the original comment addressed the choice of discount rates for use in calculating the benefit from non-recurring subsides, not the benchmark used in calculating the benefit from the IDC/Impofin loan program. The calculation methodology for the IDC/Impofin loan program is discussed in the *Department's Position* on *Comment 8,* above.

Comment 10: Average Useful Life of Assets: Petitioners argue that the Department should use five years as the average useful life of assets (AUL), as facts available, for purposes of allocating non-recurring benefits over time. In support of this argument, petitioners note that Columbus did not provide information that would allow the Department to calculate an AUL, despite the Department's repeated requests for such information. Petitioners note that the statute justifies the Department's use of adverse facts available (*see* sections 776, 782(d) and (e) of the Act) because of Columbus' unwillingness to provide the requested information. Petitioners argue that five years is the appropriate AUL for two reasons: first, the Department confirmed at verification that Columbus depreciates assets for tax purposes over five years from the date of commissioning; second, Columbus' refusal to provide the information after a preliminary determination in which the Department used 15 years, as facts available and based on the IRS tables, supports the conclusion 15 years is more beneficial than the AUL that Columbus would have reported. Petitioners cite *D & L Supply Company* versus *United States,* 113 F. 3d 1220, 1223 (Fed. Cir. 1997) and *Censaldo Componenti S.p.A.* versus *United States,* 628 F. Supp. 198 (CIT 1986) to support their contention that Columbus should not be allowed to benefit from its refusal to cooperate with the Department's information requests.

Respondents argue that petitioners are incorrect in stating that Columbus has persistently failed to provide information about its AUL. Questionnaire responses indicate that Columbus depreciates buildings over 40 years and plant and machinery, vehicles and equipment over four to 25 years. Further, Columbus has consistently expressed its view that, since Columbus has never received a non-recurring grant or any other allocable subsidy from the GOSA, further information about its AUL is unnecessary. Thus, petitioners inappropriately draw an adverse inference from Columbus' carefully explained response.

Department's Position: We disagree with petitioners. Using five years as the allocation period for any non-recurring grants received by Columbus is unwarranted for two reasons. First, respondents did provide information about their general depreciation practices: buildings are depreciated over 40 years and plant and machinery, vehicles and equipment are depreciated over four to 25 years. While this information does not enable the Department to calculate an *average* useful life of assets, it does not warrant the use of an adverse inference in determining Columbus' AUL, as petitioner urges. Second, five years is not at all relevant to the actual average useful life of assets in the steel industry. Thus, without a basis for calculating a company-specific AUL, we find that the most reasonable alternative is to rely on the *IRS Tables,* which do reflect a reasonable determination of the AUL of assets in the steel industry. In addition, using 15 years as the allocation period is reasonable in light of the information which Columbus did provide about its depreciation practices. Further, the ''Allocation Period'' section above discusses the Department's practice of determining the allocation period for non-recurring subsidies using company-specific AUL data where reasonable and practicable, and relying on the *IRS Tables* when company-specific AUL data are not available or otherwise cannot be used.

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with the government and company officials, and examining relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the CRU.

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated an individual subsidy rate for Columbus Stainless, the operating unit of the Columbus Joint Venture. Because this is the only company under investigation, Columbus' rate serves as the all-others rate. We determine that the total estimated net countervailable subsidy rate is 3.93 percent *ad valorem* for Columbus.

In accordance with our preliminary affirmative determination, we instructed the U.S. Customs Service to suspend liquidation of all entries of stainless steel plate in coils from South Africa which were entered, or withdrawn from warehouse, for consumption on or after September 4, 1998, the date of the publication of our preliminary determination in the **Federal Register**. In accordance with section 703(d) of the Act, we instructed the U.S. Customs Service to discontinue the suspension of liquidation for merchandise entered on or after January 2, 1999, but to continue the suspension of liquidation of entries made between September 4, 1998, and January 1, 1999. We will reinstate suspension of liquidation under section 706(a) of the Act if the ITC issues a final affirmative injury determination, and will require a cash deposit of estimated countervailing duties for such entries of merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does

exist, we will issue a countervailing duty order.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to Administrative Protective Order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7530 Filed 3–30–99; 8:45 am]

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DEPARTMENT OF COMMERCE

International Trade Administration

[C–423–809]

Final Affirmative Countervailing Duty Determination; Stainless Steel Plate in Coils from Belgium

AGENCY: Import Administration, International Trade Administration, U.S. Department of Commerce.

EFFECTIVE DATE: March 31, 1999.

FOR FURTHER INFORMATION CONTACT: Zak Smith, Stephanie Hoffman, James Breeden, or Melani Miller, AD/CVD Enforcement, Group I, Office 1, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW, Washington, DC 20230; telephone: (202) 482–0189, 482–4198, 482–1174, or 482–0116, respectively.

Final Determination

The Department of Commerce determines that countervailable subsidies are being provided to producers and exporters of stainless steel plate in coils from Belgium. For information on the estimated countervailing duty rates, please see the *Suspension of Liquidation* section of this notice.

Petitioners

The petition in this investigation was filed on March 31, 1998, by Armco, Inc., Lukens Inc., Butler Armco Independent Union, Zanesville Armco Independent Organization, and the United Steelworkers of America, AFL-CIO/CLC (''the petitioners'').

Case History

Since the publication of the preliminary determination in the **Federal Register** on September 4, 1998 (63 FR 47239) (''*Preliminary Determination*''), the following events have occurred:

We conducted verification in Belgium of the questionnaire responses from the Government of Flanders (''GOF''), the Government of Belgium (''GOB''), SIDMAR N.V. (''Sidmar''), and ALZ N.V. (''ALZ'') from November 9 through November 20, 1998. We postponed the final determination of this investigation until March 19, 1999 (*see Countervailing Duty Investigations of Stainless Steel Plate in Coils From Belgium, Italy, the Republic of Korea, and the Republic of South Africa; Notice of Extension of Time Limit for Final Determinations,* 64 FR 2195 (January 13, 1999)). The petitioners and ALZ filed case briefs on February 10, the GOB filed a case brief on February 11, and we received rebuttal briefs from the petitioners and ALZ on February 18, 1999.

The Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute are references to the provisions of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act (''URAA'') effective January 1, 1995 (''the Act''). In addition, unless otherwise indicated, all citations to the Department of Commerce's (''the Department's'') regulations are to the regulations codified at 19 CFR part 351 (April 1998).

Scope of Investigation

For purposes of this investigation, the product covered is stainless steel plate in coils. Stainless steel is an alloy steel containing, by weight, 1.2 percent or less of carbon and 10.5 percent or more of chromium, with or without other elements. The subject plate products are flat-rolled products, 254 mm or over in width and 4.75 mm or more in thickness, in coils, and annealed or otherwise heat treated and pickled or otherwise descaled. The subject plate may also be further processed (*e.g.,* cold-rolled, polished, etc.) provided that it maintains the specified dimensions of plate following such processing. Excluded from the scope of this investigation are the following: (1) Plate not in coils, (2) plate that is not annealed or otherwise heat treated and pickled or otherwise descaled, (3) sheet and strip, and (4) flat bars.

The merchandise subject to this investigation is currently classifiable in the Harmonized Tariff Schedule of the United States (''HTSUS'') at subheadings: 7219.11.00.30, 7219.11.00.60, 7219.12.00.05, 7219.12.00.20, 7219.12.00.25, 7219.12.00.50, 7219.12.00.55, 7219.12.00.65, 7219.12.00.70, 7219.12.00.80, 7219.31.00.10, 7219.90.00.10, 7219.90.00.20, 7219.90.00.25, 7219.90.00.60, 7219.90.00.80, 7220.11.00.00, 7220.20.10.10, 7220.20.10.15, 7220.20.10.60, 7220.20.10.80, 7220.20.60.05, 7220.20.60.10, 7220.20.60.15, 7220.20.60.60, 7220.20.60.80, 7220.90.00.10, 7220.90.00.15, 7220.90.00.60, and 7220.90.00.80. Although the HTSUS subheadings are provided for convenience and Customs purposes, the written description of the merchandise under investigation is dispositive.

Injury Test

Because Belgium is a ''Subsidies Agreement Country'' within the meaning of section 701(b) of the Act, the International Trade Commission (''ITC'') is required to determine whether imports of the subject merchandise from Belgium materially injure, or threaten material injury to, a U.S. industry. *See* section 701(a)(2) of the Act. On May 28, 1998, the ITC published its preliminary determination finding 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 Belgium of the subject merchandise (*see* 63 FR 29251 (May 28, 1998)).

Period of Investigation

The period for which we are measuring subsidies (the ''POI'') is calendar year 1997.

Subsidies Valuation Information

Responding Producers

The GOB identified one producer of the subject merchandise that exported to the United States during the POI, ALZ. There are also two subsidiaries of ALZ which are involved in the production of the subject merchandise, ALBUFIN N.V. (''Albufin'') and AL-FIN N.V. (''Alfin''), and we have included any subsidies to these companies in the subsidy rate for ALZ. Furthermore, Sidmar owns either directly or indirectly 100 percent of ALZ's voting shares and is the overall majority shareholder of ALZ.

Benchmarks for Long-term Loans and Discount Rates

ALZ and Sidmar reported that they obtained long-term commercial loans contemporaneously with the receipt of certain government loans or grants. Where appropriate, we have used these

company-specific interest rates as the long-term loan benchmark interest rate or discount rate (*see* Comments 5 and 6, below). For those years in which ALZ or Sidmar did not receive commercial loans, we are using national average rates for long-term, fixed-rate debt. In the *Preliminary Determination,* we used rates reported by the GOF as the national average rates. However, as explained in the *Interested Party Comments* section below, we determine that those rates are inappropriate benchmarks and have changed our national average benchmarks for this final determination. For further discussion on benchmarks and discount rates, *see* Comment 4 in the *Interested Party Comments* section below.

Allocation Period

In the past, the Department has relied upon information from the U.S. Internal Revenue Service on the industry-specific average useful life of assets in determining the allocation period for non-recurring subsidies (see the General Issues Appendix (''*GIA*'') to the Final Affirmative Countervailing Duty Determination: Certain Steel Products from Austria, 58 FR 37217, 37225 (July 9, 1993)). However, in British Steel plc v. United States, 879 F. Supp. 1254 (CIT 1995) (''British Steel I''), the U.S. Court of International Trade (''CIT'') ruled against this allocation methodology. In accordance with the CIT's remand order, the Department calculated a company-specific allocation period for non-recurring subsidies based on the average useful life (''AUL'') of non-renewable physical assets. This remand determination was affirmed by the CIT on June 4, 1996. *See* British Steel plc v. United States, 929 F. Supp. 426, 439 (CIT 1996) (''British Steel II''). In recent countervailing duty investigations, it has been our practice to follow the CIT's decision in British Steel II, and to calculated a company-specific allocation period for all countervailable non-recurring subsidies. Thus, for purposes of this investigation we have determined the allocation period for non-recurring subsidies using company-specific AUL data because it was reasonable and practicable to do so.

As in the Preliminary Determination, we determine that the AUL for ALZ is 15 years. In a change from the Preliminary Determination however, we have allocated non-tied subsidies received by Sidmar over Sidmar's AUL, 19 years.

Equity Methodology

Consistent with the Department's methodology, the first question in analyzing an equity infusion is whether, at the time of infusion, there was a market price for newly-issued equity (*see* GIA, 58 FR 37239). The Department will find an equity investment to be inconsistent with the usual practice of a private investor if the market-determined price for equity is less than the price paid by the government for the same form of equity purchased directly from the firm. In this investigation, for those years in which market prices do not exist, the Department has conducted an equityworthiness analysis of the firm as described in the GIA, 58 FR at 37239. *See 1985 Debt to Equity Conversion and Purchase of ALZ Shares* in the program descriptions, below.

I. Programs Determined To Be Countervailable

A. Regional Subsidies under the Economic Expansion Law of 1970

The 1970 Law offers various incentives to enterprises located within designated disadvantaged regions. While the 1970 Law is currently administered by the GOF, the GOB originally oversaw the implementation of 1970 Law benefits to disadvantaged regions throughout Belgium. Pursuant to the overall devolution of power from the GOB to the regional governments since the early 1980s, the authority to administer the 1970 Law has been transferred to the regional governments. With respect to Flanders, many of the 1970 Law subsidy programs have been implemented and administered by the GOF since the late 1980s and the ''execution modalities'' have been amended by several Flemish decrees. Currently, funding for programs under the 1970 Law is included in a lump sum amount from the GOB as part of the funds needed to finance the overall operation of the GOF. The GOF retains full authority over the distribution of funds within its budget.

ALZ received several types of assistance under the 1970 Law (the initiation and Preliminary Determination notices identified these subsidies as: 1993 Expansion Grant, 1994 Environmental Grants, Investment and Interest Subsidies, Accelerated Depreciation, and *Real Estate Tax Exemption*). Most of this assistance was provided after the GOF assumed control of the subsidy programs. Therefore, we are treating the GOF as the authority providing these subsidies. However, ALZ received one grant in 1983 (identified in the initiation notice as Investment and Interest Subsidies). Because this grant was received prior to the GOF takeover of 1970 Law authority, we consider this one grant as having been bestowed by the GOB.

The GOF framework of economic expansion consists of the 1970 Law (for medium and large-sized businesses located in a disadvantaged region), the Act of August 4, 1978 (''1978 Act,'' for small businesses and one-man companies), and the 1993 Economic Expansion Decree (''1993 Decree,'' for medium and large-sized businesses not eligible for assistance under the 1970 Law). The 1993 Decree replaced the Economic Expansion Law of 1959 (''1959 Law'') which was repealed in 1991. These laws offer various subsidies designed to promote expansion, employment, investment, research and development, and conformance with environmental standards (Vlaams Reglement betreffende de Milieuvergunning, ''VLAREM''). Because the 1970 Law is part of a framework of economic expansion, the question arises whether particular assistance provided under the various laws should be considered one program for specificity purposes.

In the Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Belgium, 58 FR 37273 (July 9, 1993) (''Certain Steel''), we determined that assistance provided under the 1970 Law complemented that provided under the 1959 Law, because it generally increased the amount of assistance for companies located in certain development zones. Subsidies provided pursuant to the 1959 Law were found not countervailable in the Final Affirmative Countervailing Duty Determinations: Certain Steel Products From Belgium, September 7, 1982 (47 FR 39305) (''Belgian Steel'') because they were not specific. Therefore, in Certain Steel, we countervailed benefits under the 1970 Law only to the extent they exceeded benefits available under the 1959 Law (*see* Certain Steel at 37275 and 37289 and § 355.44(n) of the Department's *1989 Proposed Regulations (*Proposed Rules, Department of Commerce, International Trade Administration, Countervailing Duties, 54 FR 23366, 23380 (May 31, 1989))).

ALZ has argued for the same treatment in this case. However, as noted above, the 1959 Law was repealed in 1991 and replaced with the Flemish 1993 Decree. Therefore, the question is whether subsidies provided under the current economic expansion laws—the 1978 Act, the 1993 Decree and the 1970 Law—should be considered as one program for specificity purposes. We examined each subsidy received by ALZ and Albufin under the context of all three laws and determine that environmental grants and

environmental real estate tax exemptions provided pursuant to these laws are integrally linked. For further discussion, see Comment 17 in the *Interested Party Comments* and the Memorandum to Richard Moreland, ''Specificity of Assistance Provided Pursuant to the Economic Expansion Laws,'' dated March 19, 1999 (''Economic Expansion Memorandum''). Moreover, we determine that these programs are not specific and, therefore, not countervailable. For further discussion, *see* Comments 18 and 20 in the *Interested Party Comments* section.

The other subsidies received by Albufin under the 1970 Law (*i.e.*, the 1993 Expansion Grant, the *Real Estate Tax Exemption* for Albufin's expansion investment, and Accelerated Depreciation) are either not available to large companies under the 1993 Decree or the 1978 Act, or, in the case of the 1993 Expansion Grant, the 1993 Decree was not in effect at the time the subsidy was approved. Therefore, we determine that these subsidies provided under the 1970 Law cannot be integrally linked with the 1993 Decree or the 1978 Act. For further discussion, *see* Comment 17 in the *Interested Party Comments* section and the Economic Expansion Memorandum.

1. 1993 Expansion Grant

The GOF gave Albufin a cash grant in 1994 to construct an annealing and pickling line. The grant is a financial contribution as described in section 771(5)(D)(i) of the Act which provides a benefit to the recipient in the amount of the grant. Expansion grants are only available to large firms under the 1970 Law, and as noted above, benefits under the 1970 Law are available only to firms in certain regions of Flanders. On this basis, we determine that this program is specific under section 771(5A)(D)(iv) of the Act. Therefore, the 1993 Expansion Grant received by Albufin is countervailable within the meaning of section 771(5) of the Act.

We further determine that this grant is non-recurring because the company could not expect to receive it on an ongoing basis. Because the benefit to Albufin was below 0.50 percent of ALZ's sales in the year of receipt, we expensed the grant in that year. Thus, Albufin received no benefit during the POI.

2. Investment and Interest Subsidies

The petitioners alleged that ALZ's financial statements for 1996 and 1997 show entries for ''investment subsidies'' and ''interest subsidies.'' According to ALZ, the majority of these figures are captured under the heading 1994 Environmental Grants (addressed below). However, as mentioned above, in 1983, ALZ received one cash grant from the GOB under the old system of assistance. At that time, the 1959 Law was still in effect.

We determine that this grant received by ALZ is countervailable within the meaning of section 771(5) of the Act. The 1983 grant is a financial contribution as described in section 771(5)(D)(i) of the Act. Because the countervailable portion of the assistance was received from the GOB pursuant to the 1970 Law and, as mentioned above, benefits under the 1970 Law were available only to firms in certain regions of the country, we determine that the program is specific under section 771(5A)(D)(iv) of the Act.

Furthermore, because cash grants of this nature were also available to companies under the 1959 Law, we determine that only the difference in the assistance level between the two laws constitutes a countervailable benefit (*see* Certain Steel, 58 FR 37273, 37275). To derive the benefit, we calculated the difference in the benefit level between what was actually granted pursuant to the 1970 Law and what could have been received pursuant to the 1959 Law.

We further determine that this grant is non-recurring because it was not provided on an ongoing basis. In calculating the benefit, we applied the Department's standard grant methodology. We divided the benefit attributable to the POI by ALZ's total sales during the POI. On this basis, we determine the countervailable subsidy to be 0.02 percent ad valorem.

3. Accelerated Depreciation

Article 15 of the 1970 Law allows certain companies to declare twice the standard depreciation for assets acquired using grants bestowed under the law. The tax benefit is a financial contribution as described in section 771(5)(D)(ii) of the Act which provides a benefit to the recipient in the amount of the tax savings. Because only enterprises situated in certain development zones are eligible to apply for accelerated depreciation, we determine that the program is specific under section 771(5A)(D)(iv) of the Act. Therefore, we determine that this tax benefit received by ALZ is countervailable within the meaning of section 771(5) of the Act.

Albufin, an ALZ subsidiary, received tax savings under this program during the POI. In calculating the benefit, we treated the tax savings as a recurring benefit and divided it by ALZ's total sales during the POI. On this basis, we determine the countervailable subsidy to be 0.50 percent *ad valorem.*

4. Expansion Real Estate Tax Exemption

Pursuant to Article 16 of the 1970 Law, assets acquired using benefits received under the 1970 Law may be exempted from real estate taxes for up to five years, depending on the extent to which objectives of the 1970 Law are achieved. Albufin utilized this tax exemption for an expansion project.

The expansion real estate tax exemption received by Albufin is a financial contribution as described in section 771(5)(D)(ii) of the Act which provides a benefit to the recipient in the amount of the tax savings. As noted above, only the 1970 Law provides tax exemptions for expansion investments to large enterprises. Because the 1970 Law only provides subsidies to companies located in certain regions, we determine that this expansion real estate tax exemption is specific under section 771(5A)(D)(iv) of the Act. Therefore, we determine that the expansion real estate tax exemption received by Albufin is countervailable within the meaning of section 771(5) of the Act.

Albufin received tax savings under this program during the POI. In calculating the benefit, we treated the tax savings as a recurring benefit and divided it by ALZ's total sales during the POI. On this basis, we determine the countervailable subsidy to be 0.09 percent *ad valorem.*

B. 1985 ALZ Share Subscriptions and Subsequent Transactions (identified in the initiation notice as 1985 Debt to Equity Conversion and Purchase of ALZ Shares)

In 1985, the GOB made three share subscriptions in ALZ pursuant to the Royal Decree No. 245 of December 31, 1983. This Royal Decree allowed the GOB to make preference share subscriptions in the steel industry as long as the subscriptions did not exceed one-half of the social capital of the company. The Nationale Maatschappig voor de Herstructurering van de Nationale Sectoren (''NMNS''), the government agency purchasing the shares, acquired common shares and preference shares through this plan.

In analyzing whether these share purchases conferred a benefit on ALZ, we must determine whether the GOB investment was inconsistent with the usual investment practice of private investors in Belgium. Neither ALZ's common nor preference shares were publicly traded. Therefore, we have analyzed the circumstances of the transaction.

According to ALZ, the price at which the GOB purchased shares in ALZ was determined by two separate studies as discussed in ALZ's shareholders' meeting of September 26, 1985. These studies were performed by an independent accounting firm and a group of experts selected by ALZ. In addition, we have performed our own analysis of ALZ's financial health at the time of the stock purchase. This analysis indicates that the company was equityworthy.

Pursuant to the Department's equity methodology, a finding of equityworthiness means that the Department need not inquire further regarding the commercial soundness of a government's purchase of common shares. Hence, we determine that the GOB's 1985 purchase of common shares was consistent with the usual investment practice of private investors in Belgium.

With respect to ALZ's preference shares, we have applied the standard established in *Aimcor* v. *the United States*, 871 F. Supp. 447, 454 (CIT 1994) and *Geneva Steel et al.* v. *United States*, 914 F. Supp. 563, 582 (CIT 1996) (''*Geneva Steel*'') and analyzed the characteristics and the subscription price of the preference stock purchased by the GOB. Although the record evidence is mixed, on balance, we have determined that the terms at which the GOB ultimately purchased the preference shares was consistent with the usual investment practice of private investors in Belgium (*see* memorandum from Team to Richard Moreland, ''ALZ Preference Shares,'' public version, dated March 19, 1999).

In 1987, the GOB sold ALZ's common shares purchased under the Royal Decree No. 245 to Kempense Investeringsvennootschap (''KIV''), a company controlled by Sidmar. Based on the relevant record evidence concerning this transaction, we have concluded that the GOB did not behave as a private investor when selling its shares because it accepted a lower price than it otherwise could have obtained for the shares. Specifically, the GOB agreed to sell its shares of ALZ common stock at the value assigned by a statutory auditor. However, the valuation methodology used by the auditor failed to reflect the market value of the stock. This is evident because in a relatively contemporaneous transaction a private seller of ALZ's shares obtained a much higher value. Also, circumstances surrounding the GOB's sale of shares to KIV indicate that the GOB may have been willing to accept less than the fair value of its shares in order to ensure that the shares were purchased by a Belgian company.

We have determined that the GOB's sale of ALZ's common shares to Sidmar constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. This program provides a financial contribution, as described in section 771(5)(D)(i) of the Act. As discussed above, benefits under Royal Decree No. 245 are available only to the steel sector. On this basis, we determine that the program is specific under section 771(5A)(D) of the Act.

To calculate the benefits, we took the difference between market value for ALZ's common stock and the price paid by Sidmar for the stock. We then applied the Department's standard grant methodology and divided the benefit attributable to the POI by Sidmar's total consolidated sales during the POI. On this basis, we determine the countervailable subsidy to be 0.09 percent *ad valorem.*

In addition, we determined in our *Preliminary Determination* that Sidmar received a countervailable benefit via the creation of a joint venture between Sidmar and the GOB. In this transaction, the GOB contributed its ALZ preference shares in exchange for shares in the joint venture. However, the Department verified that this transaction was structured in such a way that the government maintained ownership of ALZ's preference shares. Moreover, it was established at verification that Sidmar does not control the company. Thus, Sidmar neither controls the ALZ preference shares contributed to this company nor can profit from the shares. Accordingly, contrary to our *Preliminary Determination*, we determine that Sidmar did not ''acquire'' the preference shares originally purchased by the GOB. Therefore, no countervailable benefit was conferred upon Sidmar through the creation of the joint venture by Sidmar and the GOB.

C. Societe Nationale de Credite a l'Industrie (''SNCI'') Loans

SNCI was a public credit institution, which, through medium- and long-term financing, encouraged the development and growth of industrial and commercial enterprises in Belgium. SNCI was organized as a limited liability company and, until 1997, was 50-percent owned by the Belgian government. ALZ received investment loans from SNCI which were outstanding during the POI. All SNCI loans received by ALZ and outstanding during the POI were approved and disbursed after 1986.

In *Certain Steel*, we examined whether investment loans from SNCI were specific by analyzing whether the steel industry received a disproportionate share of loans outstanding (58 FR 37273, 37280–37281). We compared the steel industry's share of outstanding loans to the share of outstanding loans provided to all other users of the program. Although SNCI made loans to many sectors of the Belgian economy, we determined that the steel industry had received a disproportionately large share of investment loans outstanding in years prior to 1987. However, we did not find disproportionality in 1987 and 1988 as the steel industry's share of benefits dropped significantly.

In the *Preliminary Determination*, we followed the same analysis employed in *Certain Steel* and examined data on outstanding SNCI investment loans in 1989 and 1990, and preliminarily determined that the steel industry did not receive a disproportionate share of benefits in those years. Therefore, for loans approved between 1987 and 1990, we preliminarily determined that SNCI investment loans were non-specific and, therefore, not countervailable.

In a change from the analysis used in *Certain Steel* and the *Preliminary Determination*, we have focused our analysis on the steel industry's share of loans approved in a given year rather than that industry's share of loans outstanding in a given year. We believe the former provides a better indication of whether loans are limited to specific industries. Loans outstanding can be affected by other factors besides the approval process which are not relevant to a specificity determination, such as the terms of loans. Therefore, for the final determination, we are modifying our analysis to examine the percentage of loans approved for the basic metals industry in each year. On this basis, we determine that the steel industry did not receive a disproportionate share of SNCI loans for the years 1987 through 1990. *See* Memorandum to Richard Moreland, ''Specificity of SNCI Loans,'' dated March 19, 1999 (''*SNCI Memorandum*'').

Since the *Preliminary Determination*, the petitioners provided information indicating that the steel industry's share of SNCI loans was not completely captured in the data used by the Department because it did not include loans provided to the steel industry through ''coordination centers.'' SNCI classifies loans to coordination centers as loans to the ''banking and finance, insurance, business services, and renting'' sector. Therefore, the petitioners argue that the data should be

adjusted to account for all loans provided to the steel industry.

The data we are using for our final determination (loans approved) also do not include loans provided to the metals industry through coordination centers. However, we observed that in the one instance where loans through coordination centers are accounted for in the statistics reflecting loans outstanding, the increase in the metals industry's share was not significant. *See* Comment 12 in the *Interested Party Comments* section. Therefore, although we do not have information on loans approved through coordination centers, based upon the information on the record, we determine that their effect would not alter our specificity determination for the years 1987 through 1990. *See SNCI Memorandum.*

For the period 1991–1995, the GOB did not provide any industry usage information for SNCI loans. We requested this information from the GOB in both the original and supplemental questionnaires as well as in the verification outline. The GOB did provide information for 1996 and 1997, however, these figures could not be verified. Because the GOB failed to provide verifiable information with respect to the loans provided since 1991, the Department must use facts available in determining whether these loans are specific. *See* section 776(a) of the Act. Moreover, the GOB did not provide an adequate explanation as to why it was unable to supply the requested information. GOB officials simply stated that they did not have access to the necessary information. Therefore, we determine that the GOB did not act to the best of its ability and, pursuant to section 776(b) of the Act, are applying adverse inferences to determine that SNCI loans provided after 1991 are specific under section 771(5A)(D)(iii) of the Act. For further discussion, *see* Comment 12 in the *Interested Party Comments* section.

To calculate the subsidy conferred by these loans, we used our long-term fixed-rate loan methodology. Because the interest rates on ALZ's loans were periodically revised, we examined the fixed segment which included the POI. We measured the cost savings to ALZ in each year of this segment. We then took the present value of each of these amounts as of the time the interest rate was revised. Finally, using the benchmark as a discount rate, we allocated the subsidy over the period of the segment. We then divided the benefit attributable to the POI by ALZ's total 1997 sales. On this basis, we determine the countervailable subsidy to be 0.04 percent *ad valorem.*

D. Belgian Industrial Finance Company (''Belfin'') Loans

Belfin was established by Royal Decree on June 29, 1981, as a mixed corporation with 50 percent GOB participation and 50 percent private industry participation. In *Certain Steel,* we determined that Belfin's objective is to finance investments needed for the restructuring and development of various sectors of industry, commerce, and state services. Belfin borrows money in Belgium and on international markets, with the benefit of government guarantees, in order to obtain the funds needed to make loans to Belgian companies. The government's guarantee makes it possible for Belfin to borrow at favorable interest rates and to pass the savings along when it lends the funds to Belgian companies. Belfin loans to Belgian companies are not guaranteed by the GOB. Moreover, these loans carry a one percent commission which is used to maintain a guarantee fund to support the GOB's guarantee of Belfin's borrowing. ALZ received Belfin loans which were outstanding during the POI.

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. These loans provide a financial contribution, as described in section 771(5)(D)(i) of the Act, with the benefit equal to the difference between the benchmark rate and the rate ALZ pays on these loans. Although the objective of Belfin loans is to assist the restructuring and development of various sectors, steel companies are the predominant recipients of Belfin loans. Therefore, we determine that the Belfin loans to the steel industry are specific under section 771(5A) of the Act.

To measure the benefit on these loans, we used our long-term fixed-rate loan methodology. We divided the subsidy allocated to the POI by ALZ's total 1997 sales. On this basis, we determine the countervailable subsidy to be 0.00 percent *ad valorem.*

E. Industrial Reconversion Zones

Alfin

Alfin was established as a ''proper'' reconversion company in 1985 under the reconversion program ''Herstelwet 1984.'' It was financed by a government agency, Nationale Investeringsmaatschappij (''NIM'') and ALZ. In exchange for its investment, NIM received preferred non-voting shares and a two percent annual return on its investment. ALZ is obligated to repurchase all of the shares purchased by NIM at the issued price over a ten-year period.

We have used the hierarchical criteria discussed in the ''Classification of Hybrid Financial Instruments Issue'' section of the *GIA* to examine these shares and find that they constitute debt instruments because they have a fixed repayment period.

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. This program provides a financial contribution, as described in section 771(5)(D)(i) of the Act. Moreover, because benefits under the ''Herstelwet 1984'' law are limited to firms in certain regions of the country, we determine that this program is specific under section 771(5A)(D)(iv) of the Act.

To measure the benefit of this loan, we used our long-term fixed-rate loan methodology. We divided the subsidy allocated to the POI by ALZ's total 1997 sales. On this basis, we determine the countervailable subsidy to be 0.00 percent *ad valorem.*

Albufin

Albufin was established as an ''improper'' reconversion company in 1989, also under the reconversion program ''Herstelwet 1984.'' It received its initial capital from the government (NIM), the Sidmar Group (FININDUS), a private company (Klockner Stahl) and ALZ. Because Klockner Stahl was a private company at the time of Albufin's establishment, and it invested on the same terms as the government, we determine that there is no countervailable benefit resulting from the establishment of the company. However, as an ''improper'' reconversion company, Albufin benefits from a tax exemption on dividend payments and is exempt from the capital registration tax. We determine that these tax benefits received by Albufin are countervailable subsidies within the meaning of section 771(5) of the Act. The tax benefits are a financial contribution as described in section 771(5)(D)(ii) of the Act which provide a benefit to the recipient in the amount of the tax savings. Because benefits under the ''Herstelwet 1984'' law are limited to firms in certain regions of the country, we determine that this program is specific under section 771(5A)(D)(iv) of the Act.

During the POI, Albufin did not receive tax savings under the capital registration tax but did benefit from the exemption on dividend payments. To measure the benefit from this tax exemption, we treated the tax savings as a recurring benefit and divided them by ALZ's total sales during the POI. On this

basis, we determine the countervailable subsidy to be 0.05 percent *ad valorem.*

F. Subsidies Provided to Sidmar that are Attributable to ALZ

As discussed in the ''*Responding Producers*'' section above, Sidmar owns either directly or indirectly 100 percent of ALZ's voting shares and is the overall majority shareholder of ALZ. In *Certain Steel* and in the Department's redetermination on remand of *Certain Steel,* we found that Sidmar received several countervailable benefits that were attributable to the entire Sidmar group. Because ALZ is a fully consolidated subsidiary of Sidmar, any untied subsidies provided to Sidmar are attributable to ALZ (*see Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom; Final Results of Countervailing Duty Administrative Review*, 63 FR 18367 (April 15, 1998) (''*UK Lead and Bismuth*'')). Thus, we determine that the following two programs provide countervailable benefits to ALZ via its parent company, Sidmar.

1. Assumption of Sidmar's Debt

Between 1979 and 1983, the GOB assumed the interest costs associated with medium- and long-term loans for certain steel producers, including Sidmar. In exchange for the GOB's assumption of financing costs, Sidmar agreed to the conditional issuance of convertible profit sharing bonds (''OCPCs'') to the GOB. In 1985, Sidmar and the GOB agreed to substitute *parts beneficiaires* (''PBs'') for the OCPCs.

Consistent with *Certain Steel* and the attendant litigation, we determine that the GOB's initial assumption of interest costs was specific under section 771(5A) of the Act. Furthermore, we determine that the OCPCs are properly classifiable as debt and that the conversion of OCPCs to PBS constituted a debt to equity conversion. Comparing the price paid for the PBs to an adjusted market value of Sidmar's common stock, we determine that the debt to equity conversion provided a benefit to Sidmar as the share transactions were on terms inconsistent with the usual practice of a private investor. *See Amended Final Affirmative Countervailing Duty Determinations; Certain Carbon Steel Products From Belgium*, 62 FR 37880 (July 15, 1997).

We determine that this program constitutes a countervailable subsidy within the meaning of section 771(5) of the Act. This program provides a financial contribution, as described in section 771(5)(D)(i) of the Act. As discussed above, benefits under this program were available only to certain steel producers. On this basis, we determine that the program is specific under section 771(5A)(D)(i) of the Act.

To measure the benefit from the debt to equity conversion, we calculated the premium paid by the government as the difference between the price paid by the government for the PBs and the adjusted market price of the common shares. We then applied the Department's standard grant methodology and divided the benefit attributable to the POI by Sidmar's total consolidated sales during the POI. On this basis, we determine the countervailable subsidy to be 0.56 percent *ad valorem*.

2. SidInvest

The right to establish ''Invests'' was limited to the five national industries, including the steel industry. SIDINVEST N.V. (''SidInvest'') was incorporated on August 31, 1982, as a holding company jointly owned by Sidmar and the Societe Nationale d'Investissement, S.A. (''SNI'') (a government financing agency). SidInvest was given drawing rights on SNI to finance specific projects. The drawing rights took the form of conditional refundable advances (''CRAs''), which were interest-free, but repayable to SNI based on a company's profitability.

SidInvest made periodic repayments of the CRAs it had drawn from SNI. However, in 1987, the GOB moved to accelerate the repayment of the CRAs. The government agency NMNS and SidInvest discussed two options including (i) paying back the CRAs at a rate of three percent per year and (ii) repaying immediately the discounted value calculated as if the full amount were due 32 years later. In early 1988, under the first option, SidInvest agreed to pay back the outstanding balance on the CRAs at a rate of 3 percent per year.

Later, in July 1988, an agreement was reached for NMNS to become a shareholder in SidInvest by contributing the CRAs owed to the government by SidInvest in exchange for SidInvest stock. In a second agreement, through a series of transactions the Sidmar group then repurchased the SidInvest shares obtained by NMNS.

Consistent with *Certain Steel*, we determine that the CRAs were interest-free loans with no fixed repayment. However, the various agreements that took place on July 29, 1988, changed the CRAs. First, it was agreed that repayment would be achieved over 32 years. Second, the GOB swapped that repayment obligation for shares in SidInvest and sold those shares back to various members of the Sidmar group. The benefit to Sidmar in these transactions was that it was able to purchase the GOB's shares at too low a price. This occurred because: (i) The GOB agreed to accept in payment the net present value of the amount due in 32 years and (ii) it calculated the net present value using a non-commercial interest rate. The combination of these two elements of the July 29, 1988, agreements meant that the GOB forgave a considerable portion of the amount it had loaned thru the CRAs.

We determine that this debt cancellation provides a countervailable subsidy within the meaning of section 771(5) of the Act. It is a financial contribution within the meaning of section 771(5)(D)(i) of the Act. Moreover, because the right to establish ''Invests'' (and, consequently, any forgiveness of loans given to the Invests) was limited to the five national sectors, we view this debt cancellation as being limited to a specific group of industries. On this basis, we determine that the benefit is specific under section 771(5A)(D) of the Act.

To measure the benefit arising from the events of July 29, 1988, we have deducted from SidInvest's outstanding indebtedness the cash received by the GOB. We have treated the remainder as a grant and allocated the benefit over Sidmar's AUL. We divided the total benefit attributable to the POI by Sidmar's consolidated total sales during the POI. On this basis, we determine the countervailable subsidy to be 0.47 percent ad valorem.

The analysis here differs from that followed in Certain Steel. In Certain Steel, we considered the events of July 29, 1988, to constitute two separate events, the creation of a zero-interest, 32-year loan and the use of a non-commercial interest rate to calculate the benefit. Although useful as an analytical tool, the approach in Certain Steel was flawed because it created a loan that was basically repaid the same day. Under our standard loan methodology this countervailable loan would cease to be countervailable the same day it was forgiven. To avoid such an anomaly, we have revised our analytical approach, as described above, to capture the full benefit to Sidmar of this transaction.

II. Programs Determined To Be Not Countervailable

A. 1994 Environmental Grants

Pursuant to the 1970 Law, ALZ received several grants for environmental investments undertaken to conform its operations with VLAREM. As noted above, we determine that environmental grants available under the 1970 Law are integrally linked with those available

under the 1993 Decree and the 1978 Act. Because the combination of these laws makes this assistance available to everyone in Flanders, we determine that these grants are not de jure specific. *See,* also, Comment 17 in the *Interest Party Comments* section.

We also examined usage data provided by the GOF for the years 1995–1997 and further determine that these grants are not de facto specific. Therefore, the 1994 environmental grants are not countervailable. *See also* Economic Expansion Memorandum.

The GOF requested green light treatment for environmental grants. Because these grants are not specific, the green light issue is moot.

B. Environmental Real Estate Tax Exemption

We preliminarily determined that ALZ did not benefit from this program. However, at verification we learned that real estate taxes are paid separately from taxes on revenue and that ALZ did benefit from these environmental tax exemptions. Accordingly, for purposes of our final determination, we have analyzed the countervailability of the environmental real estate tax exemptions received by ALZ.

As noted above, we determine that environmental real estate tax exemptions available under the 1970 Law are integrally linked with those available under the 1993 Decree and the 1978 Act. Because the environmental tax exemptions under the 1970 Law, the 1978 Act, and the 1993 Decree are generally available, these environmental tax exemptions are not de jure specific. Moreover, following the same analysis employed for the 1994 Environmental Grants, we determine that these environmental tax exemptions are also not de facto specific under section 771(5A)(D)(iii) of the Act. Therefore, the environmental real estate tax exemptions received by ALZ are not countervailable. *See* Comments 17 and 20 in the *Interested Party Comments* section and Economic Expansion Memorandum.

III. Programs Determined To Be Not Used

Based upon the information provided in the responses, we determine that neither Sidmar nor ALZ applied for or received attributable benefits under the following programs during the POI.

A. Government of Belgium Programs

1. Subsidies Provided to Sidmar that are Potentially Attributable to ALZ
   a. Water Purification Grants
2. Societe Nationale pour la Reconstruction des Secteurs Nationaux (''SNSN'')

B. Government of Flanders Programs

1. Regional subsidies under the 1970 Law
   a. Corporate Income Tax Exemption
   b. Capital Registration Tax Exemption
   c. Government Loan Guarantees
2. Special Depreciation Allowance
3. Preferential Short-Term Export Credit
4. Interest Rate Rebates

C. Programs of the European Commission

1. ECSC Article 54 Loans and Interest Rebates
2. ECSC Article 56 Conversion Loans, Interest Rebates and Redeployment Aid
3. European Social Fund Grants
4. European Regional Development Fund Grants
5. Resider II Program

Interested Party Comments

Comment 1: Sidmar's Sales Denominator. The petitioners argue that Sidmar's sales denominator should be adjusted to exclude production that occurred outside of Belgium because the subsidies provided to Sidmar were not intended to benefit non-Belgian production. In support of their argument, the petitioners cite 19 CFR 351.525(7) of the Department's new regulations, which states that if a firm has production facilities in two or more countries, the Department will attribute these subsidies to products produced by the firm within the country of the government that granted the subsidy. (*See* Countervailing Duties; Final Rule, 63 FR 65348, 65417 (November 25, 1998) (''Final CVD Regulations'')).

Department Position: We have used Sidmar's sales denominator exclusive of all non-Belgian production for purposes of attributing the subsidies provided to Sidmar. We believe that it is reasonable to presume that the government of a country normally provides subsidies for the general purpose of promoting the economic health of that country. *See* GIA at 37231. Sidmar has not offered any information rebutting this presumption.

Comment 2: Sidmar Sales Denominator—Transportation Expenses. The petitioners argue that the Department should calculate subsidy benefits to ALZ and Sidmar on an f.o.b. basis rather than on the basis of the companies' accounting and financial statements. The petitioners note that the Final CVD Regulations are clear that sales values should be determined on an f.o.b. basis. While ALZ appears to have provided an f.o.b. based sales figure at verification, the petitioners contend that Sidmar calculated its sales figure on a c.i.f. basis. According to the petitioners, Sidmar's calculation of the total sales figure for the Sidmar Group's Belgian-located companies is based on the companies' revenues, which are reported on a c.i.f. basis. Accordingly, the petitioners argue that transportation costs should be subtracted from this calculation in order to derive the appropriate f.o.b. sales value.

ALZ argues that the Department verified that there is no method for calculating a consolidated f.o.b. figure for the Sidmar Group, a holding company consisting of Sidmar NV and other steel related companies. ALZ notes that Sidmar rarely sells on an f.o.b. basis because its main markets are in Europe, with the result that its products do not go through a port. Furthermore, the Department verified that the type of information Sidmar receives in order to calculate the consolidated financial statements does not provide any figures on transportation costs.

The respondent further argues that using Sidmar NV's cost information to adjust the Sidmar Group's consolidated figures, as recommended by petitioners, serves to overestimate the transportation costs contained in the consolidated revenue figure. ALZ notes that the companies included in the consolidated group are involved in a wide variety of activities, some of which do not incur any transportation expenses. Accordingly, it is not reasonable to assume that all of these companies would incur transportation costs at the same level as Sidmar NV. Consequently, according to ALZ, the petitioners' calculation derives an ex-factory amount as opposed to an f.o.b. amount. Moreover, the petitioners' calculation understates even the ex-factory amount by deducting transportation expenses from companies that incur none.

Department Position: In cases where the company's sales are not recorded on an f.o.b. basis, the Department adjusts the sales value to conform with the Department's longstanding practice of calculating an f.o.b.-based ad valorem subsidy rate, which is consistent with the assessment of the countervailing duties. Accordingly, we have adjusted certain sales figures of Sidmar's Belgian-located companies by the ratio of Sidmar NV's transportation expenses to its total sales. However, we have not adjusted the sales figures of companies that are not involved in production or manufacturing because these companies incur little to no transportation expenses. We believe this to be the most

accurate estimate of the f.o.b. value of Sidmar's sales.

Comment 3: Sidmar Sales Denominator—Other Income. The petitioners argue that the Sidmar Group sales figure includes additional income that is inappropriately reported. The petitioners note that Sidmar officials calculated the total sales figure for the Group's Belgian-located companies by adding accounts 70 (''Turnover'') and 74 (''Other Operating Income: Miscellaneous'') for each company. The petitioners argue that account 74 includes various forms of revenue that were derived from sources that bear no relation to Sidmar's operations. Accordingly, these sources of revenue could not have benefitted from the subsidies under investigation. Therefore, account 74 should be removed from Sidmar's sales figure.

ALZ counters that it is necessary to include ''Other Operating Income'' in order to consolidate the revenues of the Sidmar Group's Belgian companies. The respondent explains that it totaled the revenues of the Sidmar Group companies located in Belgium and reduced this amount by each company's intra-group acquisitions. However, the cost accounts used to calculate intra-group transactions do not correspond exactly to accounts 70 and 74. The respondent notes that while cost accounts beginning with the number 60, in which Sidmar subsidiaries record purchases, correspond mostly to 70 accounts, some of the items included therein correspond to items recorded in the 74 account. Cost accounts beginning with the number 61 reflect other costs corresponding to account 74. Consequently, reducing the 70 revenue account by the 60 account serves to understate revenue because some of the items recorded in the 60 accounts correspond to revenues recorded in the 74 accounts. Therefore, in order to achieve complete correspondence between revenues and expenditures, the respondent totaled accounts 70 and 74 and deducted from that combined total the intra-group acquisitions reflected in accounts 60 and 61. ALZ notes that this was the most accurate calculation of the Sidmar Group's Belgian sales given the accounting records of each company.

Department's Position: We verified that the entries recorded in Sidmar's account 74 include non-operational income. We did not request nor collect additional information as to revenue recorded in account 74 by the Sidmar Group's Belgian subsidiaries and there is no indication that all of the Sidmar Group companies record their revenue using the same accounting standard. As noted by respondents, simply deducting the 60 account from the 70 account results in an understatement of Sidmar's operating income. Thus, for purposes of our final determination, we have retained in Sidmar's sales denominator the revenue from account 74 because this is the most accurate information on the record.

Comment 4: Loan Benchmarks and Discount Rates. Both the petitioners and ALZ argue that the national average, long-term benchmark interest rates used in the Preliminary Determination are inappropriate because they are rates for all outstanding government loans, not commercial loans extended in a particular year. The petitioners suggest that the Department should use the SNCI rates collected at verification plus a 15 point spread for the years 1982 to 1997.

ALZ states that because prime rates are set each day, the Department should use the prime rate provided by Kredietbank and Generale Bank for the specific day that a loan was approved or an interest rate was revised. Because these rates are provided for the specific day and length of the loan, they are the best approximations of a commercially available interest rate. Short of using these rates, ALZ argues that the Department should calculate an annual average interest rate from the prime rates collected at verification. Prior to 1991, when prime rates are not available, ALZ argues that the Department should approximate a prime rate from the SNCI rate as was done in Certain Steel.

Department's Position: We agree that the rates used in the Preliminary Determination are inappropriate benchmarks because they represent rates for total government debt outstanding. Therefore, we are changing our benchmark rates for the final determination to reflect long-term national averages for commercial debt taken out in each year. For years in which there was no company-specific benchmark and in which a prime rate is available (*i.e.,* 1991–1993 and 1995–1997), we have used the prime rate plus a 15 point spread as our benchmark. This methodology comports with information collected at verification (*see* Appendix I of the Memorandum to Susan Kuhbach, ''Verification Report for a Private Commercial Bank,'' dated January 25, 1999). However, we are not using the prime rate for the specific day that the interest rate on the subsidized loan was revised because the Department's practice is to use an annual average interest rate during the year in which the loan was received. *See* Final Affirmative Countervailing Duty Determination: Certain Stainless Steel Wire Rod From Italy 63 FR 40474 (July 29, 1998) (''Wire Rod from Italy'').

For the period prior to 1991, when Belgium did not publish a prime rate, we are using the national average interest rate calculated in the Certain Steel investigation and used in the recently published administrative review of that case. Consistent with both of those proceedings, we are using Kredietbank rates for the years 1982 to 1990, which were supplied in the Certain Steel investigation, and adding a margin of 15 points to these rates. *See* Certain Steel, 37288–37289 and Cut-to-Length Carbon Steel Plate From Belgium; Final Results of Countervailing Duty Administrative Review, 64 FR 12982, 12987 (March 16, 1999).

We did not approximate a prime rate for the years prior to 1991 as ALZ suggested. Although we did construct a prime rate in Certain Steel, we only did so to calculate a margin for uncreditworthiness, not to calculate the benchmark rate. As stated above, for benchmark rates prior to 1991, we used the Kredietbank rates from Certain Steel plus a spread.

Comment 5: ALZ Company-Specific Benchmarks. The petitioners argue that company-specific benchmark rates used by the Department in the Preliminary Determination for ALZ in 1989 and 1993 are not appropriate benchmarks because they are based on a loan which is not a true commercial loan. The petitioners maintain that the loan originally taken out in 1989 by ALZ, and revised in 1993, should not be used because it was linked to a project which also received SNCI financing two years earlier. According to the petitioners, because both the private bank loan and the SNCI loan were taken out to finance the same project, they are part of a consortium loan and the participation of SNCI may have affected the terms of the private bank loan. Moreover, the petitioners argue that the interest rate revision on this loan used to determine the 1993 benchmark rate for ALZ was not applicable until 1994 and, therefore, should not be used as a benchmark for 1993. Instead of using these aforementioned company-specific rates, the Department should use the SNCI rates collected from Kredietbank for the years 1982 to 1997.

It is ALZ's position that its 1989 loan is a commercial loan and the fact that an SNCI loan was taken out two years earlier to finance the same project should have no bearing. In addition, the relevant date in determining benchmarks is the date on which the rate is established. Therefore, the interest rate revision in 1993 is applicable to 1993.

Department's Position: It is the Department's policy to use a company-specific benchmark rate to determine the benefit conferred by a government loan program. *See, e.g.,* Certain Iron-Metal Castings from India; Final Results and Partial Rescission of Countervailing Duty Administrative Review, 63 FR 64050, 64057 (November 18, 1998). Therefore, where available, we have used ALZ's loans as benchmarks. We disagree with the petitioners that ALZ's 1989 loan was not a commercial loan merely because the loan was used to finance a project which received SNCI financing years earlier. When the loan contract was reviewed at verification, there was nothing in the document to indicate that the loan was not a commercial loan or was in any way connected with the SNCI loan. Therefore, consistent with the Department's practice, we are using ALZ's 1989 loan as a company-specific benchmark.

With regard to the 1993 interest rate revision, we agree with the petitioners that while the interest rate revision occurred in 1993 it did not go into effect until 1994. Given that this was an interest rate revision to an ongoing loan, and the revision would not apply until the next year, we are treating this revised rate as a 1994 benchmark. Therefore, we are including this interest rate in our calculation of the company-specific benchmark for 1994.

Comment 6: Sidmar Company-Specific Benchmarks. The petitioners argue that the company-specific benchmark rate used by the Department in the Preliminary Determination for Sidmar in 1988 is not an appropriate benchmark because Sidmar's loan does not represent comparable commercial financing in terms of structure and maturity. Specifically, the petitioners maintain that one of Sidmar's loans was not a fixed-rate loan. The petitioners also state that the maturities of two of Sidmar's loans used as benchmarks are not comparable to the maturity of the subsidized loan. Therefore, the petitioners state that the Department should reject Sidmar's 1988 company-specific rate.

With respect to Sidmar's 1988 loans, ALZ contends that the national average interest rate for five-year loans is not more comparable to the subsidized loan than Sidmar's company-specific rate. Therefore, the Department should continue to use Sidmar's loans for 1988.

Department's Position: As noted in the comment above, it is the Department's policy to use a company-specific benchmark rate in determining the benefit conferred by a government loan program. Therefore, where available, we used Sidmar loans as benchmarks. However, we agree with the petitioners that one of Sidmar's loans taken out in 1988 is not a long-term, fixed-rate loan. Therefore, it does not provide an appropriate benchmark for our purposes and we are excluding that loan from our benchmark calculation. Consequently, we are using a recalculated company-specific benchmark rate for Sidmar in 1988. We agree with the respondents that Sidmar's company-specific rate calculated from its other 1988 loans is a more appropriate benchmark than a national average benchmark. The maturity of Sidmar's loans and the maturity of the national average interest rate (five-years) do not differ enough to warrant deviating from the Department's preference for using company-specific benchmarks when available.

Comment 7: Government Equity Infusions In Sidmar. The petitioners allege that the GOB equity infusion into Sidmar in 1984 was made on terms inconsistent with the usual investment practice of private investors and, therefore, constitute countervailable studies. The petitioners base their argument on the GOB's decision to invest in these companies without evaluating information typically examined by private investors. In support of their position, the petitioners refer to § 351.507(a)(4)(ii) of the Final CVD Regulations, which state that the government investor must provide ''the information and analysis completed prior to the infusion and * * * absent the existence or provision of an objective analysis, containing information examined by potential private investors considering an equity investment, the Secretary will normally consider that the equity infusion provides a countervailable benefit.'' The petitioners argue that the information on the record demonstrates that the GOB failed to meet this standard when it invested in Sidmar.

Specifically, the petitioners note that the GOB made substantial equity investments in Sidmar pursuant to the Claes and Gandois plans. The petitioners assert that information on the record establishes that the objective of these programs was to restructure and revitalize the Belgian steel industry. Thus, the objective and circumstances surrounding the investments render it contrary to the behavior of a normal private investor. Moreover, the Department previously found the Gandois Plan to provide countervailable benefits to steel companies because it was ''commissioned and adopted by the GOB * * * specifically to assist the Belgian Steel industry.'' *See* Certain Steel at 37277. The petitioners argue that consistent with the GOB's primary objective of restructuring the Belgian steel industry regardless of the commercial soundness of its investments, the GOB failed to conduct objective analyses containing information typically examined by private investors.

ALZ counters that the petitioners' attempt to include a new allegation regarding the GOB's purchase of Sidmar's common and preference shares in 1984 should be rejected. Pursuant to § 351.301(d)(4)(i)(A) of the Department's regulations, the time limit for making new allegations is 40 days before the scheduled date of the preliminary determination. Moreover, ALZ notes that in Certain Steel, the Department refused to examine the common share transaction and determined that no countervailable subsidy arose from the preferred share transactions.

Department Position: With respect to the Sidmar share transactions, our regulations (at § 351.301(d)(4)(i)(A)) are clear regarding the time limit for making new allegations. The petitioners first made this allegation in their case brief. Thus, for purposes of our final determination, we have not conducted an investigation of the Sidmar share transactions because the petitioners did not meet this regulatory deadline.

Comment 8: GOB Decision to Invest in ALZ. With respect to the ALZ's common and preference shares purchased in 1985, the petitioners contend that the GOB's share valuation methodology and objectives were inconsistent with the actions of a reasonable private investor. The petitioners argue that by valuing ALZ's shares based on the replacement value of its assets, the GOB failed to consider factors that would provide a commercial rationale for the investment, such as financial performance. Furthermore, the petitioners allege that the GOB was not commercially motivated when it purchased ALZ's common stock in order to obtain a blocking share of the company's equity. The petitioners assert that the GOB's objective to block decisions made by ALZ's major stockholders is inconsistent with the usual investment practice of private investors.

ALZ argues that the petitioners ignore the evidence on the record regarding the valuation studies conducted in preparation for ALZ's share subscription. Citing the minutes of ALZ's General Shareholders' meeting, at which it was determined to issue the shares and permit the GOB to subscribe them, the respondent notes that return on investment was considered in

determining the value of the shares issued, contrary to petitioners' contention.

In addition, ALZ objects to the petitioners' allegation that the GOB's purchase of ALZ's common stock in order to gain a blocking share of the company's equity is inconsistent with the Department's private investor standard. ALZ argues that private investors frequently purchase equity in a company specifically in order to obtain a blocking share and, thus, gain a measure of control.

Department Position: The objective of the Department's private investor standard is to determine if a particular investment reflects a rational assessment of whether a reasonable return on the investment would be generated in a reasonable period of time. *See* GIA 58 FR 37217, 37249. As noted by respondents, return on investment was analyzed by the statutory auditor in determining the value of the preference shares. Thus, the GOB's share valuation methodology was consistent with our private investor standard.

Furthermore, the petitioners indicate that methodologies which focus on earnings and financial performance are typically used by private investors for purposes of valuing private companies. However, this represents only one of the valuation approaches available to private investors. The replacement value methodology used to estimate the value of the preference shares is a common approach for valuing privately held companies and, therefore, consistent with the actions of a private investor.

Finally, we agree with the respondent that the GOB's purchase of ALZ common shares for purposes of obtaining a blocking share is not inconsistent with the actions of a private investor. As verified by the Department, the GOB obtained a blocking share in order to protect its investment in ALZ. Thus, we determine that the GOB's purchase of ALZ common shares was consistent with the usual practice of a private investor.

Comment 9: The Formation of Sidfin International. ALZ argues that neither it nor Sidmar received a countervailable benefit through the formation of the joint venture, Sidfin International, because Sidmar did not acquire ALZ's preference shares. ALZ notes that the Department verified that the joint venture was neither controlled by Sidmar nor was Sidmar able to benefit from the returns associated with ALZ's preferred shares. Thus, regardless of the valuation of the shares performed in 1993 at the time of Sidfin creation, Sidmar received no benefit from this transaction.

ALZ further argues that the valuation of ALZ's preference shares in this transaction was consistent with a reasonable private investor standard. ALZ notes that the parties involved in this transaction, including the private company Sidmar, valued their assets according to the same standards. The valuation of the assets contributed was also reviewed by a statutory auditor. In addition, the respondent contends that the Department has previously accepted the use of net present value as a reasonable valuation approach for a private investor. *See* Certain Steel, 37278.

The petitioners argue that Sidmar's audited financial statements clearly indicate that Sidfin International is controlled only by Sidmar. The admission by Sidmar in a public document provides unbiased documentary evidence that, while Sidmar owned only half of Sidfin International's shares, it effectively controlled all of the company. The petitioners rely on statements made during verification as further indication that Sidmar controlled Sidfin.

Furthermore, the petitioners contend that contrary to respondent's claim, private investors do not employ the valuation methodology used in this transaction. In support of its argument, ALZ refers to Accounting Principles Board Opinion 16 which explains that the NPV is used in the context of business combinations to assign a value to debt instruments. Conversely, marketable securities such as ALZ's preference shares should be valued at the current net realizable value of the shares. In the case of ALZ's preference shares, the current net realizable value was the market value of the shares at the time of the transaction. Thus, for purposes of measuring the benefit conferred by the 1993 capitalization of Sidfin International, the petitioners argue that the Department should use the market value of ALZ's preference shares in 1993 as the benchmark share price rather than the 1985 subscription price.

Department's Position: As noted above, we have determined that the 1993 capitalization of Sidfin International did not involve a sale of shares or any other potentially countervailable event. Consequently, the valuation methodologies used in this transaction are irrelevant.

Comment 10: GOB Sale of Common Share—Consistency With Actions of a Private Investor. ALZ argues that the GOB's 1987 sale of ALZ's common stock to KIV/Sidmar was consistent with the actions of a reasonable private investor. ALZ contends that the 1987 transactions reflect pre-existing contractual relationships among ALZ's shareholders which limited the potential buyers of the GOB's shares and, thus, affected the GOB's sale of its shares. According to ALZ, these contractual relationships created constraints on the GOB's freedom to transfer the shares but such constraints were common private investor practices among the entities involved in this transaction.

ALZ explains that, as required by the rights of preemption agreed to in 1980 by the GOB, KIV and Klockner Stahl, the GOB was obligated to offer its shares of ALZ first to KIV and then to Klockner Stahl before it could sell the shares to an outside party. Thus, the GOB structured the sale such that it sold the shares to KIV. Subsequently, Sidmar gained control of these shares when it acquired KIV. ALZ argues that the structure of this transaction enabled the GOB to sell freely without violating Klockner Stahl's preemption rights.

The petitioners counter that the respondent's argument ignores the fact that the GOB structured the 1987 transaction to account for noncommercial concerns regarding the nationality of potential buyers. The petitioners argue that a private investor would not share the GOB's concern regarding the nationality of a potential investor. Rather, private investors would seek to obtain the highest return for their investment. As a result, the GOB neglected a potentially higher purchase price offered by Klockner Stahl due to its concern regarding the nationality of the investor and, instead, accepted the discounted price paid by Sidmar. Thus, the sale of ALZ's common shares by the GOB to Sidmar was not consistent with actions of a reasonable private investor.

Department Position: Although the preemption agreements affected the transferability of ALZ's shares, the GOB elected not to pursue a potentially higher offer by Klockner Stahl and, instead, accepted the discounted offer by Sidmar. Moreover, record evidence indicates that the GOB and Sidmar structured the 1987 sale of ALZ common shares to account for noncommercial concerns regarding the nationality of potential buyers. Accordingly, we have determined that the GOB did not act as a reasonable private investor.

Comment 11: GOB Sale of Common Shares. ALZ argues that, consistent with the actions of a private investor, the GOB negotiated a purchase price for ALZ common shares in ALZ with KIV/ Sidmar. After evaluating the offer and

gaining an understanding with Sidmar regarding the protection of the GOB's interests in the preferred shares which it retained, the GOB determined that the price offered for its shares was reasonable. Moreover, a statutory auditor valued the same number of shares held by KIV in ALZ at the same price.

In addition, the respondent maintains that the ALZ stock Sidmar purchased later in 1987, which the Department used as a benchmark in its preliminary determination, is not comparable. ALZ argues that this sale was not constrained by the preemption agreements of 1980. Thus, it is logical that a private investor would require a higher price for its shares under these circumstances. The respondent also notes that it is reasonable to assume that Sidmar was willing to pay a higher price for the shares because it was consolidating its holdings in ALZ at the time.

The petitioners assert that the purchase price was significantly below the market-determined prices paid at the time of, and prior to, the transaction in question. According to the petitioners, the arguments offered by the respondent are unsubstantiated and, furthermore, conflict with the evidence on the record.

The petitioners further argue that the share purchase used as the benchmark in the Preliminary Determination reflects the market value of ALZ stock because it was negotiated between private companies unrelated to each other. Given the disparity between the price at which the GOB sold the shares to Sidmar, the Department should consider the share price received by the GOB to be below the market-determined share price.

Department Position: We agree with the petitioners that, while the GOB agreed to sell its shares of ALZ's common stock at the same value assigned by a statutory auditor to KIV's shares of ALZ stock, the valuation methodology used by the auditor failed to reflect the market value of the stock. Pursuant to the Department's equity methodology, we have compared the price at which the GOB sold its shares of ALZ common stock against a contemporaneous market transaction for purposes of measuring the countervailable benefit.

With respect to the market benchmark used in our Preliminary Determination, the relevant record evidence indicates that the preemption agreements did affect the transferability of ALZ's shares. However, these agreements did not meaningfully restrict the ability of the GOB to sell to Klockner Stahl and, thereby, to obtain the market price of the shares. Consequently, the market transaction involving ALZ's common shares absent these contractual constraints represents a comparable benchmark. Thus, we have continued to use this transaction as our market benchmark in our final determination.

Comment 12: SNCI Loans. As noted above in the *SNCI Loan* section, the petitioners argue that the Department erred in its Preliminary Determination when it found SNCI loans provided between 1987 and 1990 to be non-specific, because the usage data did not include all loans provided to the steel industry.

The petitioners further argue that, with respect to SNCI loans approved after 1990, the respondents have failed to provide any breakdown of benefits by industrial sector between 1991 and 1995, and have failed to document how they derived the percentages reported for 1996 and 1997. Given the respondents' failure to provide the information necessary to conduct a specificity analysis, the Department should apply adverse facts available and countervail all SNCI loans provided to ALZ between 1990 and 1997.

ALZ argues that in Certain Steel, the Department found that SNCI loans not expressly given under a government plan were not specific in 1987 and 1988, and in its Preliminary Determination, the Department extended this finding to include 1989 and 1990. Moreover, ALZ notes that an SNCI official explained at verification that SNCI treated investment loans to the steel industry in the same manner as loans to any other industry and that the steel industry could not have been given a disproportionate share of SNCI loans. Therefore, ALZ contends that the Department should determine that SNCI loans are not specific to the steel industry.

ALZ further argues that the lack of information on loans through coordination centers should not lead to a determination that loans to the steel industry are specific because any industry can have a coordination center. Therefore, the respondent reasons that if loans to the steel industry are underreported because of coordination centers, likewise the loans to all industries are also underreported.

Moreover, ALZ maintains that the use of adverse facts available is not appropriate in this case. It argues that U.S. law requires that for adverse inferences to be applied in this case, the Department must find that a respondent has ''failed to cooperate by not acting to the best of its ability to comply with a request for information'' from the Department. *See* section 776(b) of the Act. ALZ states that the GOB attempted to accommodate the Department's request for information and verification, but the requested information is not available because SNCI no longer aggregates the loan usage data in the format requested. ALZ argues that the respondents have acted to the best of their ability, and the Department should not view any deficiencies in the information they have provided as a cause for applying adverse inferences in this case.

Department's Position: We agree with the petitioners that loans provided to the steel industry through coordination centers should be included in the specificity analysis. However, the petitioners' argument overstates the effect of loans through coordination centers on the percentage of loans to the steel industry. The 1990 SNCI annual report provides specific information on this issue and indicates that when coordination center loans to the steel industry are included in the calculation for 1990, the steel industry's share of SNCI loans increases by 2.3 percent. Instead of employing the petitioners' suggestion to include all coordination center loans to industrial sectors and adding 10 percentage points to the calculation of loans provided to the steel industry, we are accounting for coordination centers by using the information specific to the steel industry.

In addition, we modified our final analysis to include the percentage of loans approved in each year, as well as the percentage of loans outstanding. When both statistics are taken into account, the percentage of SNCI loans directed toward the steel industry greatly decreases. Therefore, for the years in which ALZ received SNCI loans and for which we have the relevant information (*i.e.,* 1987 through 1990), we do not find SNCI loans to be specific to the steel industry. (*See,* also, SNCI Memorandum.)

In response to ALZ's argument that, based upon comments at verification, the steel industry did not receive a disproportionate share of SNCI loans, we have already determined that SNCI investment loans provided in the years 1987–1990 are not specific. However, as noted above in the *SNCI Loans* section, the Department repeatedly requested information on the breakdown of loans in the years 1991–1997. The GOB did not provide any information for the years 1991–1995 and was unable to provide verifiable figures for 1996 and 1997. Therefore, the comments made at verification are completely unsubstantiated with respect to these years. Moreover, the GOB never

explained why it could not provide the required data. While SNCI may not aggregate the information in the manner requested by the Department, the GOB never indicated why the usage information could not be collected through other sources. As a result, we determine that the GOB did not act to the best of its ability with respect to providing the requested information and, pursuant to section 776(b) of the Act, we are applying adverse inferences in those years and determine that SNCI investment loans are *de facto* specific for the years 1991–1997.

Comment 13: Fictive Withholding Tax. The petitioners argue that the Department's calculation methodology for SNCI loans should include benefits from the Fictive Withholding Tax (''FWT''). The FWT permitted lending institutions to deduct a certain percentage of the taxes due on interest income from loans to coordination centers and to pass those savings on to the coordination centers. As a result, the petitioners argue, the GOB provides a financial contribution to the borrower through the lender.

ALZ states that the FWT was available for loans provided to coordination centers through any lending institution, not just SNCI. Therefore, the benefits from FWT are not specific. In addition, the FWT was abolished in 1991 and the ALZ group did not benefit from it after 1995. Therefore, the program was terminated prior to the POI. Lastly, ALZ argues that the FWT had no effect on interest rates paid by ALZ, Alfin and Albufin from SNCI. The Department verified that the coordination centers did not pass on the savings to the ultimate borrowers, but instead retained those savings. Thus, ALZ, Alfin, and Albufin did not benefit from the FWT during the time it was in effect and the Department should use the interest rates actually paid by the ultimate borrowers.

The petitioners counter that ALZ's attempt to distinguish between the rates paid by Al-Center (ALZ's coordination center) and the rates paid by ALZ, Alfin and Albufin admits to the preferentiality of the loan terms, in particular through the FWT.

Department's Position: The FWT only applied to loans taken out by coordination centers such as Al-Center. Al-Center took out SNCI loans under investigation in the years 1987, 1989 and 1990. Because we have already determined that SNCI loans provided in those years are not specific, this issue is moot.

Comment 14: GOB Control of SNCI. ALZ argues that SNCI acts like any other commercial entity and partial government ownership does not change this fact. ALZ cites to Certain Granite Products from Italy, (Final Negative Countervailing Duty Determination: Certain Granite Products from Italy, 53 FR 27197, 27202 (July 19, 1988)) where it is stated that the Department's practice has been to find that ''long-term lending * * * in which (a government) has direct or indirect ownership, that involves no government program'' does not confer countervailable subsidies. Moreover, ALZ cites to the final concurrence memorandum in Certain Steel in which the Department found that ''fifty percent government ownership does not necessarily lead to the conclusion that SNCI operates in other than a commercial fashion.'' Further, ALZ contends that SNCI was purchased by ASLK prior to the approval of ALZ's 1997 loan from SNCI. Therefore, SNCI was not ''government-controlled'' or ''government-owned'' and this loan is not countervailable.

The petitioners state that because ASLK itself was partially owned by the GOB, the sale of SNCI to ASLK did not eliminate the GOB control and, to the extent it was provided on preferential terms, the 1997 loan is countervailable. Moreover, the fact that SNCI was not acting as a ''commercial lender'' is apparent from the interest rates charged on ALZ's investment loans. The preferential terms associated with ALZ's SNCI loans prove that SNCI provided ALZ with a countervailable benefit.

Department's Position: We agree that fifty percent GOB ownership of SNCI does not, in and of itself render SNCI loans countervailable. However, the fact that SNCI was providing loans at rates lower than those otherwise available does indicate that SNCI was not acting as a commercial entity. We have examined the record evidence and determined that SNCI loans provided between 1991 and 1997 contain all the elements of a countervailable subsidy (*i.e.,* specificity, financial contribution, and benefit).

We agree with the petitioners that although ASLK purchased 99 percent of SNCI in 1995, ASLK continued to remain under GOB control through the fall of 1997. Because ALZ's loan was approved in early 1997, SNCI cannot be considered beyond the control of the government at that time and the purchase of SNCI by ASLK does not diminish the potential countervailability of the loan.

Benefits Received Pursuant to the 1970 Law

Comment 15: Interest Rebate. The petitioners argue that the Department should countervail the interest rate subsidy found at verification even though the relevant loan is no longer outstanding. The petitioners base this argument on the Department's practice to treat interest rate rebates as a grant if the company does not know if the government will provide the rebate when the firm agrees to the terms of the loan. Consequently, because the government approval for this interest rebate occurred after the loan was approved, the Department should treat the interest subsidy as a non-recurring grant.

ALZ argues that it did not report this interest subsidy because it was for a loan which is no longer outstanding. Moreover, ALZ points out that the Department made a specific decision to treat interest subsidies under the 1970 Law as interest rebates and not grants in Certain Steel. ALZ argues that in that case, the Department did so because, although the government approval occurred after the loan was granted, this approval was merely a ''rubber stamp'' and companies were reasonably certain that their application would be approved at the time they withdrew the loan. In addition, they knew the precise amount of the rebate they would receive and the length of time that it would remain in effect.

Department's Position: In the concurrence memorandum for Certain Steel, the Department stated that ''although applicants for the interest rebate did not receive approval of their applications until about 60 days after receipt of the loan in question, they were, nonetheless, reasonably certain that their application would be approved. In addition, they knew the precise amount of the rebate they would receive and the length of time that it would remain in effect. Therefore, we (view) these rebates as interest reductions rather than grants.'' Based upon our analysis of the interest rebates in question in Certain Steel, we agree with the respondent. Because the loan in question was no longer outstanding during the POI, we find that ALZ did not benefit from the interest rebate at issue during the POI.

Comment 16: Applicability of Integral Linkage Analysis. The petitioners argue that in Certain Steel, the Department stated that it would not conduct an integral linkage analysis of the 1970 Law due to the fact that the law was specific in that it provided benefits only to firms in certain regions. The petitioners state that no evidence has been placed on the record to support a different conclusion in this proceeding. Therefore, the Department should determine that the subsidies provided pursuant to the 1970 Law are provided

to a specific enterprise or industry or group of enterprises or industries.

ALZ argues that the Department found in Certain Steel that the 1959 Law complemented the 1970 Law and, hence, the two should be considered together when determining benefit levels. The same situation now exists with respect to the 1993 Decree and the 1970 Law, in ALZ's view. Therefore, ALZ argues, nothing changed with the replacement of the 1959 Law by the 1993 Decree—except the level of benefits.

Department's Position: In Certain Steel, we were examining a situation where firms qualifying for benefits under the 1970 Law would also qualify for benefits which were ''generally available'' under the 1959 Law. In situations where a firm can qualify for the same benefit (or virtually the same benefit) under two laws, the issue is not one of integral linkage, but one of ''tiered benefits.'' Hence, as the Department stated in Certain Steel, ''* * * the question of linkage does not apply here.'' Instead, we stated, ''we have determined to countervail benefits under the 1970 Law only to the extent that they exceed benefits available under the 1959 Law. This approach is in accordance with our treatment of programs with tiered levels of benefits in Granite from Italy.'' (*See* Certain Steel at 37289)

In this proceeding, the 1959 Law was replaced by the 1993 Decree. To apply the same analysis would require the Department to determine that the 1993 Decree is generally available (*i.e.,* neither *de jure* nor *de facto* specific). ALZ did not receive any benefits under the 1993 Decree and the record evidence does not allow the Department to fully analyze the specificity of the 1993 Decree. The data that is on the record includes subsidies provided under both the 1993 Decree and the 1970 Law and does not distinguish between the monies provided under each law. Moreover, the 1993 Decree states that benefits under it are provided for investments ''which do not fall under'' the 1970 Law. This implies that investments eligible to receive assistance under the 1970 Law would not receive assistance under the 1993 Decree. Therefore, the tiered benefits analysis is not applicable in this case.

Therefore, in order to view subsidies provided under more than one law as constituting a single program, the Department must determine that those subsidies are integrally linked. In response to the petitioners' argument that benefits under the 1970 Law will always be regionally specific, we acknowledge that the 1970 Law provides benefits only to specific regions. However, the regional specificity aspect may be removed when the 1970 Law is combined with the 1993 Decree and the 1978 Act. *See, also,* the Department's Position in Comment 18.

Comment 17: Integral Linkage. The petitioners argue that the 1993 Decree should not affect the countervailability of subsidies received pursuant to the 1970 Law. Although the 1993 Decree replaced the 1959 Law, it did so because a 1991 EC Directive stated that the 1959 Law had to be revised and benefit levels reduced to be consistent with European regulations. The petitioners argue that by itself, this fact suggests that the benefits under the 1993 Decree are more limited than those available under the 1959 Law. The petitioners state that the 1993 Decree is distinctly different from both the 1970 Law and the 1959 Law, which was found noncountervailable in the 1983 Belgian Steel case. Therefore, the Department should not treat the 1993 Decree in the same manner that it treated the 1959 Law in Certain Steel.

The petitioners argue that the eligibility criteria and the benefits provided under the 1993 Decree are different from those under the 1970 Law or the 1959 Law. Therefore, the benefits received by ALZ pursuant to the 1970 Law after the 1959 Law was repealed should be countervailed in their entirety. However, the petitioners do not disagree with the Department's conclusion in Certain Steel and the Preliminary Determination that 1970 Law benefits are not specific when assessed against the type and level of benefits available under the 1959 Law.

ALZ and the GOB state that the Laws of 1959, 1970, the 1978 Act and the 1993 Decree are all part of the same GOF comprehensive program of economic expansion and should be considered together in determining benefits. Moreover, the record evidence makes clear that the 1993 Decree replaced the 1959 Law and the only part that the 1991 EC directive required to change and, therefore, the only point that differs between the two laws is the level of benefits. The GOB further argues that it is common knowledge in Belgium that the GOF intended the 1993 Decree to replace the 1959 Law and that the benefits available under the 1993 Decree are the same ones that were available under the 1959 Law. The record evidence dictates that the Department must consider the economic expansion laws as a whole when analyzing any benefits received under the 1970 Law. Therefore, consistent with the Department's treatment of the 1959 Law in Belgian Steel and Certain Steel and with the facts of this case, the Department should only countervail benefits under the 1970 Law to the extent they exceed those available under the 1993 Decree.

Department's Position: In Belgian Steel, the Department found the 1959 Law to be not specific. In Certain Steel, we countervailed benefits provided under the 1970 Law only to the extent they exceeded those available under the 1959 Law. The 1959 Law was replaced with the 1993 Decree and the record evidence suggests that the 1959 Law, the 1970 Law, and the 1993 Decree all have similar types of benefits. In addition, the 1978 Act provides the same types of benefits to small companies. Moreover, the level and type of environmental assistance provided under all laws is identical.

Section 355.43(b)(6) of the Department's 1989 Proposed Regulations requires that in determining whether two programs are integrally linked, the Secretary will examine factors such as ''the administration of the programs, evidence of a government policy to treat industries equally, the purposes of the programs, and the manner of funding the programs.'' The evidence on the record of this proceeding suggests that, since their inceptions, the 1970 Law, the 1978 Act, and the 1993 Decree are related to each other and complement each other in the types of subsidies offered and the goals they seek to achieve. The 1970 Law targets development zones, while the 1978 Act and the 1993 Decree offer assistance to companies that cannot receive assistance under the 1970 Law. The Department confirmed at verification that from the time the GOF assumed authority for economic expansion, all laws, including the 1993 Decree, have promoted similar objectives and have been administered by the same authority. Moreover, all applicants go through the same approval process, use the same application form for assistance (the application form for the 1978 Act is less detailed than the one for the 1970 Law and the 1993 Decree), and receive their funding from the same source.

Consistent with Live Swine from Canada; Final Results of Countervailing Duty Administrative Reviews (61 FR 52408, 52415 (October 7, 1996)) which stated that an integral linkage analysis should be performed on a ''program by program'' basis, the Department considered particular types of assistance under the 1993 Decree, the 1970 Law, and the 1978 Act separately to determine whether such programs under each law (*i.e.*, expansion grants, environmental grants, etc.) are integrally linked for specificity purposes. Given

this analysis, when looking at the subsidies received by ALZ and Albufin, we determine that the environmental grants available under the 1993 Decree, the 1970 Law, and the 1978 Act are integrally linked. Likewise, the environmental real estate tax exemptions available under all three laws are also integrally linked. Consequently, for purposes of this investigation, we consider environmental grants available under all three laws to constitute a single program. Likewise, we consider environmental real estate tax exemptions available under all three laws to constitute a single program. For further information on integral linkage, *see* Economic Expansion Memorandum.

Comment 18: Specificity of Environmental Grants. ALZ argues that the 1994 Environmental Grants are not countervailable because the evidence on the record shows that they are not de jure or de facto specific when examined in the context of the 1970 Law, the 1978 Act, and the 1993 Decree.

Department's Position: As noted in Comment 17 above, we determine that the environmental grants available under the 1970 Law are integrally linked with those available under the 1993 Decree and the 1978 Act. Since environmental grants under all of these laws are generally available, these grants are not de jure specific. Moreover, after analyzing the usage data for the environmental grants bestowed under the 1993 Decree and the 1970 Law, we observed that these environmental grants are provided to 35 distinct industry groupings and that the steel industry did not receive a disproportionate share of benefits. Therefore, we determine that the environmental grants are also not de facto specific. For further discussion, *see* Economic Expansion Memorandum.

Comment 19: Green Light Treatment for Environmental Grants. We received several comments from interested parties on green light issues. ALZ and the GOB argued that the environmental grants qualified for green light treatment under section 771(5B)(D) of the Act. The petitioners disputed this assertion and argued that all of the criteria for green light treatment had not been met. Specifically, the petitioners argued that the assertion that there was no manufacturing cost savings had not been sufficiently documented.

Department's Position: Although the Department conducted some green light analysis in the Preliminary Determination, we did not make a green light determination because more information was needed. Because in the final determination we determine that the environmental grants are not specific, the Department need not determine whether this subsidy meets all the criteria for green light treatment.

Comment 20: Real Estate Tax Exemptions. ALZ argues that the environmental real estate tax exemption is not specific and, therefore, does not provide a countervailable subsidy. In support of its argument, ALZ notes that the Department verified that ALZ's real estate tax exemptions were tied to the environmental projects approved for assistance under the 1970 Law. Moreover, the Department verified that the 1993 Decree, the 1970 Law, and the 1978 Law allow the same real estate tax exemption for ecological adaptions. Thus, the environmental real estate tax exemption is neither de jure nor de facto specific because any company in Flanders that made ecological adaptions can qualify for the real estate tax exemption.

Should the Department determine that the real estate tax exemption is countervailable, ALZ argues that the alleged subsidy rate should be calculated only on those investments eligible for the exemption. ALZ explains that it initially calculated the tax exemption for all investments approved to receive this exemption because it does not track the amount of taxes not paid. However, certain investments were not eligible for the exemption during the POI because they had not been completed by 1996. Thus, the calculations were corrected and resubmitted. ALZ contends that the Department should use the corrected figures for purposes of calculating the alleged benefit.

The petitioners comment that ALZ failed to address the expansion real estate tax exemptions received by Albufin in conjunction with the 1993 Expansion Grant. The Department preliminarily determined that the 1993 Expansion Grant conferred a countervailable benefit upon Albufin. Accordingly, the Department should continue to countervail the real estate tax exemptions benefits provided to Albufin for purposes of its final determination.

Department Position: As stated above, we've determined that the environmental real estate tax exemptions received by ALZ are not specific and, therefore, not countervailable. *See, also,* Economic Expansion Memorandum at 10.

With respect to the expansion real estate tax exemption received by Albufin, we affirm our preliminary determination that this subsidy is regionally specific because only the 1970 Law provides expansion real estate tax exemptions to large-sized enterprises. Therefore, firms must be situated in a development zone to receive this real estate tax exemption. Since the expansion real estate tax exemption received by Albufin is specific, we are continuing to countervail it.

Comment 21: Accelerated Depreciation Methodology. ALZ and the GOB argue that accelerated depreciation should be treated as a tax deferral rather than a tax exemption. In support of its argument, ALZ refers to the Department's 1997 proposed rules, in which the Department recognized that its existing methodology "focused on the tax savings, but has not acknowledged the later tax increases." *See* Countervailing Duties, 62 FR 8818, 8835 (February 26, 1997). Furthermore, ALZ contends that the treatment of accelerated depreciation as a tax deferral rather than a tax exemption is a basic accounting principle. *See* A.N. Mosich and E. John Larsen, Intermediate Accounting, (6th ed. 1987), 617. ALZ further argues that the U.S. tax law and U.S. courts have also recognized that accelerated depreciation in a tax deferral rather than a tax exemption. In order to calculate the benefit, ALZ suggests treating the deferred taxes as an interest-free contingent loan. This methodology allows the Department the opportunity to address changes in the tax laws or a company's financial position.

The petitioners argue that the Department should reject ALZ's argument because it contradicts the agency's longstanding approach to measuring benefits from accelerated depreciation. The petitioners refer to the Final CVD Regulations, in which the Department reaffirmed its practice of treating accelerated depreciation as a tax exemption without regard for any later tax increases that may be incurred. *See* Final CVD Regulations, 65376. According to the Department, the speculation inherent in giving a company credit for a contingent tax liability that it may never incur supports the continued treatment of accelerated depreciation benefits as tax exemptions. *See* Extruded Rubber Thread from Malaysia, 57 FR 38472 (August 25, 1992).

The petitioners also contend that ALZ has offered no evidence that compels the Department to modify its current methodology. Rather, the petitioners note that the respondent relies primarily on authorities such as accounting texts and the U.S. tax law, none of which are concerned with the implications of accelerated depreciation benefits in the context of the countervailing duty law.

Therefore, the Department should continue to use its current methodology for purposes of its final determination.

Department Position: It is our practice to treat the tax savings from accelerated depreciation as a tax exemption rather than a tax deferral because we cannot be certain that the benefits of an accelerated depreciation program will be offset by higher taxes in the future. *See* Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Germany, 58 FR 37315, 37324–25, (July 9, 1993). Such factors as changes in tax provisions and government tax policies, the provision of additional future tax benefits, or the possibility that the recipient company is in a tax loss position in the future might prevent higher taxes from materializing. Therefore, for purposes of our final determination, we have continued to countervail the tax savings received from accelerated depreciation.

Comment 22: Accelerated Depreciation—Albufin. ALZ contends that even if the Department continues to treat accelerated depreciation as a tax exemption rather than a tax deferral, Albufin did not benefit from this program after 1997. The respondent notes that in fiscal year 1997 Albufin decided not to participate in this program. Therefore, there is no benefit from accelerated depreciation after the POI. Consequently, no benefit from accelerated depreciation is applicable to any entries potentially subject to countervailing duties.

The petitioners contend that the respondent's argument conflicts with Department practice. Citing 19 CFR 351.509(b), the petitioners assert that Albufin received a benefit in 1997 in conjunction with taxes paid for the 1996 tax year when it filed its tax return in 1997. According to the petitioners, the fact that Albufin did not apply for accelerated depreciation with respect to taxes incurred in 1997 and payable in 1998 has no bearing on the POI.

Department Position: We agree with petitioners. Pursuant to § 355.48(b)(4) of the 1989 Proposed Regulations, the Secretary normally will consider the benefit as having been received on the date on which the recipient firm would otherwise have had to pay the taxes associated with the exemption or remission. Normally, this date will be the date on which the firm filed its tax return. Therefore, for purposes of our final results, we have countervailed the benefit Albufin received in conjunction with taxes paid in 1997 for the 1996 fiscal year.

Comment 23: Treatment of Public Investment in Alfin. ALZ argues that the Department's classification of the NIM's investment in Alfin as a loan was inappropriate and that the Department should instead treat it as a noncountervailable equity investment. In the first instance, ALZ argues that, under the Department's hybrid financial instrument methodology, NIM's investment should be treated as equity because each criterion of the Department's analysis of hybrid financial instruments indicates that the investment was equity and not debt.

With respect to the first criterion (Expiration/Maturity Date/Repayment Obligation), ALZ states that NIM's shares in Alfin are properly characterized as equity because they do not have an expiration/maturity date nor is there a repayment obligation on the part of the ''debtor.'' Specifically, ALZ argues that, unlike a loan which has a specific expiration date, the shares in question never expire, rather they are being purchased by ALZ (a private shareholder) and not being repaid by Alfin (the supposed ''debtor''). According to respondent, because ALZ's purchase does not eliminate the shares, a repayment is not indicated. ALZ also argues that, while its requirement to purchase the shares is legally enforceable in court, it differs from the requirement to repay a debt because no legal action can be taken against the ''debtor,'' Alfin.

ALZ argues that because NIM's dividends are paid from profit, must be specifically declared by the board, and are conditional rather than guaranteed, NIM's shares are properly characterized as equity rather than debt under the second criterion (Guaranteed Interest or Dividends). As for the third criterion (Ownership Rights), ALZ argues that NIM does have ownership rights, as evidenced by NIM's appointment of half of the Board of Directors and by the fact that the shares carry a dividend and, thus, NIM has a claim on the profits of the firm. As for the last criterion (Seniority), ALZ states that NIM's shares do not have a liquidation priority over other shares and, thus, creditors would come before NIM in the event of a liquidation which indicates that the shares are properly characterized as equity.

ALZ also argues that, when applying the hybrid financial instrument methodology, the Department should review all the relevant characteristics of a financial instrument rather than apply a strict hierarchy. ALZ notes that while the Department has stated that it will end its analysis when a characteristic is clearly indicative of debt or equity, its practice has been to review all of the relevant characteristics in making a determination. ALZ cites to the GIA (at 37254) where the Department made a determination in the Final Affirmative Countervailing Duty Determinations: Certain Steel Products From France, 58 FR 37304 (July 9, 1993) on more than one criteria. In further support of its argument, ALZ cites to the CIT's decision in Inland Steel, 967 F. Supp. at 1273, in which the CIT discussed characteristics outside of the Department's stated hierarchy. ALZ also cites to the preamble of the final regulations in which the Department stated that it would be premature to codify the treatment of its hierarchy. Thus, ALZ contends that the Department does not have a practice of adhering to a strict hierarchy or of examining only the above four criteria and, thus, the Department should consider all relevant characteristics and determine that, when viewed in their entirety, Alfin's shares must be classified as equity.

Finally, ALZ argues that NIM's investment was consistent with that of a reasonable private investor and, thus, does not provide a countervailable subsidy. ALZ contends that it is the Department's practice to compare the price paid by the private investor with that paid by the government. If this practice is followed, ALZ notes, the Department will find that the terms of shares subscribed to by NIM were better than the terms of those purchased by the private investor. Thus, because NIM paid the same price paid by the private investor the transaction did not provide a countervailable subsidy.

The petitioners argue that the Department's treatment of NIM's investment as debt instead of equity was appropriate and consistent with Department practice. Specifically, petitioners note that the Department states in the GIA that ''once a characteristic is clearly indicative of debt or equity, we will stop our analysis and categorize the hybrid as debt or equity.'' Thus, according to petitioners, to the extent that NIM's investment had a repayment obligation it should be classified as debt. The petitioners argue that the Department verified that ALZ is required to repay the principal over the course of ten years and, thus, NIM's shares contain a repayment obligation and are more appropriately categorized as debt.

The petitioners also disagree with ALZ's contention that because ALZ (the private shareholder) is buying the shares from NIM instead of Alfin (the ''debtor'') it is not a debt instrument. The petitioners state that the Department's hierarchy does not require that repayment be made by the debtor

because the key fact is that the shares have a repayment obligation.

Finally, the petitioners argue that if the Department does categorize NIM's investment in Alfin as equity instead of debt, the Department should find the investment inconsistent with the practice of private investors and not use ALZ's subscription in Alfin as a benchmark. On the latter point, petitioners argue that in fact NIM did not purchase its shares on the same terms as ALZ, but paid a significant premium. In the petitioners' view this demonstrates that NIM's involvement was on noncommercial terms. According to petitioners, because NIM involved itself in a noncommercial manner it impacted the reasonableness of the investment and, thus, altered ALZ's evaluation of the commercial reasonableness of the project. Thus, the petitioners argue that the share price paid by ALZ is distorted and unacceptable as a commercial benchmark.

Further, the petitioners argue that NIM's investment was inconsistent with the practice of private investors, for two additional reasons. First, NIM failed to evaluate the commercial reasonableness of its investment prior to making its decision. Second, the shares purchased by NIM offered an unreasonably low rate of return. Based on these factors, petitioners argue that NIM's investment was inconsistent with the practice of private investors and, thus, countervailable.

Department's Position: We are continuing to categorize NIM's investment in Alfin as debt. As stated in the GIA (at 37254), "even if the instrument has no pre-set repayment date, but a repayment obligation exists when the instrument is provided, the instrument has characteristics more in line with loans then equity." NIM's investment in Alfin was in accordance with the Economic Recovery Law of July 31, 1984 (Herstelwet 1984). Under the law, the contract amongst the parties must contain an undertaking by the private shareholders that they will repurchase the shares representing the public contribution at the issuing price. Furthermore, "the repurchase must be effected at the rate of one-tenth per year, from the fourth to the thirteenth calendar year following that in which the shares were issued." Additionally, we found at verification that ALZ, in accordance with the contract, has been repurchasing the shares. Thus, a repayment obligation clearly existed with a pre-set repayment date. Based on the above, we find that the instrument has characteristics more in line with a loan than equity.

With respect to ALZ's argument that the Department must look at all relevant information in making such a determination, we note that our practice is to consider, in order, the four criteria for determining the nature of hybrid financial instruments and stop our analysis when one characteristic is clearly indicative of debt or equity. In this case, ALZ's repayment obligation is clearly indicative of debt under the first criterion and, thus, it is not necessary to address the other criteria. Even if other evidence reflects equity rather than debt, we have found that a repayment obligation bears such significance and outweighs other evidence that the instrument should be properly categorized as debt. In Geneva Steel, the CIT held that this hierarchical method of classifying hybrid instruments is based on a permissible construction of the Act and is in accord with Congressional intent. *See* Geneva Steel at 578–79. Thus, in reviewing all relevant information on the record, we continue to find that this financial instrument is properly classified as debt.

Because we are affirming our preliminary determination that this financial instrument is properly treated as a loan, it is not necessary to address the other issues raised by ALZ and petitioners with respect to the commercial reasonableness of NIM's investment.

Comment 24: Attribution of Sidmar and Sidmar Group Subsidies to ALZ. ALZ argues that while a company may exercise considerable control over its consolidated subsidiaries, if there is an insufficient identity of interests between the parent and its subsidiary, the Department has not allocated untied subsidies to the subsidiary. *See* Wire Rod from Italy (in which we stated, "if there is an insufficient identity of interest among the corporate group, the Department will consider these facts and determine whether it is appropriate to attribute subsidies to the consolidated group holdings"). Respondent argues that such a situation exists here in that Sidmar and ALZ have an insufficient identity of purpose. ALZ notes that Sidmar has considerable interests in other businesses, is a producer of carbon steel, and does not produce stainless steel. Further, ALZ notes that both companies use different distribution systems for their products. ALZ also points out that Sidmar's ownership interest in ALZ was insignificant when the the alleged subsides were provided.

ALZ notes that if the Department finds a countervailable subsidy provided to a company within the Sidmar Group, the Department must base any attribution analysis on the relationship between ALZ and the company in question, not between Sidmar and ALZ. Specifically, ALZ argues that because SidInvest and ALZ have never had any direct ownership interest in one another, the Department's practice with respect to parent companies does not apply to this situation. While ALZ admits that the two companies may be affiliated, it notes that the Department's practice has been to consider subsidies to affiliated parties only when both parties are involved in the production or distribution of the subject merchandise or if there is a specific pass-through of subsidies. ALZ argues that neither of these two situations exists with respect to SidInvest and ALZ and, moreover, there is no convergence of interests between the two companies, as SidInvest's list of investments does not indicate significant involvement in steel production or distribution.

ALZ makes a similar argument with respect to the relationship between it and Sidfin. Specifically, ALZ notes that while Sidfin does have an ownership interest in ALZ, the interest is not controlling and, thus, no cross-ownership is indicated. Also, ALZ argues that it did not receive any financing nor waive any obligation out of the government's transaction with Sidfin and, thus, no benefit can be attributed to ALZ. Finally, ALZ argues that Sidmar's 1985 debt-to-equity conversion should not be attributed to ALZ because the assumption of the loans was tied to Sidmar's carbon steel activities.

The petitioners argue that while Sidmar and ALZ may produce different products and use different distribution systems, these facts have no bearing on the question of whether subsidies provided to Sidmar should be attributed to ALZ. The petitioners note that the Department has a basic rule for determining whether subsidies should be attributed amongst companies when cross-ownership exists. Specifically, the petitioners cite to the Department's Final CVD Regulations which state that subsidies should be attributed when "the interests of two corporations have merged to such a degree that one corporation can use or direct the individual assets (or subsidy benefits) of the other corporation in essentially the same ways it can use its own assets (or subsidy benefits)." See Final CVD Regulations, § 351.525(b)(6)(vi). The petitioners note that since 1987 Sidmar has, either directly or indirectly, controlled ALZ. Prior to 1987, according to the petitioners, both Sidmar and ALZ were under common ownership of

either the GOB or Arbed. Based on the above, the petitioners argue that this overlapping ownership is sufficient to attribute subsidies received by Sidmar to ALZ.

On a specific level, the petitioners argue that SidInvest's relationship with ALZ is sufficient to allocate subsidies received by SidInvest to ALZ. They base this argument on the fact that Sidmar has a common ownership interest in both SidInvest and ALZ, thereby establishing a degree of cross-ownership that supports attribution of subsidies received by SidInvest to ALZ. The petitioners argue that while SidInvest is not the parent of ALZ and SidInvest has no ownership or control over ALZ, such facts have no bearing on the Department's attribution of subsidies because SidInvest is a non-producing financial subsidiary of Sidmar. Given this status, petitioners argue that SidInvest is more properly treated as a holding or parent company and, thus, any benefits it receives are attributable to ALZ. Petitioners point to *Wire Rod from Italy,* in which the Department attributed equity infusions received by different companies, all of whom were owned by a government holding company, in support of their argument.

With respect to subsidies received by Sidfin, the petitioners argue that the record establishes that Sidfin is a non-producing holding company controlled by the GOB and that the GOB also controls a significant portion of ALZ. Thus, the petitioners contend that because Sidfin is a non-producing holding company, subsidies related to Sidfin are attributable to ALZ's sales. Furthermore, the petitioners argue that Sidfin's degree of ownership in ALZ is adequate to establish cross-ownership and, thus, subsidies should be attributed between these companies.

With respect to ALZ's argument Sidmar's 1985 debt-to-equity conversion should not be attributed to ALZ because the benefit was tied to Sidmar's carbon steel activities, the petitioners argue that the subsidy was provided in conjunction with the government's restructuring plans for the entire steel sector, not just carbon steel. Secondly, the petitioners note that the Department treated the subsidy as a debt-to-equity conversion in the *Preliminary Determination* and, therefore, it is an untied subsidy.

Department's Position: As in the *Preliminary Determination,* we are attributing the benefits from non-recurring untied subsidies received by Sidmar, including subsidies related to SidInvest to the consolidated operations of the Sidmar Group which includes ALZ. This is consistent with the Department's practice that attributes untied subsidies to the company's total domestically-produced sales. *See GIA* at 37267.

With respect to the subsidies received by Sidmar, when the parent company of a consolidated group receives untied subsidies, such as equity infusions, these domestic subsidies are normally attributed to the consolidated group. *See Certain Hot-Rolled Lead and Bismuth Carbon Steel Products From the United Kingdom; Final Results of Countervailing Duty Administrative Review,* 62 FR 53306, 53311 (October 14, 1997). In this case, we have attributed untied subsidies received by Sidmar to the consolidated sales of that company, including the sales of ALZ. We disagree with ALZ that there is an insufficient identity of interest between ALZ and Sidmar to do this. Sidmar currently owns 100 percent of ALZ's voting shares. Also, Sidmar apparently saw that its business interests would be advanced by making ALZ part of the Sidmar Group because it moved from a minority ownership position to a 100 percent ownership interest over time.

With respect to subsidies received by SidInvest, consistent with *Certain Steel,* we are treating the subsidies received as untied benefits to the Sidmar Group. Thus, because ALZ is a member of the Sidmar Group, benefits are properly attributed to ALZ. Specifically, in *Certain Steel,* we stated, ''. . . any subsidies provided to SidInvest are not tied to SidInvest or to the specific activities in which it invested. Instead, any benefits flow to the Sidmar Group as a whole.'' *See Certain Steel* at 37282.

Finally, as we have not found any benefits resulting from the Sidfin transactions, it is not necessary to discuss their attribution.

Comment 25: SidInvest Transactions. ALZ argues that, in the *Preliminary Determination,* the Department overstated the amount of benefit provided to ALZ through the SidInvest transactions. ALZ notes that the Department's practice is to find that the benefit from a loan lasts for the life of the loan. Thus, according to ALZ, the Department inappropriately allocated benefits from the creation of the 32 year loan to the POI. Specifically, ALZ argues that since 1988 the loan has been off SidInvest's books and, thus, under the Department's practice there can be no benefit from this loan since 1988.

ALZ also argues that the Department should make the following calculation changes. First, it argues that when conducting the expense test, the Department should use the consolidated sales of the Sidmar Group because any benefit found to have been provided from the SidInvest transaction is attributable to the entire group. Lastly, ALZ argues that the Department did not take into account a payment by SidInvest, and the payment should be deducted from the difference between the net present value of the balance of the outstanding loan and the shares received by the government in return for the loan.

The petitioners state that the Department should affirm its treatment of the SidInvest transactions in the *Preliminary Determination.* However, petitioners argue that if the Department finds that the benefit from the 32 year loan ceased in 1988, the Department should treat the transaction as a debt-to-equity conversion. According to petitioners, the agreement between the GOB and SidInvest indicates that the government's contribution to SidInvest was made up of the balance of debt instruments that comprised the 32 year loan. Furthermore, petitioners argue that the debt-to-equity conversion was made on terms inconsistent with the practice of private investors because there is no evidence that the GOB based its decision on any studies that provided an objective assessment of the investment and because the GOB sold its shares to Sidmar at a price below their commercial value.

Department's Position: We are continuing to find a benefit arising from these transactions. However, as discussed above, we have revisited our analytical approach. We believe the revised approach more accurately reflects the benefit to Sidmar from the transactions that occurred on July 29, 1988. In particular, we are no longer treating the first step in this transaction as the creation of a 32-year loan. Instead, we now consider that the series of transactions effectively canceled the debt owed to the GOB by SidInvest, and we have treated the amount of debt forgiveness as a grant.

We agree with ALZ that the benefits incurred from the SidInvest transactions are attributable to the entire group and, thus, when determining whether the benefit should be expensed in the year of receipt, we have used the consolidated sales of the Sidmar Group. However, upon conducting the expense test we have not found that the subsidy is expensed in the year of receipt, rather the benefit is being allocated over Sidmar's AUL.

With respect to the payment made by SidInvest to the government, we agree that the payment should be taken into account and have done so for purposes of this final determination. However, while ALZ has argued that the payment should be deducted from the difference

between the net present value of the balance of the outstanding loan and the shares received by the government in return for the loan as it was in 1988, we have instead deducted the payment prior to the creation of the loan. The transactions in question occurred on the same day. On that day SidInvest made various cash payments to the government. We view the cash payments made on that day as reductions in the total amount of money owed to the government by SidInvest. If we were to deduct the payment after taking the net present value, the benefit conferred to SidInvest by the transactions would be understated.

Comment 26: Assumption of Sidmar's Debt. ALZ and the GOB argue that the Department should not have initiated an investigation of this program because the Department determined in *Certain Steel* that it did not provide a countervailable subsidy and the petitioners have not provided any new information that would change that determination. ALZ argues that the reliance on a redetermination that was later vacated as new information is inappropriate because any decision that was vacated should be treated as if it never existed. Thus, ALZ argues that no new information was ever presented in this case that would justify the Department's departure from its normal practice to not reconsider a determination unless new information is presented. ALZ further argues that, in investigating this program, the Department has deviated from the Act and the WTO Agreement on Subsidies and Countervailing Measures because both require a petition to include sufficient evidence of a subsidy. When the Department receives a petition that does not meet this requirement, ALZ argues that the Department should not initiate an investigation and, thus, in this case the Department must terminate its investigation immediately.

ALZ also argues that the GOB's receipt of the PBs was consistent with a reasonable private investor standard because the value of the shares received by the government was consistent with the GOB's financial contribution. Specifically, ALZ cites to the different terms of the shares and notes that all of the terms are consistent with commercial considerations and, thus, consistent with *Aimcor,* we should not find a countervailable subsidy from the issuance of the PBs.

The petitioners argue that the Department properly initiated an investigation of this program because the petition contained sufficient evidence of a subsidy. The petitioners note that in their petition they cited to the *Amended Final Affirmative Countervailing Duty Determination: Certain Carbon Steel Products from Belgium,* 62 FR 37880 (July 15, 1997), in which the Department concluded that the debt to equity conversion was inconsistent with commercial considerations. The petitioners disagree with ALZ's contention that this determination should not be relevant because of the order of vacatur. Rather, the petitioners note that the Department has already rejected ALZ's argument on this point when it was raised following the initiation.

The petitioners also argue that ALZ's argument is not consistent with *Aimcor,* because in the *Aimcor* decision the CIT noted that even if a company is equityworthy, it does not necessarily follow that a purchase of stock from such a company is consistent with commercial considerations. The petitioners then note that in this case the issue before the Department is not whether the terms were consistent with commercial considerations, but whether the investment price paid by the GOB was more than the value of the shares received by the GOB.

Department's Position: ALZ is incorrect in stating that the petitioners did not provide sufficient evidence of a subsidy. In fact, the petitioners cited to our amended final determination, in which we found that Sidmar received a countervailable subsidy from this program. The fact that the decision affirming our remand was vacated does not nullify the factual record and development of agency practice resulting from the proceeding. *See* Memorandum to Richard Moreland, ''Initiation of Certain Programs Alleged to benefit ALZ,'' dated June 18, 1998. The petitioners are also correct in noting that the issue at question is not whether the terms of the PBs were consistent with the reasonable private investor standard, but rather if the price paid for the PBs was consistent with the price a reasonable private investor would pay. In this case, the record indicates that the share transactions were on terms inconsistent with the usual practice of a private investor because the government paid more for the shares than a reasonable private investor would pay. Thus, a countervailable subsidy was provided to Sidmar.

Verification

In accordance with section 782(i) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, and examining relevant accounting records and original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the Central Records Unit of the Department of Commerce, Room B–099.

Suspension of Liquidation

In accordance with section 705(c)(1)(B)(i) of the Act, we have calculated an individual subsidy rate for ALZ, the sole manufacturer of the subject merchandise. Because ALZ is the only respondent in this case, ALZ's rate will also serve as the ''all others'' rate. We determine that the total estimated net countervailable subsidy rate is 1.82 percent *ad valorem* for ALZ.

In accordance with our preliminary determination, we instructed the U.S. Customs Service to suspend liquidation of all entries of stainless steel plate in coils from Belgium which were entered or withdrawn from warehouse for consumption on or after September 4, 1998, the date of the publication of our preliminary determination in the **Federal Register**. In accordance with section 703(d) of the Act, we instructed the U.S. Customs Service to discontinue the suspension of liquidation for merchandise entered on or after January 2, 1999, but to continue the suspension of liquidation of entries made between September 4, 1998 and January 1, 1999. We will reinstate suspension of liquidation under section 706(a) of the Act if the ITC issues a final affirmative injury determination, and will require a cash deposit of estimated countervailing duties for such entries of merchandise in the amounts indicated above. If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled.

ITC Notification

In accordance with section 705(d) of the Act, we will notify the ITC of our determination. In addition, we are making available to the ITC all non-privileged and non-proprietary information related to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files, provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Assistant Secretary for Import Administration.

If the ITC determines that material injury, or threat of material injury, does not exist, this proceeding will be

terminated and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order.

Return or Destruction of Proprietary Information

In the event that the ITC issues a final negative injury determination, this notice will serve as the only reminder to parties subject to Administrative Protective Order (''APO'') of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to sections 705(d) and 777(i) of the Act.

Dated: March 19, 1999.

Robert S. LaRussa,

Assistant Secretary for Import Administration.

[FR Doc. 99–7531 Filed 3–30–99; 8:45 am]

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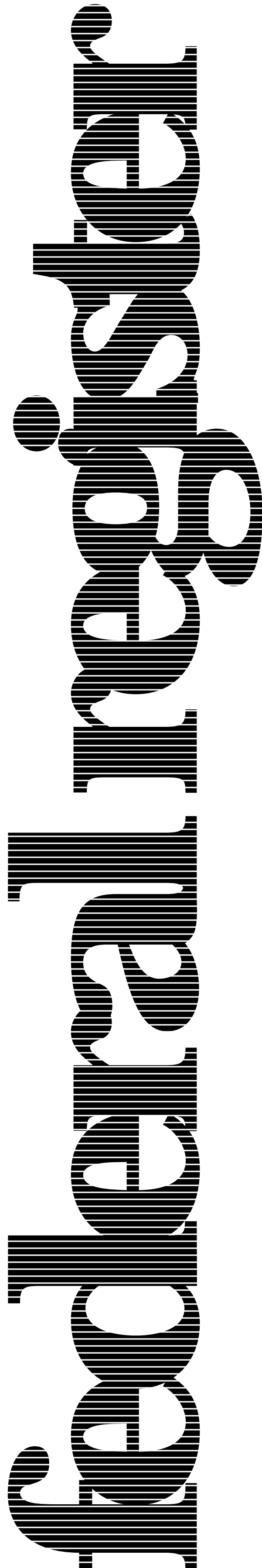

Wednesday
March 31, 1999

Part IV

Department of Transportation

Federal Highway Administration

49 CFR Part 393

Parts and Accessories Necessary for Safe Operation; Lighting Devices, Reflectors, and Electrical Equipment; Final Rule

DEPARTMENT OF TRANSPORTATION

Federal Highway Administration

49 CFR Part 393

[FHWA Docket No. MC–94–1; FHWA–1997–2222]

RIN 2125–AD27

Parts and Accessories Necessary for Safe Operation; Lighting Devices, Reflectors, and Electrical Equipment

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Final rule.

SUMMARY: The FHWA is amending the Federal Motor Carrier Safety Regulations (FMCSRs) to require that motor carriers engaged in interstate commerce install retroreflective tape or reflex reflectors on the sides and rear of semitrailers and trailers that were manufactured prior to December 1, 1993, have an overall width of 2,032 mm (80 inches) or more, and a gross vehicle weight rating (GVWR) of 4,536 kg (10,001 pounds) or more. The FHWA is requiring that motor carriers install retroreflective tape or reflex reflectors within two years of the effective date of this rule. The agency is allowing motor carriers a certain amount of flexibility in terms of the colors or color combinations during a 10-year period beginning on the effective date of this rule, but is requiring that all older trailers be equipped with conspicuity treatments identical to those mandated for new trailers at the end of the 10-year period. The locations at which the retroreflective tape or reflex reflectors must be applied to trailers during the phase-in period is specified. This rulemaking is intended to help motorists detect trailers at night and under other conditions of reduced visibility, thereby reducing the incidence of passenger vehicles colliding with the sides or rear of trailers.

DATES: The effective date for this rule is June 1, 1999.

FOR FURTHER INFORMATION CONTACT: Mr. Larry W. Minor, Office of Motor Carrier Research and Standards, HCS–10, (202) 366–4009; or Mr. Charles E. Medalen, Office of the Chief Counsel, HCC–20, (202) 366–1354, Federal Highway Administration, 400 Seventh Street, SW., Washington, D.C. 20590. Office hours are from 7:45 a.m. to 4:15 p.m., e.t., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access

Internet users can access all comments that were submitted to the Docket Clerk, U.S. DOT Dockets, Room PL–401, 400 Seventh Street, SW., Washington, DC 20590-001, in response to previous rulemaking notices concerning the docket referenced at the beginning of this notice by using the universal resource locator (URL): http://dms.dot.gov. It is available 24 hours each day, 365 days each year. Please follow the instructions online for more information and help.

An electronic copy of this document may be downloaded using a modem and suitable communications software from the Federal Register Electronic Bulletin Board Service at (202) 512–1661. Internet users may reach the Federal Register's home page at http://www.nara.gov/fedreg and the Government Printing Office's database at: http://www.access.gpo.gov/nara.

Background

On December 10, 1992, the National Highway Traffic Safety Administration (NHTSA) amended Federal Motor Vehicle Safety Standard (FMVSS) No. 108 (49 CFR 571.108), to require that trailers with an overall width of 2,032 mm (80 inches) or more and a GVWR greater than 4,536 kg (10,000 pounds), except trailers manufactured exclusively for use as offices or dwellings, be equipped on the sides and rear with a means for increasing their conspicuity (57 FR 58406). Trailer manufacturers are given a choice of installing either red and white retroreflective sheeting or reflex reflectors arranged in a red and white pattern. Manufacturers of retroreflective sheeting or reflex reflectors intended for use in satisfying these requirements must certify compliance of their product with FMVSS No. 108, whether the material is used as original or replacement equipment. The effective date for the final rule was December 1, 1993.

Summary of the NHTSA Rulemaking

The NHTSA issued an advance notice of proposed rulemaking (ANPRM) on May 27, 1980, requesting comments on methods to reduce the incidence and severity of collisions between passenger cars and large trailers during conditions of darkness or reduced visibility (45 FR 35405). The use of retroreflective materials was considered a possible solution.

Between 1980 and 1985, the NHTSA conducted a fleet study in which retroreflective material was placed on van-type trailers in a manner designed to increase their conspicuity during conditions of darkness or reduced visibility. The treatment of the trailers consisted of outlining the rear perimeter, and delineating the lower sides with retroreflective tape. The authors of the study concluded that truck-trailer combinations equipped with retroreflective material were involved in 15 percent fewer accidents (in which a trailer was struck in the side or rear by a passenger car at nighttime) than combinations that were not equipped with the material. This research is documented in the following research reports: ''Improved Commercial Vehicle Conspicuity and Signaling Systems, Task I—Accident Analysis and Functional Requirements,'' March 1981 (DOT HS 806–100); ''Improved Commercial Vehicle Conspicuity and Signaling Systems, Task II—Analyses, Experiments and Design Recommendations,'' October 1981, (DOT HS 806–098); and, ''Improved Commercial Vehicle Conspicuity and Signaling Systems, Task III—Field Test Evaluation of Vehicle Reflectorization Effectiveness,'' September 1985 (DOT HS–806–923). A copy of each of the reports is in the docket.

On September 18, 1987, the NHTSA published a notice discussing the results from the fleet study and requesting comments on the research as well as information from motor carriers about their experiences using reflective material to enhance conspicuity (52 FR 35345).

In response to the NHTSA fleet study, Congress included in the Motor Carrier Safety Act of 1990 (Pub. L. 101–500, 104 Stat. 1218), a provision directing the Secretary of Transportation (Secretary) to initiate a rulemaking on the need to adopt methods for making commercial motor vehicles more visible to motorists. The rulemaking was required to begin no later than February 3, 1991, and to be completed no later than November 3, 1992.

Between March 1990 and September 1991, the NHTSA conducted additional research on trailer conspicuity. The purpose of the research program was to define a range of minimally acceptable large truck conspicuity enhancements that could be used as a basis for developing Federal regulations. A number of laboratory and field studies were carried out to assess the value of using a pattern of retroreflective sheeting, the form the pattern should take, the placement of the treatment on the trailer, the effect of retroreflective markings on the detection and identification of stop and turn signals, and the trade-off between the width and retroreflective intensity of the treatment

material. In addition, field surveys were conducted to assess the effect of environmental dirt on the performance of the marking systems and the durability of retroreflective materials when used on commercial motor vehicles.

The final report for the research conducted between 1990 and 1991 (''Performance Requirements for Large Truck Conspicuity Enhancements,'' March 1992, (DOT HS 807 815)) includes recommendations that the retroreflective tape be at least two inches in width, applied in a red and white pattern (continuous or broken strip) along the bottom of the trailer on the sides, with a continuous strip along the bottom of the rear of the trailer. The authors also recommend white corner markers at the top of trailers. In addition, the report provides recommendations concerning minimum retroreflectivity levels, taking into account the effects of environmental dirt, aging, and orientation of the marked vehicle. A copy of the final report is in the docket.

On December 4, 1991, the NHTSA published a notice of proposed rulemaking (NPRM) based upon the research conducted between 1990 and 1991 (56 FR 63474). The NHTSA considered its NPRM, which was part of a rulemaking initiated before the enactment of the Motor Carrier Safety Act of 1990, to be responsive to the congressional mandate and its December 10, 1992, final rule as the completion of the rulemaking mandated by Congress.

Current FHWA Requirements for Trailer Conspicuity

The FHWA is responsible for establishing standards for commercial motor vehicles operated in interstate commerce. Commercial motor vehicles subject to the FMCSRs must meet the requirements of 49 CFR parts 393 (Parts and Accessories Necessary for Safe Operation) and 396 (Inspection, Repair, and Maintenance). The requirements for lamps and reflective devices are contained in §§ 393.11 through 393.26.

Section 393.11 of the FMCSRs requires that all lighting devices on commercial motor vehicles placed in operation after March 7, 1989, meet the requirements of FMVSS No. 108 in effect at the time the vehicle was manufactured. Therefore, trailers manufactured on or after December 1, 1993, the effective date of the NHTSA requirement for retroreflective tape or reflex reflectors, must have retroreflective tape or reflex reflectors of the type and in the locations specified in FMVSS No. 108 in order to comply with the FHWA's requirements.

On April 14, 1997, the FHWA published a notice of proposed rulemaking in which the agency proposed general amendments to part 393 of the Federal Motor Carrier Safety Regulations (FMCSRs), Parts and Accessories Necessary for Safe Operation (62 FR 18170). The proposed amendments covered a wide range of topics, including conspicuity treatments on trailers manufactured on or after December 1, 1993. To make certain that all motor carriers operating trailers subject to the FMCSRs are aware of their responsibility to maintain the conspicuity treatment, the FHWA proposed the addition of detailed language under § 393.11. The FHWA would cross-reference the specific paragraphs of FMVSS No. 108 related to the applicability of NHTSA's trailer conspicuity standards, the required locations for the conspicuity material, and the certification and marking requirements.

FHWA Rulemaking and Congressional Action Concerning Retrofitting

On January 19, 1994, the FHWA published an ANPRM requesting comments on issues related to the application of conspicuity treatments to trailers manufactured prior to the effective date of the NHTSA's final rule on trailer conspicuity (59 FR 2811). The agency requested that commenters respond, at a minimum, to several specific questions listed in the notice. In addition to responding to those specific questions, the FHWA encouraged commenters to include a discussion of any other issues that the commenters believed were relevant to the rulemaking.

On August 6, 1996, the FHWA published a notice announcing that the agency had completed its review of the comments received in response to the ANPRM and that it would issue a notice of proposed rulemaking (61 FR 40781).

The Transportation Equity Act for the 21st Century (TEA–21) (Pub. L. 105–178, 112 Stat. 107) was enacted on June 9, 1998. Section 4025 requires that the Secretary issue a final rule regarding the conspicuity of trailers manufactured before December 1, 1993, within one year of the enactment of TEA–21. The Secretary must consider, at a minimum:

(1) The cost-effectiveness of any requirement to retrofit trailers manufactured before December 1, 1993.

(2) The extent to which motor carriers have voluntarily taken steps to increase equipment visibility.

(3) Regulatory flexibility to accommodate differing trailer designs and configurations, such as tank trucks.

On June 19, 1998, the FHWA published a notice of proposed rulemaking to require motor carriers to install retroreflective tape or reflex reflectors within two years of the effective date of the final rule (63 FR 33611). The agency proposed allowing motor carriers a certain amount of flexibility in terms of the colors or color combinations during a 10-year period beginning on the effective date of the final rule, but requiring all older trailers to be equipped with conspicuity treatments identical to those mandated for new trailers at the end of the 10-year period. The proposal also specified the locations at which the retroreflective material would have to be applied to trailers during the phase-in period.

Although the FHWA drafted the NPRM prior to the enactment of the TEA–21, the agency reviewed section 4025 of the TEA–21 prior to publishing the NPRM. The FHWA considered the NPRM to be consistent with the three statutory criteria. The final rule being adopted today fulfills the requirements of the TEA–21.

Discussion of Responses to the NPRM

The FHWA received 700 comments in response to the NPRM. The strongest voice of support came from concerned citizens—a total of 652 responses. The FHWA received 549 responses from the Amy Elizabeth Corbin Foundation for the Promotion of Highway Safety, an organization established in memory of an 18-year old who was killed in a collision with a tractor-semitrailer that blocked the road as the truck driver was making a turn across a highway. Another 72 responses were on behalf of Stacey Balascio, a 24-year old passenger who died when the car she was riding in struck the rear of a parked tractor-semitrailer. The FHWA received several letters from the family and friends of Carl Hall, who was killed in a collision with a tractor-semitrailer that blocked the road as the truck driver backed the vehicle into a driveway. The remaining comments from concerned citizens included letters from families and friends of other accident victims, survivors of collisions between passenger cars and tractor-semitrailer combination vehicles, and individuals who saw a recent network television news program that discussed the FHWA's rulemaking concerning trailer conspicuity.

As indicated in the preamble to the NPRM, the FHWA has the greatest sympathy for the losses suffered by these respondents. The goal of this

rulemaking is to reduce the number of such accidents, but rules must be based on consideration of evidence and data submitted. Since these commenters did not include information concerning technical or economic aspects of retrofitting trailers with conspicuity treatments, the remainder of this preamble will focus on those issues. The agency, however, has not ignored the concerns of those whose tragic personal experiences led them to support this rulemaking.

In addition to concerned citizens, the FHWA received comments from 15 members of Congress. The agency received letters from Senators Edward M. Kennedy, John F. Kerry, Rick Santorum, and Arlen Specter. The agency received comments from the following members of the House of Representatives: William D. Delahunt; Barney Frank; James C. Greenwood, Joseph P. Kennedy, II; Edward J. Markey; James P. McGovern; Martin T. Meechan; John Joseph Moakley; Richard E. Neal; John W. Olver; and John F. Tierney. All of the members of Congress who submitted comments in response to the NPRM supported the rulemaking and encouraged the FHWA to expedite the issuance of the final rule.

The specific concerns or issues raised by the commenters that discussed technical or economic issues are discussed in the following sections.

General Comments Concerning Technical and Economic Issues

The agency received comments from 3M; Advocates for Highway and Auto Safety (Advocates); American Association of Motor Vehicle Administrators (AAMVA); American President Lines, Ltd. (APL); the American Trucking Associations, Inc. (ATA); the Canadian Council of Motor Transport Administrators (CCMTA); Citizens for Reliable and Safe Highways (CRASH); the Commercial Vehicle Safety Alliance (CVSA); Farmland Industries, Inc.; Georgia Public Service Commission; GROWMARK, Inc.; the Insurance Institute for Highway Safety (IIHS); the International Association of Chiefs of Police (IACP); National Association of Governors' Highway Safety Representatives (NAGHSR); National Automobile Dealers Association (NADA); the National Private Truck Council (NPTC); the National Sheriff's Association; the National Tank Truck Carriers, Inc. (NTTC); David L. Narkiewicz; Northland Insurance Companies; the Owner Operator Independent Drivers Association, Inc. (OOIDA); Parents Against Tired Truckers (PATT); Reflexite; Salisbury Area Chamber of Commerce; Sate-Lite; Shannon & Peters, Attorneys at Law; S.O.S. Transportation, Inc.; Transport Canada; the Transportation Safety Equipment Institute (TSEI); the Underride Network; XTRA Corporation (XTRA); and Yellow Corporation (Yellow).

Generally, almost all of the commenters supported the concept of using conspicuity treatments of some form to help motorists detect trailers at nighttime and under other conditions of reduced visibility. However, almost all of the commenters believed the agency's proposal would either provide the motor carrier industry with too much flexibility (e.g., allowing the use of alternative colors during the proposed transition period), or not provide the motor carrier industry with enough time to comply with the rule (e.g., requiring that the industry complete the retrofitting within two years of the effective date, and mandating the use of red and white conspicuity treatments 10 years after the effective date of the rule).

Accident Data

The ATA, CRASH, and Yellow provided comments about accident statistics concerning passenger cars striking the sides and rear of semitrailers and trailers. The ATA and Yellow argued that there is insufficient data to support the FHWA's rulemaking and to assess the effectiveness of the NHTSA's requirements for trailers manufactured on or after December 1, 1993. CRASH believes the FHWA's analysis of accident data may have resulted in the agency underestimating the safety benefits of the conspicuity retrofitting rule.

Yellow stated:

In evaluating the effectiveness of the proposed retrofit program we do not agree with FHWA that there is sufficient safety data to support the requirement to retrofit pre-1993 trailers. Since the early 1990's Yellow has been concerned with the visibility of our trailer fleet. We have taken steps to improve the safety of these vehicles by utilizing white trailers, placing reflective unit numbers on the nose and rear of each unit and recently side logos with company identification.

These safety features have improved the visibility of all trailers, yet we find no clear evidence that trailers equipped with additional conspicuity tape have fewer accidents. Nighttime accidents involving passenger cars and trailers have numerous contributing factors. We [cannot] mitigate the fact that automobiles do strike commercial vehicles through the use of conspicuity tape.

While the rulemaking recognizes certain existing conspicuity applications, it does not give full credit to other reflective application that provides improved visibility, yet fails to meet the NHTSA standards. The adage of ''one size fits all'' is not responsive to current trailer application such as corporate logos, trailer color or trailer types. A van trailer does not have the visibility problems as say a flatbed trailer. FHWA, in relying on safety to support the need for retroreflective tape applications, has not fully taken into consideration differing types of trailers, current reflective applications and trailer colors in its proposed rulemaking.

The ATA stated:

All new trailers built after December 1, 1993, have had to incorporate either red and white striped tape or strip reflectors on their sides and rear. This means that every new trailer placed on the highway in 1994 and 1995 incorporates such markings. Moreover, the total portion of such vehicles in the national trailer fleet is growing year-by-year. Yet the FARS data quoted in the docket shows:

NIGHTTIME CAR INTO TRUCK COLLISIONS

FARS data	Side	Rear	Total
1994	119	173	292
1995	115	200	315

The data seems to indicate 8 percent more fatal accidents happened the second year after adding reflective materials to new trailers. Given that the statistics are for the first two years following the mandate of the new requirements and the sample is extremely small, the proper interpretation may be that there has been no difference. As tragic as they are, these are small numbers. With such a little universe, it will always be hard to show results with statistical significance.

To put the totality of car striking trailer accidents into further perspective, consider that in 1996 there were around 4.3 million registered commercial trailers. That same year there were 364,000 total collisions involving trucks. These incidents included both trucks and trailers and they occurred at all hours. If we say they only applied to trailers and divide the two figures together; we can conservatively project a collision involvement for any specific trailer of once every 12 years.

The point of these examples is that there is very little likelihood of any given trailer being involved in an accident. . . .

Citizens for Reliable and Safe Highways believes there is sufficient data to support the FHWA's conspicuity retrofitting rulemaking but indicated the agency underestimated the safety benefits of the rulemaking. CRASH stated:

In fact the projected safety benefits of trailer conspicuity material that meets the NHTSA requirement are too low because many rear and side underride crashes caused by truck invisibility are not reported as such. Previous to 1994, FARS [Fatality Analysis Reporting System] coded only catastrophic underride crashes with passenger compartment intrusion as ''underride.'' In 1994 the National Center for Statistics and Analysis (NCSA) within NHTSA changed FARS so that it would include underride without passenger compartment intrusion in the data elements. However, according to Insurance Institute for Highway Safety (IIHS), ''these crashes are still being substantially undercounted.'' IIHS has shown that FARS reflects only a small portion of the fatal underride crashes recorded in independent databases such as NASS and CDS. A comparison of IIHS's estimated 248 rear fatal underride crashes each year from 1988 to 1993 to NHTSA's estimate of 60 shows that FARS is undercounting rear underride fatalities by a factor of 4. The National Center for Statistics and Analysis has, ''examined and confirmed the assertions made by IIHS.'' The benefits of taping trailers are higher than estimated by the FHWA.

The FHWA disagrees with the ATA's and Yellow's assertions that the magnitude of the problem does not warrant mandating the retrofit of semitrailers and trailers manufactured before December 1, 1993. The FHWA has reviewed data from the NHTSA's FARS and General Estimates System (GES) for 1993 through 1997, and the data suggests that motorists have trouble detecting semitrailers and trailers at nighttime. The nighttime incidence of passenger vehicles colliding with combination vehicles has fluctuated from 1993 through 1997, but a significant number of these collisions occurred each year.

NIGHTTIME CAR INTO COMBINATION VEHICLE FATAL COLLISIONS

FARS data	Side	Rear	Total
1993	119	222	341
1994	119	173	292
1995	115	200	315
1996	118	170	288
1997	127	198	325

ESTIMATE OF NUMBER OF NIGHTTIME CAR INTO COMBINATION VEHICLE COLLISIONS WITH A NON-FATAL INJURY OR PROPERTY DAMAGE ONLY

GES data	Side	Rear	Total
1993	3,032	2,594	5,626
1994	3,546	3,154	6,700
1995	2,331	2,443	4,774
1996	3,690	2,561	6,251
1997	3,053	2,086	5,139

The FHWA believes the ATA's comments about the accident statistics are misleading. Because of the year-to-year fluctuations shown in the preceding tables it is inappropriate to attempt, at this time, to draw conclusions from the FARS and GES data on the effectiveness of the NHTSA's requirements for conspicuity treatments. In addition, consideration must be given to factors such as the percentage of the U.S. fleet of semitrailers and trailers equipped with conspicuity treatments that conform to the NHTSA requirements, the percentage of vehicles equipped with some other form of conspicuity treatment, and the percentage of vehicles that are not equipped with retroreflective sheeting or reflex reflectors.

The agency notes that 1994 is the first full calendar year in which all new semitrailers and trailers were required to be equipped with conspicuity treatments. The preamble to the NPRM indicated that an estimated 2.1 million trailers and semitrailers were being operated in interstate commerce as of January 1994.

The agency estimates that there are approximately 2.56 million semitrailers and trailers currently in operation. By January 1, 2001, that figure will increase to approximately 2.69 million as 480,000 new semitrailers and trailers are added to the fleet and 350,000 of vehicles are retired from revenue service. Approximately 1.6 million of these semitrailers and trailers were manufactured after December of 1993, and are, therefore, already equipped with conspicuity treatments. The remaining 1.02 million trailers were manufactured before December 1, 1993. The FHWA estimates that 20 percent of these trailers already have conspicuity treatments . Therefore, approximately 815,000 trailers will have to be retrofitted within two years.

Although the ATA indicated in its comments that as of 1996 there were 4.3 million commercial trailers registered in the United States, the FHWA believes this figure greatly exceeds the actual number of semitrailers and trailers operated by interstate motor carriers, and is far in excess of the number of trailers that would be subject to this rule.

The FHWA acknowledged in both its preliminary and final regulatory evaluations that there is uncertainty about the exact number of trailers in use. According to the agency's publication ''Highway Statistics 1994'' (FHWA-PL–95–042) 4.12 million commercial trailers and semitrailers were registered in 1994; ''Highway Statistics 1997'' (FHWA–PL–98–020) indicates 4.45 million commercial trailers and semitrailers were registered in 1997. However, some States do not require annual registration of trailers and some States do not send their figures to the FHWA. The FHWA must estimate the number of trailers in these States.

In addition, States appear to have different definitions of commercial trailers, which could result in the inclusion of semitrailers and trailers exempt from the retrofitting requirements. Another consideration is

that many semitrailers are used as offices or in other non-highway capacities. Finally, only semitrailers and trailers operated by motor carriers in interstate commerce are subject to this regulation. State registration data does not generally distinguish between semitrailers and trailers operated in interstate commerce and those operated in intrastate commerce.

Because of shortcomings of the registration data, the FHWA based its estimate of the number of trailers in operation on the average life of trailers, and trailer production data. The NHTSA's final regulatory evaluation estimated that the average trailer has a useable service life of approximately 14 years. Tank trailers are both more expensive and sturdier than other types of trailers, and they have a useful life of approximately 20 years.

Based upon the Census Bureau's Current Industrial Reports data on the number of trailers sold in the United States, and the average useful service life estimates, the FHWA estimates that 2.69 million semitrailers and trailers will be in use by the year 2001. However, more than half of these semitrailers and trailers will be manufactured after 1993 and will already be equipped with retroreflective sheeting. The agency believes 815,000 pre-1994 semitrailers and trailers will still be in use and have to be retrofitted. Therefore, the FHWA does not agree with the ATA's estimate of the number of trailers in operation in the U.S., and considers its estimate of the probability of any given trailer being involved in a visibility-related accident to be based upon an incomplete analysis.

The FHWA has considered the number of new semitrailers and trailers placed in operation each year and believes they constitute less than 10 percent of the total population of such vehicles during a given year. Since 1994 through 1998 are the only complete calendar years during which new semitrailers and trailers were equipped with conspicuity treatments, and since the average useful service life of a trailer is 14 years (approximately 20 years for cargo tank trailers), there is a significant population of semitrailers and trailers in operation today that were not subject to the NHTSA requirements for conspicuity treatments at the time of manufacture. While some of these vehicles may have been voluntarily retrofitted or removed from revenue service, the agency believes that most of these vehicles currently do not have conspicuity treatments that would satisfy the requirements being adopted today. Therefore, this rulemaking is needed to ensure that older trailers are retrofitted with conspicuity treatments to reduce significantly the incidence of passenger vehicles colliding with combination vehicles at nighttime and under other conditions of reduced visibility.

With regard to Yellow's comments about using white trailers, reflective unit numbers on the nose and rear of trailers, and reflective corporate logos, the FHWA does not consider these steps to be a sufficient response to the problem of motorists colliding with semitrailers and trailers at nighttime and under other conditions of reduced visibility. The FHWA is not aware of research that quantifies the safety benefits of retroreflective logos on the sides and rear commercial motor vehicles, or that identifies a correlation between trailer color and the incidence of passenger vehicles colliding with combination vehicles.

The FHWA considers Yellow's evaluation of its program to prevent nighttime collisions inconclusive since no data or detailed information was provided in support of the statements. The information that needs to be evaluated includes: the total number of trailers operated; the total number of trailers on which these countermeasures were in use; daytime and nighttime exposure data (miles traveled with a distinction between urban and rural roads) for the trailers that have the countermeasures and trailers that do not; the color of the trailers; and the colors and sizes of the logos. The before-and-after accident experience should also be examined. Yellow did not indicate that this type of information was collected and analyzed, or that such information would be made available for review by the FHWA.

As for CRASH's comment about the FHWA underestimating the safety benefits of the rulemaking, the FHWA considers debates about the total number of rear and side underride accidents to have little if any relevance to this rulemaking. The FHWA examined the FARS and GES data to gather information on the total number of accidents per year in which a passenger vehicle struck the side or rear of a combination vehicle. The agency did not attempt to estimate the number of these accidents in which underride occurred, or in which a portion of the commercial motor vehicle penetrated the passenger compartment, because accidents involving side and rear underride are included in the larger set of data concerning collisions with the sides and rear of semitrailers and trailers. While a detailed analysis of side and rear underride accident data would be appropriate if the FHWA's rulemaking concerned side or rear impact guards intended to reduce the incidence (daytime and nighttime) of passenger compartment intrusion during underride accidents, this type of analysis is not necessary for a rulemaking intended to reduce the incidence of passenger vehicles striking semitrailers and trailers by increasing their visibility.

Disagreement with NHTSA's Research Findings

The ATA, CCMTA, and Transport Canada disagreed with the NHTSA research reports cited by the FHWA in the preamble to the NPRM. The ATA does not believe the research proved the effectiveness of conspicuity treatments, and all three commenters believe the research did not provide justification for the selection of the red-and-white pattern for conspicuity treatments. The ATA stated:

> The preamble [to the NPRM] makes several references to the National Highway Traffic [Safety] Administration tests of conspicuity enhancement. FHWA noted there was no questioning of results of these tests. This is incorrect. The methods, sample sizes and conclusions of the tests have all been disputed. Since there was discussion of NHTSA's research at the time the agency made changes to FMVSS 108, no further critique appeared necessary for this proceeding. The purpose of FHWA's NPRM is not to change FMVSS 108.
>
> However, FHWA raised the issue of NHTSA's test program in the preamble to this NPRM. Because there were implications that this work was unchallenged and establishes a need for retrofitting, we will review its past criticisms.
>
> NHTSA ran two types of experiments that led to its selection of the horizontal, red and white stripe conspicuity enhancement requirements in Federal Motor Vehicle Safety Standard (FMVSS) 108. They conducted laboratory and field tests to find what patterns people could identify as trailers. There was also an on-highway evaluation to see if the patterns selected from the laboratory tests would have an impact on accident rates.
>
> Inadequate sample size was a criticism of both types of experiments. There were questions of the laboratory and field tests because they did not contain enough persons from a wide cross section of drivers. The use of too few vehicles for too short a time in too few operations resulted in the statistical significance of the on-highway evaluations being assailed. The criticisms called into question such things as the impact of the so-called "moth effect" and if there were more effective markings.

The ATA cited research performed in Canada as a part of its rationale for disagreeing with the NHTSA's research recommendations for the use of the red-and-white pattern. The ATA stated:

Subsequent testing done in Canada indicated that NHTSA's selected red and white markings were quite inferior to all-white patterns. The Transportation Group of the University of New Brunswick conducted this work titled "Effectiveness of Heavy Truck Conspicuity Treatments Under Different Weather Conditions." NHTSA did not specifically study the red and white patterns under various weather conditions as did New Brunswick. This work alone opens the question of whether NHTSA selected the optimum conspicuity treatment.

The ATA believes the researchers' recommendations for the use of a red-and-white pattern resulted in the establishment of manufacturing standards that were contrary to long-standing principles regarding the use of red reflective material on the sides of commercial motor vehicles. The ATA stated:

Until NHTSA's requirement for side mounted red and white strips of reflective markings, red mandated devices only faced the rear of a vehicle. FHWA established red-means-rear because it helps approaching drivers define the truck's direction of travel. Under inclement conditions, such as approaching a foggy intersection, this visual clue can be very important.

In establishing a red and white pattern of reflective materials for both the sides and rear of a trailer, NHTSA destroyed the long held convention established by FHWA. Given their action on red, side-facing markings, we find it surprising that NHTSA believes strongly in the effectiveness of standardized reflectorized colors and patterns. The agency certainly showed no qualm about changing a FHWA created and maintained convention that enabled drivers to know they were facing the rear of a vehicle.

NHTSA is still studying the effectiveness of its trailer conspicuity requirements. The agency is conducting an accident review in two states to gain insight on the involvement of marked and unmarked trailers. Florida began collecting information for this study in July and Pennsylvania started in December of 1997. The scheduled completion for this work is in September of 2000. Presently those involved indicate it is much too early to draw any conclusions.

One can conclude that NHTSA did research before changing FMVSS 108 to require conspicuity markings. There are still questions on whether the colors and configurations selected were correct. This calls into question the need to retrofit all trailers in the manner proposed by this docket.

Transport Canada and the Canadian Council of Motor Transport Administrators expressed concerns about the FHWA's proposal to mandate the use of red-and-white conspicuity treatments at the end of the 10-year transition period, citing Canadian research concerning conspicuity. Transport Canada provided a copy of "The Perceptual Basis of Heavy Vehicle Conspicuity and the Role of Retroreflective Materials In Increasing Driver Decision Sight Distances' prepared by Carleton University of Ottawa, Ontario, in support of its position. Transport Canada stated:

[Canadian Motor Vehicle Safety Standard (CMVSS) No. 108] requires a red and white stripe on the rear underride guard in order to provide a red marking to identify the rear of the vehicle. Research conducted for Transport Canada by Carleton University, described in the enclosed report, showed that all-white markings are more effective and are visible at greater distances than the red and white pattern. Although the research did not specifically investigate yellow material, the Canadian regulation included yellow material as an option because the effectiveness of yellow material exceeds the average of the red and white material, and yellow is widely recognized as a warning colour.

The FHWA considers the NHTSA's research results to be reliable indicators of the potential safety benefits of the use of retroreflective materials in preventing passenger cars from crashing into the sides or rear of trailers. As the FHWA indicated in the preamble to the NPRM, it is very important to note that the authors of the NHTSA's research reports acknowledged that an "emphasis was placed on deriving an improved and practical pattern, rather than some optimum pattern." While it is true that an "optimum pattern" —optimum for visibility, but not necessarily for hazard recognition—could differ from the pattern required by the NHTSA for new semitrailers and trailers, the FHWA supports the NHTSA selection of the red-and-white pattern as the standard for conspicuity treatments and is requiring older trailers to be equipped with this pattern at the end of the 10-year transition period. The agency believes highway safety will be improved by putting into place a deadline that will discourage motor carriers from retrofitting their vehicles with colors other than red and white, and will ensure that all semitrailers and trailers operated in the United States are equipped with the standard conspicuity treatment within 10 years of the effective date of this rule.

The FHWA has discussed this subject with NHTSA and fully understands that the principal reason for NHTSA's requirement of a red-and-white pattern was to make the reflective image on the side of a trailer recognizable to motorists. Since the side conspicuity treatment consists of a single line of material, a distinct color pattern, less ambiguous than solid white or yellow, was established so that motorists would learn to associate it with trailers. A red-and-white pattern was chosen because it was already commonly associated with danger. This color combination is widely recognized and associated with highway hazard warning signs, such as, stop signs and railroad grade crossing gates.

The FHWA has reviewed the Carleton University research report cited by Transport Canada and does not believe it requires a result different from the one announced in this final rule. Alternative markings, though highly visible, do not convey the same message or warning as two-color markings. The FHWA believes the methodology used in the NHTSA research was acceptable for the stated objectives of the research, and that the conclusions and recommendations in the reports were appropriate based upon the work performed.

It is unlikely that any single research program concerning conspicuity would result in conclusions and recommendations acceptable to all interested parties. Citing differences between United States, Canadian, and European researchers' methodology and opinions does not, in and of itself, disprove the results of the NHTSA research that the FHWA has cited in support of this rulemaking. None of the commenters to this rulemaking docket have identified flaws in the research methodology for the work performed between 1980 and 1985, or the work performed between 1990 and 1991. Therefore, in the absence of substantive information or data that would call into question the conclusions and recommendations presented in the NHTSA research reports, the agency is issuing the final rule consistent with the NHTSA requirements for new vehicles.

Allowing Motor Carriers Flexibility in the Use of Alternative Colors

A number of commenters disagreed with the FHWA's proposal to allow motor carriers to use colors or color combinations other than red and white during a 10-year transition period beginning on the effective date of the rule. The AAMVA stated:

[O]ur main concern with the proposed rule is its allowance of non-standard colors for reflective materials. Many states require red or amber reflective material on the sides of trailers, and allow only red reflective material on the rear, unless provided for elsewhere in federal law. We are especially concerned about those carriers that may incorporate blue or green reflective material, as these colors are commonly reserved by states for the exclusive use of police, fire and ambulance vehicles.

In addition the Motor Vehicle Safety Act (Canada) permits the use of conspicuity markings with colors other than those permitted by FMVSS 108. The final rule should permit the operation of Canadian

trailers which are in compliance with Canada Motor Vehicle Safety Standard (CMVSS) 108, as it pertains to conspicuity markings, regardless of the year of manufacture of the trailer.

In all cases where retrofitting has been or will be performed, the final rule should encourage, in the strongest language possible, ONLY the use of colors that comply with FMVSS 108 or CMVSS 108. However, for the locations specified by the final rule, the use of blue and green reflective material should be expressly prohibited. For older trailers not already retrofitted, this means that the addition of these two colors would not be allowed. For older trailers that have been retrofitted, we believe that the final rule should require removal of blue and green reflective material within two years of the effective date of the final rule, to be replaced with colors otherwise allowed.

The Advocates stated:

Advocates strongly opposes the agency's decision to allow substantial deviations from the NHTSA requirements for tape and reflector colors, sizes, and locations over a 10-year period. In effect, FHWA has proposed the establishment of [an] independent rationale for conspicuity benefits that fundamentally departs from the basis for the tape and reflectors selected by NHTSA in its 1992 final rule. As a result, the FHWA proposal abridges the purposes of NHTSA's regulation by underwriting protracted deviations from the conspicuity protocol called for by NHTSA in Federal Motor Vehicle Safety Standard No. 108. Advocates disagrees with FHWA's assertion in this note that "this proposal will [not] inhibit NHTSA's goal of having the public learn to associate a long red and white line of retroreflective sheeting (or reflex reflectors) with the side of a trailer." Id. at 33617.

To the contrary, the attenuated approach to full compliance with the contours of NHTSA's Standard No. 108 proposed in this notice will accomplish exactly the result of diluting the important safety message intended by the uniform conspicuity enhancement mandated by the December 1992 final rule. Since FHWA itself has acknowledged that no carrier has expressed interest in a conspicuity retrofitted color combination other than red and white, the agency is proposing to undermine the more rapid securement of safety benefits, as well as to dilute the safety message to other vehicle operators achieved by the NHTSA final conspicuity rule, simply for the sake of offsetting industry cost burdens.

As indicated in the preamble to the NPRM, the FHWA agrees with commenters who argue that all older trailers should be retrofitted with red-and-white conspicuity treatments. However, the agency does not intend to penalize motor carriers that have voluntarily retrofitted their trailers with conspicuity treatments of alternative colors. The FHWA is allowing these carriers 10 years to continue to use the non-conforming colors. The end of the 10-year period coincides with the expected end of the useful service life of the vehicles in question (except tank trailers).

The NHTSA in its final regulatory evaluation estimated that the average trailer has a useful service life of approximately 14 years. Commenters to both the NHTSA's NPRM and the FHWA's ANPRM generally agreed with this estimate. Tank trailers are both more expensive and more durable than other types of trailers and are believed to have a useful life of approximately 20 years. The NHTSA requirements cover trailers manufactured on or after December 1, 1993, which means that the 14-year useful service life on most trailers manufactured shortly before this date would be reached around the year 2007. The useful service life of most tank trailers would be reached around the year 2013. Therefore, the 10-year period will help to ensure that motor carriers operating trailers equipped with non-conforming conspicuity treatments will not be penalized by the retrofitting rulemaking. However, if these carriers choose to continue operating these trailers at the end of the 10-year period, the vehicles will have to be retrofitted with a conspicuity treatment that conforms to the NHTSA standard.

For carriers operating tank trailers equipped with non-conforming conspicuity treatments, the old treatments will have to be replaced with a conforming conspicuity treatment in the year 2009, at the end of the ten-year transition period, and approximately 4 years before most of these vehicles would be retired from revenue service.

As discussed in the preceding section of this notice, the NHTSA's research suggests that there are potential safety benefits from the use of other color combinations. While the FHWA fully supports the NHTSA's decision to require the red-and-white pattern on newly manufactured trailers, attempting to immediately extend that requirement to trailers that are already equipped with a different conspicuity scheme would not result in a cost effective improvement in safety. The FHWA is not aware of data that would enable the agency to conclude that the level of effectiveness of the alternative color schemes on older trailers is unacceptable for use during the proposed 10-year transition period.

With regard to the AAMVA's comments about blue and green reflective material, the FHWA does not intend to prohibit motor carriers from using conspicuity treatments that include blue or green. Since the FHWA did not prohibit these carriers from using blue and green colors for retroreflective sheeting prior to this rulemaking, it would be inappropriate to prohibit the use of these before the end of the ten-year transition period.

States have the authority to prohibit the use of blue and green reflective materials if they believe such action is necessary. Interstate motor carriers are responsible for complying with Federal regulations, as well as applicable State requirements. Therefore, if a State has a law or regulation that limits the use of blue and green reflective materials to emergency vehicles, motor carriers operating in that State must comply. The FHWA does not believe that additional Federal action is required.

Two-Year Deadline for Equipping Vehicles With Conspicuity Treatments

Several commenters requested that the FHWA provide motor carriers more than two years to comply with the retrofitting requirement. American President Lines believes it needs at least three years to retrofit all of its intermodal container chassis. Farmland believes carriers should have up to four years to complete the retrofitting of semitrailers and trailers. The ATA, CVSA, GROWMARK, NTTC, XTRA, and Yellow believe the industry should be given 5 years. The TSEI indicated that it supports the two-year deadline but would also support three or four years.

American President Lines stated:

Although APL understands the reasons for the proposed rule, because of the geographic scope of APL's routes and the size of its fleet, APL foresees extensive logistical difficulties in assuring that, in the normal course of business, APL can transport all of its pre-1994 chassis to locations where retroreflective tape or reflex can be installed within two years of the effective date of the final rule. APL is seriously concerned that, in order to meet the two year rule, it would be required to significantly disrupt the normal flow of business, taking chassis out of service when they would not otherwise be required to be taken out of service.

Given the severe demands on the intermodal system in today's environment caused by a number of factors, APL believes it is particularly important that companies be given adequate time to do the installations without creating further constraints on the transportation system by requiring companies to withdraw equipment from service to install tape or reflectors.

XTRA stated:

Practical considerations must not be ignored, particularly in connection with the pace of work necessary to perform the retrofitting within the two-year period allowed for trailers that lack any sort of reflective conspicuity marking. Reflective tape cannot be installed in ambient temperatures below 60 degrees Fahrenheit. At cooler temperatures, the tape will not adhere to trailer surfaces, at least not for very

long, requiring further applications and expense. XTRA has only two repair facilities, at Chicago and Fairmont City, Illinois, at which reflective tape could be applied indoors during the cold weather months in the Middle West. Even at that, the facilities could not handle more than a small part of the 31,500 unmarked trailers in the next two years. Each trailer retrofitted at one of those facilities during the months October through March would require 24 hours of indoor storage in order to achieve the temperature needed for tape application.

This limited window of opportunity within which the application of reflective tape to trailer surfaces is feasible demonstrates that XTRA requires more than two years for accomplishment of the retrofitting task presented by its 31,500 trailers. XTRA strongly recommends that FHWA extend that period to five years. The requested extension of time is reasonable in the circumstances: a shorter period would certainly produce both greater costs and unsatisfactory results. Greater costs would arise from employee overtime and business disruption caused by the compression of the work into the warm weather months. Unsatisfactory results, in terms of short-lived tape applications and repeat orders, would arise from the performance of work in unfavorable weather conditions, if done under deadline pressures in cold weather months.

The ATA stated:

So far our estimates require four hours of open shop time per trailer. This requirement grows and becomes especially critical in places where ambient temperatures remain below 60 degrees Fahrenheit for long periods. Once the temperature dips below that level it is necessary to bring trailers in and warm them prior to the application of reflective tape. The two hours could easily be tripled if surfaces have to be raised to 60 degrees Fahrenheit from something below freezing. This greatly increases in-shop time and makes reflective material application impracticable during certain portions of the year. Other factors adding to this time include shuttling the trailers in and out, purging certain tank trailers, and the indoor period needed for paint to properly cure during low outside temperatures.

The ATA also expressed concern that maintenance resources would have to be diverted from routine duties to complete the retrofitting within two years. The ATA stated:

We have not seen an analysis of the safety lost by diverting the attention of 3,700 people from routine maintenance duties and into retrofitting reflective materials to trailers. Nowhere in its cost-benefit analysis of this proposal did the agency indicate it contemplated the hiring of a new workforce to perform the trailer retrofit. There were no costs shown for hiring persons and no discussions of from where an additional 3,700 technicians might come. We believe the agency has assumed it is possible to set aside the work normally accomplished by these technicians while they perform retrofitting of reflective materials to older trailers.

This is not a viable alternative. The industry cannot divert the normal maintenance duties of 3,700 technicians without adverse consequences. It is possible to safely accommodate new jobs like retrofitting reflective materials to trailers but not as quickly as suggested in this proposal. Once again the answer to a problem posed by this NPRM is to provide more time to complete the retrofit of older trailers with reflective materials.

We believe it is necessary to have five years to complete a retrofit of reflective materials to trailers built before December of 1993. This time allotment will enable completing the process without a negative impact on safety caused by either a shortage of shop space or technicians.

The FHWA has considered the comments from motor carriers and industry groups but believes the problem of passenger cars colliding with semitrailers and trailers at nighttime and under other conditions of reduced visibility requires a more immediate response than the commenters have suggested. The motor carrier industry has had sufficient time to recognize the safety benefits of conspicuity treatments and voluntarily to begin the process of retrofitting the semitrailers and trailers manufactured before December 1, 1993. The NHTSA issued its final rule in 1992 sending a clear signal to the motor carrier industry that a significant reduction in the incidence of passenger cars colliding into semitrailers and trailers can be achieved through the use of conspicuity treatments. Yet, many motor carriers have not begun to retrofit their semitrailers and trailers.

The opportunity for voluntary action at the convenience of the industry has passed and a Federal mandate is necessary. It is inappropriate to extend the amount of time motor carriers have to comply with the requirements of this rule given the amount of time motor carriers have had to voluntarily retrofit their older trailers. The agency acknowledges that retrofitting the population of older trailers is no small challenge and that the costs to the industry in general, and larger fleets in particular, is significant. However, the safety benefits outweigh the costs.

The FHWA recognizes that some trailer leasing operations, such as, XTRA have a trailers-to-maintenance facilities ratio that would make retrofitting a large number of trailers within a two-year period extremely difficult. The FHWA does not believe this is sufficient cause to delay the compliance date for retrofitting older trailers. The FHWA believes leasing companies and their motor carrier clients can work together to accomplish the retrofitting. For example, leasing companies can provide some of their clients with discounts if the clients retrofit the trailers.

With regard to the ATA's comments about diverting maintenance resources, the FHWA does not believe the requirements of this rule will force motor carriers to choose between retrofitting trailers with conspicuity treatments and maintaining safety-critical equipment, such as, brake systems, steering, suspension, etc. Motor carriers are responsible for keeping each commercial motor vehicle in safe and proper operating condition at all times. Each motor carrier must assess its maintenance needs and hire the staff necessary to operate its inspection, repair, and maintenance facilities.

In some cases, it may be necessary to hire additional staff to comply with this rule. However, the agency does not believe the personnel used for retrofitting trailers have to be permanent, full-time employees, or highly skilled workers. The agency is not aware of any data that would support the ATA's estimate of 3,700 additional maintenance workers as being required to complete the retrofitting within a two-year period.

Ten-Year Deadline for the Use of Red and White Conspicuity Treatments

Several commenters discussed the FHWA's proposal for a ten-year transition period during which motor carriers would be allowed to use alternative colors and color combinations to satisfy the retrofitting requirements. The Advocates believe motor carriers should be given a transition period, but the duration should be limited to four years rather than 10 years. GROWMARK, OOIDA, and 3M support the ten-year transition period. The ATA and NPTC believe alternative colors and color combinations should be allowed indefinitely.

The Advocates stated:

The proposed 10-year delay in producing important safety benefits from uniform conspicuity treatments will allow the great majority of existing trailers, especially vans, to be operated through the remainder of their useful service lives without ever conforming to the dictates of FMVSS No. 108.

The Advocates disagreed with the FHWA's argument that alternative colors and color combinations may also have safety benefits, but recognized the need for a transition period. The Advocates stated:

Advocates concedes that some reasonable period for retrofitting in-service trailers is needed to mitigate industry burdens, but not one so long as to result in a regulation whose real effect will be the retirement of the great

majority of in-service trailers without the chance of their being subject to the retroreflectorization specified in current federal regulation.

The NPTC requested that the FHWA extend or eliminate the ten-year phase-in deadline: The NPTC stated:

First, the number of trailers involved in a retrofit ten years after FHWA issues a final rule will be very small because:

1. Every new trailer built since January 1, 1994, meets FMVSS 108.
2. If the retrofit becomes effective in 1999, the exemption will end in 2009 when trailers built in [1993] or earlier will be at least 16 years old at that time.
3. FHWA indicated the life of the majority of trailers is 14 years.
4. The cost of keeping an inventory of many colors of retroreflective tape will become cost-prohibitive and cause most fleet operators to choose the standard red and white.

By the time trailers reach the end of the ten-year exemption period they most likely will be used in limited service due to their age and condition. Since older trailers have had more exposure to damaging conditions, they are likely to cost more to prepare for retrofitting. More expensive repairs combined with a return to limited service means that complete retrofitting in order to change the color of the retroreflective material will not be cost-effective.

The primary reason given for the ten-year limit for conspicuity treatments in colors other than red and white is ultimately for marking uniformity. This uniformity has not been proven necessary to improve safety. Also by the year 2009 the number of trailers having other than red and white retroreflective materials will be very small, yet these trailers will still have retroreflective markings, just of a different color.

The FHWA is retaining the ten-year deadline for motor carriers to use conspicuity treatments that conform to the NHTSA standard for new semitrailers and trailers. The FHWA believes the safety benefits of requiring conspicuity treatments will be enhanced if those treatments are uniform in colors and patterns. Having a standard conspicuity treatment will help to ensure that motorists learn to associate the red-and-white pattern with semitrailers and trailers.

The ten-year deadline serves as a deterrent to the use of alternative colors by motor carriers operating semitrailers and trailers that are not currently equipped with any form of conspicuity treatment. Motor carriers that anticipate using their older trailers beyond the year 2009 will recognize the easiest way to comply with the final rule is to use the red-and-white pattern. The transition period helps to ensure that the number of trailers for which the replacement of alternative color conspicuity treatments is kept to a minimum.

The FHWA believes the transition period is sufficient to ensure that most motor carriers are not penalized for voluntarily retrofitting their semitrailers and trailers with alternative colors or patterns. The agency recognizes that some motor carriers will be forced to replace their conspicuity treatments in order to comply with the requirements for the year 2009 and beyond. The FHWA believes the final rule represents a balance between regulatory flexibility and the need for having a standard conspicuity treatment for commercial motor vehicles.

Conspicuity Treatments for Single-Unit Trucks, Truck Tractors, and Cargo Containers

Some of the commenters to the NPRM believe the FHWA should expand the scope of the rulemaking to include single-unit trucks and truck tractors. One commenter believes the FHWA should require conspicuity treatments on intermodal cargo containers.

Citizens for Reliable and Safe Highways (CRASH) stated:

CRASH . . . advocates that the FHWA rule should apply not only to all trailers and semitrailers manufactured prior to December 1, 1993, which have an overall width of 2,032 mm (80 inches) or more and a gross vehicle weight rating of 4,536 kg (10,001 pounds) or more, but also to single unit trucks. The FHWA claims that no one has provided data to prove that a retrofitting requirement for single-unit trucks would be a cost-effective solution to the problem of passenger vehicles colliding with single-unit trucks. The data is already presented in the FHWA notice; the same data that shows tractor trailers are more visible with red and white tape on them proves that single unit trucks would be more visible with red and white tape on them.

The Advocates stated:

Advocates would like to address FHWA's pre-emptive repudiation of the need for retrofitting single-unit trucks with conspicuity markings. We are especially perplexed over FHWA's declaration that the issue is out of bounds because this proposed rule, as well as its preceding ANPRM, did not entertain the conspicuity retrofit of single-unit trucks in part because there is no existing NHTSA regulation requiring single-unit trucks to be fitted with conspicuity treatments which FHWA could emulate for in-service motor carriers.

Yet FHWA proceeds to review the data for single-unit truck crash involvements with passenger vehicles for the purpose of demonstrating that there purportedly are insufficient benefits to justify a retrofit of existing vehicles. However, FHWA's logic clearly is also intended to forswear equipping even new single-unit trucks with conspicuity enhancement. This exercise prejudices a topic which properly should be left to NHTSA, the agency that has not closed the door on the potential for requiring single-unit trucks to be equipped with retroreflectorized enhancements. Advocates would like to stress here that FHWA's argument that trailers are overrepresented in both rear and side impacts by passenger vehicles cannot by itself demonstrate that the benefits of providing similar conspicuity markings for single-unit trucks are not sustainable. If this argument were used as a paradigm, many of the regulations issued by NHTSA would have been mooted prior even to ventilation through proposed rulemaking. . . .

In addition to expressing concerns about the need for conspicuity treatments on single-unit trucks, the Advocates discussed the need for retrofitting truck tractors. The Advocates stated:

Advocates also wants to emphasize that FHWA in this proposed rule ignores the need to increase the conspicuity of truck tractors, especially those operating bobtail. FHWA could have simultaneously initiated rulemaking to institute overall fleet conspicuity enhancements in a single policy action. Instead, the agency has ignored and deferred action on this important safety need. FHWA has already delayed the enlargement of benefits resulting from improved heavy vehicle conspicuity for the entire operating combination truck fleet by allowing five and one-half years to elapse before it has even tendered a proposal for retrofitting existing trailers and semitrailers. Given the additional time necessary to issue a final rule with a further delay in effective date for the onset of compliance, Advocates is concerned that FHWA will take another several years to propose the retrofit of existing truck tractors. Since the agency has correctly argued that conspicuity benefits from the use of retroreflectorized tape and reflex reflectors are a valid policy axiom despite the current lack of definitive studies on the affirmative value of NHTSA's 1992 final rule, Advocates sees no reason for the agency to defer rulemaking on conspicuity retrofits for truck tractors. See *id.* at 33615. NHTSA's regulation governing truck tractor conspicuity has been in place since August 8, 1996 (61 FR 41355 *et seq.*). It would be irresponsible for FHWA to wait until well into the 21st century to issue a proposal mandating the conspicuity retrofit of truck tractors manufactured prior to July 1, 1997, the effective date of NHTSA's final rule on truck tractor conspicuity enhancement.

3M also expressed concerns about retrofitting truck tractors, but added that the FHWA should require retroreflective sheeting on intermodal cargo containers. 3M stated:

We question the absence of requirements for making tractors and unitized shipping containers used as trailers. The NHTSA has acknowledged that tractors without trailers are over represented in accident statistics. According to the NHTSA docket no. 80–9; notice 13, 60 percent of fatalities and 41 percent of the injuries associated with crashes in which a truck tractor is struck in the rear occur at night. The NHTSA uses "the research on reflective conspicuity for trailers, which have similar proportion of fatal

collisions at night, as a sufficient basis for the tractor conspicuity rule.'' We believe that the retrofitting of tractors could be combined with the retrofitting of trailers. The more consistent the regulations are among agencies, the better.

Unitized shipping containers, once mounted on chassis are, for all intents and purposes, vehicles. The U.S. DOT report HS 806 923 indicated an 18 percent overall reduction of collisions in which other vehicles struck reflectorized tractor-trailer units. It is reasonable to assume this same result would be accomplished for shipping containers mounted on chassis because, to other drivers, the shipping containers are indistinguishable from integral trailers.

The FHWA does not intend, at this time, to propose conspicuity treatments on single-unit trucks. This rulemaking is not intended to serve as a forum for resolving complaints about the NHTSA's conspicuity rulemaking. The NHTSA provided all interested parties with the opportunity to comment on the amendments to FMVSS No. 108 during its rulemaking on trailer conspicuity.

The data presented in the NPRM, and the data presented in this final rule indicate that a significant number of passenger vehicles crash into the sides and rear of single-unit trucks at nighttime. While research indicates that conspicuity treatments are an effective means to help motorists detect vehicles at nighttime, there is no indication that the safety benefits from requiring every single-unit truck operated in interstate commerce to be equipped with retroreflective sheeting or reflex reflectors exceeds the costs of retrofitting these vehicles. Commenters have not provided data to prove that a retrofitting requirement for single-unit trucks would be cost-effective.

The NHTSA's accident data (FARS and GES) indicate that combination vehicles are over represented in collisions involving passenger vehicles striking the sides or rear of commercial motor vehicles. This means that the number of accidents in which a passenger vehicle strikes a combination vehicle (a single-unit truck pulling a trailer(s), or a truck-tractor pulling a trailer(s)) exceeds the amount that one would expect if one looked at the percentage of the registered commercial vehicle fleet that is listed in the combination-vehicle category.

In 1997, there were an estimated 20,357 nighttime accidents in which one commercial motor vehicle and one passenger vehicle were involved. All of these accidents resulted in a fatality, injury, or one of the vehicles incurring damage severe enough to require that the vehicle be towed from the accident scene. In 5,139 of these accidents, a passenger vehicle rear-ended a trailer (2,086 cases) or struck the side of the trailer (3,053 cases). By comparison, in 2,856 of the 20,357 nighttime accidents a passenger vehicle rear-ended a single-unit truck or truck-tractor (1,430 cases) or struck the side of the single-unit vehicle (1,426 cases).

Looking at the 1997 FARS data, there were 994 fatal nighttime accidents involving one commercial motor vehicle and one passenger vehicle. In 316 of these accidents, a passenger vehicle rear-ended a trailer (198 cases) or struck the side of the trailer (118 cases). By comparison, in 53 of these nighttime accidents a passenger vehicle rear-ended a single-unit truck or truck tractor (37 cases), or struck the side of the single-unit vehicle (16 cases).

The 1997 nighttime accident statistics indicate that the frequency with which passenger vehicles strike the rear of trailers is 1.46 times the frequency with which passenger vehicles strike the rear of single-unit vehicles. The frequency with which passenger vehicles strike the side of a combination vehicle is 2.14 times the frequency with which passenger vehicles strike the side of a single-unit vehicle. The FARS data for 1997 show that frequency of fatal nighttime accidents involving a passenger vehicle striking the side of a combination vehicle is more than seven times the rate at which passenger vehicles strike the side of a single-unit commercial motor vehicle. The frequency of fatal nighttime accidents involving a passenger vehicle rear-ending a combination vehicle is more than five times the rate at which passenger vehicles strike the rear of a single-unit commercial motor vehicle.

The difference between the nighttime accident involvement for combination vehicles and single-unit vehicles is especially important because the number of registered single-unit trucks (4,219,920) is 2.63 times the number of combination trucks (1,607,183).[1] Therefore, combination vehicles represent approximately 27 percent of the fleet, but 64 percent (5,139 out of 7,995 cases) of nighttime accidents in which a passenger car struck the side or rear of a commercial motor vehicle. Looking at the fatal nighttime accidents, combination vehicles were involved in 85 percent (316 out of 369 cases) of the incidents in which a passenger vehicle struck the side or rear of a commercial motor vehicle. Based upon this data, the FHWA has decided to limit the retrofitting rulemaking to semitrailers and trailers.

This decision does not preclude any future consideration by the NHTSA of a requirement for conspicuity treatments on single-unit trucks, or a future rulemaking by the FHWA to require some form of conspicuity retrofitting for these vehicles. The FHWA's decision is based upon the data currently available. If, at some point in the future, information becomes available suggesting that the benefits from a retrofitting rulemaking exceeds the costs, the agency will consider initiating a rulemaking at that time.

With regard to the commenters requesting that the FHWA require retrofitting of truck-tractors, the FHWA must emphasize that this rulemaking is not intended to resolve all conspicuity-related issues concerning commercial motor vehicles. The agency initiated this rulemaking before the NHTSA established conspicuity requirements for truck-tractors, and elected to focus its resources on the completion of its trailer conspicuity retrofitting rulemaking prior to attempting to assess the cost-effectiveness of a truck-tractor retrofitting rulemaking.

The FHWA notes that the IIHS has submitted a petition for rulemaking to require motor carriers to retrofit truck-tractors manufactured before July 1, 1997, with retroreflective sheeting or reflex reflectors on the rear of the cab, and mud flap brackets. The agency is reviewing the petition and will, if the petition is determined to have merit, issue a notice requesting public comment on this topic.

In response to 3M's comments about intermodal cargo containers, the FHWA does not intend to require retroreflective sheeting on cargo containers. The FHWA is not aware of data that would suggest that the current requirements for lighting devices, reflectors, and conspicuity treatments on intermodal container chassis (and other trailers used to transport intermodal cargo containers) are insufficient to help motorists detect loaded container chassis at nighttime and under other conditions of reduced visibility.

The FHWA believes a rulemaking to require conspicuity treatments on intermodal cargo containers would have significant legal, economic, and international implications. Intermodal cargo containers are considered cargo and such a rulemaking would result in requiring motor carriers to mark their client's cargo irrespective of the client's wishes. This would be particularly difficult to accomplish if the FHWA does not have the statutory authority to

[1] ''Summary of Medium and Heavy Truck Crashes in 1990,'' National Highway Traffic Safety Administration, February 1993 (DOT HS 807 953).

regulate the owners of the intermodal cargo containers.

Since intermodal cargo containers are often imported from and exported to destinations around the world, the FHWA and the motor carrier industry would need international cooperation from companies and governments to ensure that containers were equipped with conspicuity treatments before being shipped to the United States. If the containers were not equipped with conspicuity treatments prior to arrival at a U.S. port, entities in the U.S. would have to absorb the economic burden of applying retroreflective sheeting to the containers.

Another potential complication concerns international standards or foreign laws that would prohibit the marking of the containers with retroreflective sheeting. The FHWA would have to consult with numerous foreign governments to ensure that the agency's actions did not conflict with the laws of other countries.

The FHWA notes that 3M did not provide any data to suggest that the incidence of passenger vehicles colliding with intermodal container chassis could be significantly reduced by the addition of retroreflective sheeting on the cargo containers they are used to transport. Furthermore, 3M has not provided information that would suggest that the FHWA could build an international coalition of businesses and governments that would support such a requirement to ensure that U.S. companies are not placed at an economic disadvantage.

The FHWA acknowledges that there may be safety benefits to applying conspicuity treatments to intermodal cargo containers, but does not believe that the mere assumption of safety benefits satisfies the agency's obligation to quantify the benefits of the rulemaking and to prove that the benefits exceed the costs to the transportation industry and U.S. consumers.

Harmonization with Canadian Requirements

Several commenters discussed Canadian requirements for conspicuity treatments on semitrailers and trailers. Transport Canada and CCMTA explained the current Canadian requirements for new semitrailers and trailers, and trailers manufactured prior to the effective date of the Canadian rules for new vehicles. CCMTA stated:

> Canadian governments support the objectives of this rulemaking given that similar requirements are being introduced in the regulations of Canadian provinces and territories. Transport Canada, the federal agency which has similar responsibilities to NHTSA in the development and promulgation of new vehicle manufacturing standards has mandated effective January 24, 1997 that all new trailers manufactured for sale in Canada be equipped with reflective tape or reflex reflectors per Canadian Motor Vehicle Safety Standard (CMVSS) 108. A review of the Canadian and US provisions applying to new vehicles indicates the requirements are almost identical. The Canadian manufacturing requirements while specifying a red and white pattern do however permit other colours and colour combinations which attract attention more effectively than the basic red and white pattern outlined in the US rule. Copies of this research will be forwarded under separate cover by Transport Canada. Canadian governments are concerned the present rulemaking is unduly restrictive in prescribing that only one color scheme or combination may be used to meet US requirements. This would seem to preclude the possibility of innovation as it relates to other colour schemes or combinations which might prove to be more effective in enhancing the conspicuity of commercial vehicles in future years.
>
> The retro-fitting of trailers with reflective tape or reflex reflectors would not normally fall under the jurisdiction of Transport Canada. The setting of in-use motor vehicle standards is generally the responsibility of the provincial and territorial governments of Canada. In 1995, a CCMTA Project Group consisting of a number of jurisdictional and industry representatives undertook to review whether reflective tape and reflex reflectors should be retroactively mandated on commercial trailers in Canada. A copy of the final report has been enclosed. This report provides a cost/benefit analysis and a review of various implementation options. Following discussion among government and industry stakeholders CCMTA in May 1997 adopted the following implementation schedule for mandating retro-fitting reflective tape or reflex reflectors on trailers in service:
>
> 1. All trailers manufactured on, or after December 1, 1993 will be required to be equipped with reflective tape or reflex reflectors by January 1, 1999; and,
>
> 2. All trailers manufactured before December 1, 1993 will be required to be equipped with reflective tape or reflex reflectors by January 1, 2002.

The CCMTA indicated that Canadian jurisdictions believe that harmonization between U.S. and Canadian conspicuity requirements is important. CCMTA stated:

> Canadian governments are concerned that opportunities to better coordinate the introduction of these requirements between the US and Canada to cause minimum disruption to the cross border traffic between the two countries may have been missed. Canadian jurisdictions have agreed to allow a one year period of ''soft enforcement'' on the January 1, 1999 deadline. Operators of vehicles without reflective tape will be advised of the requirements when stopped at roadside inspections and this will continue until January 1, 2000. At this point operating a trailer without reflective material will become an offense, subject to fines for violation of the respective vehicle standards in each jurisdiction. It is anticipated this will have little or no impact on US trailer owners operating vehicles manufactured after December 1, 1993 as these vehicles have all presumably been equipped with reflective tape or reflex reflectors.
>
> CCMTA is however concerned that Canadian requirements will have an impact on US operators with respect to the second implementation date in Canada of January 1, 2002 for vehicles manufactured prior to December 1, 1993. The current NPRM does not set an effective date apart from two years after the publication of the final rule. Depending on the date set for implementation of the final rule, a significant number of US trailer owners who operate equipment into Canada could become subject to Canadian rules prior to the implementation of the US rule. This will also hold true for a significant number of Canadian trailers operating into [the] US unless steps are taken to harmonize the implementation dates. CCMTA is unable to provide a precise estimate of affected trailers and carriers at this juncture. CCMTA believes further efforts should be undertaken by our respective officials to harmonize the effective dates of our respective rules.

The FHWA supports the goal of harmonizing safety regulations, but does not intend to modify U.S. requirements (neither the substance of the rules nor the implementation dates) solely for the sake of harmonization. Improving highway safety is the FHWA's top priority.

The NHTSA, through FMVSS No. 108, has established the red-and-white pattern as the U.S. standard for semitrailers and trailers manufactured on or after December 1, 1993, and truck tractors manufactured on or after July 1, 1997. The FHWA is requiring that within 2 years of the effective date June 1, 1999 of this rulemaking, motor carriers have their semitrailers and trailers, manufactured before December 1, 1993, equipped with retroreflective sheeting or reflex reflectors. The FHWA will allow, during a 10-year transition period beginning on the effective date of this final rule, the industry a certain amount of flexibility in terms the colors and color combinations they may use to avoid penalizing motor carriers that have voluntarily retrofitted their semitrailers and trailers with conspicuity treatments that differ from the NHTSA requirement for new vehicles. However, the agency encourages motor carriers to use the red-and-white pattern as required on new vehicles, and is putting into place a deadline that will ensure uniformity in conspicuity treatments on semitrailers and trailers.

The FHWA recognizes that Transport Canada's requirements for new trailers

provides four options for colors and color combinations for conspicuity treatments. All four options may be used to satisfy the FHWA's retrofitting requirements during the 10-year transition period.

The FHWA has indicated in correspondence with Transport Canada that the agency will not accept the alternative colors allowed by Canada on trailers manufactured on or after December 1, 1993. The FHWA has advised Transport Canada that vehicles operated by Canada-based motor carriers must comply with the same conspicuity requirements applicable to the U.S. motor carriers. Therefore, Canada-based motor carriers operating semitrailers and trailers manufactured on or after December 1, 1993, must ensure that those vehicles meet the requirements of FMVSS No. 108 if those vehicles are used in the United States.

The FHWA believes the NHTSA rationale of establishing uniformity to ensure that motorists learn to associate the red-and-white pattern with commercial motor vehicles is reasonable. The agency does not believe that allowing four different color schemes indefinitely will result in an equal or greater level of motorists' recognition.

On the subject of implementation dates, the FHWA believes the problem of passenger cars colliding with certain commercial motor vehicles requires more immediate action than that planned by the jurisdictions in Canada. The NHTSA requires conspicuity treatments on semitrailers and trailers manufactured on or after December 1, 1993, and truck tractors manufactured on or after July 1, 1997. Through this rulemaking, the FHWA is requiring conspicuity treatments on semitrailers and trailers manufactured before December 1, 1993, and motor carriers must complete the retrofitting within two years after the effective date. The FHWA's requirement for retrofitting will be enforced beginning in the year 2001, several months prior to the Canadian deadline of January 1, 2002, for retrofitting vehicles manufactured before December 1, 1993. Since there are no discernible safety or economic benefits to delaying the effective date of the FHWA requirements for retrofitting, or the deadline for motor carrier compliance, the FHWA will not adjust its schedule to match the Canadian schedule.

The FHWA is committed to working closely with its Canadian and Mexican counterparts on highway safety issues and believes harmonization should be pursued whenever practicable. The agency does not believe this rule will impede cross-border commerce or place an undue burden on either the U.S. or Canadian motor carrier industries.

Exemptions for Certain Motor Carrier Operations and Certain Types of Trailers

A number of industry commenters discussed the need for exemptions to the conspicuity requirements. These commenters discussed a range of motor carrier operations and types of trailers.

The NPTC indicated that certain trailers lack a suitable location for mounting retroreflective materials. The NPTC stated:

Some tank trailers have no continual horizontal surface upon which to mount retroreflective materials either along the side or across the rear. This is a reason why TEA–21 specifically mentions tank trucks in its call for FHWA to provide regulatory flexibility to accommodate trailers of different designs and configurations.

Low-platform trailers have D-rings for load securement and swing arms mounted along the trailer's sides that disallow suitable locations for the placement of retroreflective materials. Swing arms are devices that provide a structure on which to place planking to extend trailer width and accommodate wider loads, such as earth-moving equipment and cranes, when swung out from the trailer side. Cleaning rust from the trailer sides behind these attachments would be very difficult. Additionally, the D-rings and swing arms will partially hide and quickly damage any retroreflective material added in these locations.

In the aforementioned cases, trailer manufacturers have changed designs for the successful application of retroreflective materials on new trailers. In some instances they have added new structures whose only purposes are to accommodate the mounting of such material. Fleet operators attempting to retrofit older trailer designs may be unable to modify older trailers by simply adding a piece of sheet metal to accommodate retroreflective materials.

The ATA believes the operational conditions to which some trailers are subjected makes it impractical to retrofit the vehicles. The ATA stated:

There are certain trailers that, by reason of their condition or service, are unsuitable for retrofit of reflective materials. Tank trailers used to spread cement powders for stabilization of a highway's subsurface are an example. This equipment works over open dirt. It quickly becomes crusted with an extremely hard-to-remove mixture of dirt and cement. Chipping, acid treatment and painting are necessary before installation of reflective materials. Once returned to service, a dirt and cement crust soon covers the trailers and their new reflective material.

Another operation where vocational use nullifies reflective material effectiveness is the transport of hot-mix asphalt (see Attachment A; pictures 35–43). This is the material used to make roads. The temperature of hot-mix carried in trailers is over 300 degrees Fahrenheit. Materials in both tape and plastic reflectorized strips deform at these temperatures. Besides destroying those reflective materials that it contacts, the hot-mix also makes trailer surfaces unsuitable for their application. The rear of hot-mix trailers will require much preparation prior to successful application of reflective materials. Once placed in that location the material will have a short life.

There is no chance there will be a cost-effective return from placing reflective materials on vehicles whose use destines them to rapidly become covered in visibility blocking material. We do not believe the Congress meant DOT to mandate retrofitting reflective materials in such cases.

The FHWA recognizes the concerns the motor carrier industry has about technical problems applying conspicuity treatments to older trailers and maintaining conspicuity treatments on trailers operated in tough work environments that could adversely impact the durability or visibility of the retroreflective sheeting or reflex reflectors. The FHWA must emphasize that the agency is requiring motor carriers to retrofit the same types of semitrailers and trailers on which the NHTSA requires manufacturers to install conspicuity treatments. The FHWA did not propose including any trailer types or configurations that were exempt from FMVSS No. 108, or exempt from the conspicuity requirements in FMVSS No. 108.

Interstate motor carriers are currently required under 49 CFR 393.11 to maintain the conspicuity treatments on the semitrailers and trailers manufactured on or after December 1, 1993. Commenters have not explained why it is possible for the manufacturers to comply with the NHTSA requirement and motor carriers to maintain the conspicuity treatments as required by the FHWA, but impractical and burdensome to retrofit the older versions of these semitrailers and trailers.

The FHWA acknowledges that some trailer manufacturers may have included special mounting devices to comply with the NHTSA's conspicuity requirements. However, the agency believes motor carriers should be capable of meeting the requirements of this rule by doing the same things vehicle manufacturers did to comply with the NHTSA requirements. The FHWA is not aware of any trailer manufacturers that have made significant design changes for the purpose of complying with the NHTSA's conspicuity rule. Therefore, the agency does not believe motor carriers have to invest significant resources to find a practical and effective means to attach retroreflective

sheeting or reflex reflectors to the vehicles described.

Interpretation of the Transportation Equity Act for the 21st Century

The ATA indicated that it believes the FHWA is not required to issue a final rule concerning conspicuity based upon its reading of the House of Representatives conference report (H.R. Conf. Rep. No. 105–550, at 499–500 (1998)) on the TEA–21.

The FHWA has reviewed the conference report and believes the explicit language in section 4025 of the TEA–21 requires that the agency issue a final rule regarding the conspicuity of trailers manufactured before December 1, 1993. The content of that rule is not mandated by section 4025, but the agency is required to consider certain factors if it decides to require retrofitting. There is no conflict between the statutory language and the conference report.

The FHWA initiated this rulemaking under the statutory authority provided by 49 U.S.C. 31136 and 31505, and issued its NPRM under the same statutory authority. The agency developed the NPRM based upon the agency's analysis of the comments received in response to the ANPRM, accident data, and a preliminary regulatory evaluation. The agency published an announcement of its decision to issue an NPRM prior to the drafting of the TEA–21 (61 FR 40781, August 6, 1996). The TEA–21 does not preclude the agency from issuing a final rule provided the final rule satisfies the three criteria of section 4025. The FHWA has determined that this final rule is consistent with the requirements of the TEA–21.

Economic Impacts of the Rulemaking

The ATA and NPTC disagreed with the FHWA's estimates of the costs of the rule. The ATA stated:

> The 1996 ATA ''F&OS Motor Carrier Annual Report'' recorded an average revenue per ton for 505 fleets of $54. Derivation of that average came from figures that ranged from $8 to $950 per ton. The 505 fleets also reported an average load of 30,000 pounds. From those figures, the cost of missing a load with each of the 1.4 million trailers FHWA estimates will need retrofitting with reflective materials is $1 billion. This expense, for just lost revenue, dwarfs the agency's estimate for the complete retrofitting job and points out our concerns with the costs presented in the NPRM.

The NPTC stated:

> Based on polling of NPTC member companies, we have found that fully-loaded labor hour costs are closer to $35.00 per hour. As a result, total per trailer retrofit costs would be from 7.5 to 9.5 percent greater than FHWA's estimates shown in [the NPRM].

The NPTC believes the economic impact on private motor carriers of property will be greater than the impact on for-hire motor carriers. The NPTC stated:

> Private fleets will incur significant downtime expense retrofitting pre-1993 trailers with conspicuity treatments. Whereas most for-hire fleets typically have two or more trailers per power unit, that ratio is much lower for private fleets. Private fleets typically have specialized equipment and cannot justify the expense of extra trailer equipment. As a result, placing trailers out of service to complete the proposed conspicuity retrofit could potentially cause a severe backlog of product at distribution centers and manufacturing facilities. This backlog could prove to be a serious economic hardship to private fleet operators due to canceled orders, etc.
>
> Additionally, [FHWA] greatly underestimates just the revenue lost during the time required for retrofitting. For trailers with extensive surface preparation requirements, the total time for performing retrofitting would be well over the FHWA's two-three hour estimates. Further, more than one work session will be required to conduct such tasks as surface preparation and repainting. As a result, retrofitting cannot be accomplished in a single step and extensive downtime will occur as part of a paint curing process or waiting for available shop space to complete application of reflective materials.

The FHWA does not believe this rule will result in motor carriers losing business either through lost loads in the case of for-hire carriers of property, or canceled orders for private motor carriers of property. The final rule is applicable to all interstate motor carriers operating semitrailers and trailers manufactured before December 1, 1993. For motor carriers operating trailers that are not currently equipped with any form of conspicuity treatment or retroreflective sheeting in locations that do not satisfy the requirements of this rule, the economic consequences are more immediate than those for a motor carrier that can take advantage of the ten-year transition period. Motor carriers that have not already equipped their older trailers with retroreflective sheeting or reflex reflectors must invest the necessary resources to complete the retrofitting process within two years of the effective date of this rule.

The FHWA does not believe that the final rule will have a disproportionate impact on any segment of the motor carrier industry. The agency recognizes that trailers will have to be taken out of revenue service while the retrofitting is being done but believes most motor carriers should be able to perform the retrofit while the trailer is in the shop for maintenance and repairs. The agency does not believe motor carrier managers would be unable to piggyback retrofitting onto the many non-revenue hours devoted to routine maintenance during the two-year period allowed by this rule. The job will require careful planning, but the rule allows ample time for that.

The FHWA disagrees with the ATA's estimate of the opportunity cost, or lost revenues. The $1 billion estimate was not derived in a statistically valid manner; it simply assumes that every trailer to be retrofitted will lose an opportunity to carry a load. The estimates presented in the NPRM, and accompanying preliminary regulatory evaluation (PRE), are much more representative of the actual opportunity costs that most motor carriers will experience.

The FHWA has prepared a final regulatory evaluation (FRE) to accompany this rulemaking notice. A copy of the FRE is included in the docket. The FHWA estimates that the total cost of this rule will be $228 million. This estimate is based upon the assumption that approximately 815,000 trailers will be covered by the rule. The FHWA estimates that the benefits of the rule will be approximately $360 million. A detailed discussion of how the FHWA prepared its estimates is provided later in this notice for interested parties that are not able to review the FRE.

The FHWA recognizes the difficulties that motor carriers have had retrofitting conspicuity treatments to older trailers. The agency has considered the technical problems associated with installing conspicuity treatments as part of the process for preparing the FRE. The agency has also considered the scheduling problems cited by the commenters and used this information as one of the factors for deciding to adopt a two-year phase-in period for installing retroreflective materials on trailers that are not equipped with any form of conspicuity treatment, and a 10-year transition period to replace non-conforming treatments with retroreflective material that conforms to the NHTSA requirement.

Summary of the FHWA's Rationale for Issuing the Final Rule

The FHWA recognizes the technical and economic concerns of commenters opposed to a retrofitting requirement. However, based upon the information currently available, the agency believes that retrofitting of trailers with conspicuity treatments will provide significant safety benefits. Retrofitting appears to be cost-effective and technically feasible.

Three key issues were considered in determining whether to issue a final rule. The first issue is the cost of installing retroreflective material on older vehicles. The FHWA recognizes that the surfaces of many of the older trailers will require preparation (e.g., removal of oxidation, pre-treating, etc.) to ensure that the retroreflective tape adheres. In many cases the trailer will have to be removed from revenue service to complete the retrofit. Therefore, the final rule provides a two-year phase-in period to allow motor carriers to complete the retrofitting at routine maintenance intervals. The FHWA estimates that the total cost (conspicuity material, labor, and the loss in revenues) for retrofitting a 45–53 foot trailer would be approximately $314, with the cost for shorter trailers being less.

The second issue is the voluntary use of retroreflective material on older trailers by certain fleets. A large number of fleets have been using conspicuity treatments on their trailers since the mid-1980's. However, many of the color schemes, as well as the levels of reflectivity of the tape used on the older trailers, differ from the NHTSA requirements for trailers manufactured on or after December 1, 1993. If these operators were required to replace the retroreflective materials that they voluntarily installed to improve safety, it would have the effect of penalizing motor carriers that demonstrated an extra level of safety consciousness. Such an action would also discourage motor carriers from future efforts to explore innovative approaches to improving safety. With this in mind, the FHWA is allowing motor carriers 10 years to replace alternative conspicuity treatments applied to trailers manufactured before December 1, 1993, with treatments that conform to the NHTSA requirements for new trailers.

The third issue, but certainly not the least important, concerns the projected safety benefits of trailer conspicuity material that meets the NHTSA requirement. The NHTSA estimates that retroreflective tape could lead to a 25 percent reduction in rear end collisions and a 15 percent reduction in side impact collisions. From data available at the time of the NHTSA's final rule implementing conspicuity enhancements, tractor-trailer combinations were involved annually in about 11,000 accidents in which they were struck in the side or rear at night. Within this group of accidents, about 8,700 injuries and about 540 fatalities occurred. The NHTSA indicated that the conspicuity requirements, when fully implemented, are expected to prevent, annually, 2,113 of these accidents. The NHTSA estimated 1,315 fewer injuries and about 80 fewer fatalities would occur.

In 1997, there were an estimated 20,357 nighttime accidents in which one commercial motor vehicle and one passenger vehicle were involved. All of these accidents resulted in a fatality, injury, or one of the vehicles incurring damage severe enough to require that the vehicle be towed from the accident scene. In 5,139 of these accidents, a passenger vehicle rear-ended a trailer (2,086 cases) or struck the side of the trailer (3,053 cases).

Looking at the 1997 FARS data, there were 994 fatal nighttime accidents involving one commercial motor vehicle and one passenger vehicle. In 316 of these accidents, a passenger vehicle rear-ended a trailer (198 cases) or struck the side of the trailer (118 cases).

FHWA Estimates of the Costs and Benefits

The FHWA has completed a final regulatory evaluation comparing the projected safety benefits of a retrofitting requirement to the potential economic impact on the motor carrier industry. The following discussion summarizes the FHWA's analysis. A copy of the complete FRE is available for review in the docket.

The agency analyzed and compared the estimated costs and benefits of two-, three-, and five-year phase-in period options for a retrofitting requirement, proposed a two-year phase-in period for trailers that are not currently equipped with retroreflective sheeting, and is adopting a final rule consistent with the proposal. The FHWA estimates that the total costs for motor carriers to comply with the conspicuity requirements within a two-year period will be $228 million, with the safety benefits (fatalities and injuries prevented) and economic benefits (property damage prevented) totaling $360 million. The FHWA estimates that this final rule will apply to approximately 1.02 million trailers, of which approximately 20 percent already have conspicuity treatments. It is estimated that the rule will, over a ten year period, prevent 102 fatalities and 1,766 injuries associated with passenger cars colliding with semitrailers and trailers. In addition, this rule will prevent approximately 2,556 property damage only (PDO) accidents. The FHWA believes the projected safety benefits (in terms of accidents prevented and lives saved) outweigh the economic burden on the motor carrier industry. The following section provides a detailed discussion of how the FHWA prepared its estimates of the costs and benefits.

The costs are considered one-time costs in that the conspicuity treatments will not need to be replaced during the remaining years of the useful service lives of the trailers that would be subject to the retrofitting requirement. The estimates for the benefits are the total expected benefits over the remaining years of the useful service lives of the trailers that would be retrofitted.

Generally, there are three types of costs associated with retrofitting: the tape or reflex reflectors; the labor required to apply it; and, the opportunity cost of withdrawing the trailer from revenue-producing service. The following describes how the FHWA arrived at its estimates for the different types of costs and benefits.

Costs for Retroreflective Sheeting

The NHTSA's preliminary regulatory evaluation used a tape cost of $.675 per linear foot for 50 mm (2-inch) wide tape. Based upon comments to the NHTSA rulemaking and further analysis, the NHTSA adjusted this figure to $1.29 in its final regulatory evaluation.

The amount of tape required to retrofit a trailer varies with its size. For example, a 28-foot trailer would need 47 feet of tape: 14 feet of material per side (because the rule would require that at least 50 percent of the length of the trailer must be covered); an 8-foot strip along the bottom of the rear; 2 pairs of one foot strips for the outline of the upper rear, and approximately seven feet of material for the underride guard. (The estimated cost for retrofitting a rear underride guard that does not require complete refurbishment was included in the FRE, although the FHWA is not requiring motor carriers to install conspicuity materials on the underride guard. Actual costs to motor carriers will therefore be slightly lower than the estimates given in the FRE.) By contrast, a 48-foot trailer would require the use of an additional 10 feet of material for each side of the trailer or a total of 67 feet of tape.

The NHTSA estimated that the total cost for the tape would be $60.84 for 28-foot trailers, $77.67 for 40–42 foot trailers, and $86.73 for 45–53 foot trailers. The FHWA adjusted these figures in the NPRM to account for inflation between 1992, when the NHTSA's final regulatory evaluation was completed, and 1995. This adjustment, based upon the producer price index for industrial commodities (See Table b63 from the "Economic Report of the President," 1996, ISBN 0–16–048501–0), increased the costs to $65.04 for 28-foot trailers, $83.03 for

40–42 foot trailers, and $92.71 for 45–53 foot trailers. The FHWA has revised the estimate presented in the NPRM to account for changes in the price levels between 1995 and 1997, with the result being $66.18 for 28-foot trailers, $84.48 for 40–42 foot trailers, and $94.33 for 45–53 foot trailers. A more detailed explanation is provided in the final regulatory evaluation.

Cost for Labor to Apply the Retroreflective Sheeting to the Trailers

The FHWA used an average wage of $25 per hour in the preliminary regulatory evaluation, including both wages and fringe benefits. The agency has reviewed the Bureau of Labor Statistics' 1996 Occupational Compensation Survey and other information and has lowered the assumed wage rate to $20 for the final regulatory evaluation.

The NHTSA estimated that it takes 30 minutes to install tape on a trailer. While this is a reasonable estimate for factory installed tape, the FHWA recognizes that it would take longer to retrofit a trailer. Trailers will generally have to be prepared and cleaned for the conspicuity treatment. Trailers which have holes and other damage may require more extensive repairs.

The comments to the ANPRM and NPRM, as well as observations by the FHWA staff during a 1994 site visit to a Roadway terminal (documentation of the visit is included in the docket file), indicate that the amount of time required to retrofit a trailer will vary significantly with trailer type and condition. For example, trailers with outer posts may require more extensive work than trailers with smooth exterior surfaces.

Taking into account these considerations, the FHWA estimates that the retrofitting process for the average 28-foot trailer would take 3 hours to complete. The agency estimates that the time required to retrofit 40–42 foot and 45–53 foot trailers would be 3.5 and 4 hours, respectively. The estimates for the time required to complete the retrofitting were increased for the final regulatory evaluation in response to the wide range of estimates provided by the commenters in response to the NPRM. The FHWA's estimates of labor costs are $60, $70, and $80 for the 28–, 40–42, and 45–53 foot trailers, respectively.

Opportunity Costs

Estimating the value of revenue that cannot be generated while the trailer is being retrofitted is difficult because of the variety of trailer types, the variety of motor carrier operations and the rates that are charged, and the overall manner in which some trailers are used—being left idle at the motor carrier's terminals for periods of time that may be as short as a few hours to several days.

The FHWA believes that it is more likely than not that a large percentage of trailers would have to undergo routine repair and/or maintenance at some point during the two-year phase-in period. Retrofitting trailers at the same time that repairs or maintenance are performed would result in negligible opportunity cost since the trailers would not be generating revenue in any case. Even the trailers that do not require routine repairs may be idle at some point during the phase-in period and could be retrofitted at minimal opportunity cost.

The FHWA does not have the detailed information required to develop a comprehensive model of opportunity costs. Therefore, the agency constructed a simple model of the form $150/(1.5 X logarithm of the phase-in period). The opportunity costs for a two-year phase-in period are estimated at $140.

Number of Trailers

The FHWA estimates that 2.69 million trailers and semitrailers will be in use by the year 2001. However, more than half of these trailers will be post-1993 trailers, which already have the required retroreflective sheeting. The agency believes 1.02 million of the 2.69 million trailers and semitrailers will be pre-1994 trailers, and approximately 20 percent of these vehicles will already have some form of conspicuity treatment. Approximately 815,000 trailers and semitrailers will have to be retrofitted. A detailed discussion on how the agency prepared its estimate is provided in the FRE.

Total Costs for Retrofitting Trailers

Based upon the information currently available concerning the costs for retroreflective sheeting, labor, and opportunity costs, and the estimates of the number of trailers for which motor carriers will be required to take some type of actions to comply with the proposed requirements, the FHWA believes the total costs for retrofitting will be $228 million. It should be noted that opportunity cost makes up approximately 60 percent of the total cost. These estimates are for a 10-year period discounted at a 7-percent rate.

Benefits of a Retrofitting Requirement

The estimated benefits of this rulemaking are a reduction in the number of fatalities, injuries, and property damage only incidents caused by nighttime accidents in which a passenger car collides with the rear or side of a trailer. The FHWA estimates that over a 10-year period, a total of 102 fatalities and 1,766 injuries will be prevented because of this rule. The following table shows the number of accidents and injuries prevented. The net present value of this level of accident reduction is $360 million.

The reduction in fatalities comprises the largest component of benefits. The second largest component is maximum adjusted injury scale (MAIS) 3 accidents.[2]

DISTRIBUTION OF DOLLAR AMOUNTS OF BENEFITS

Severity	Number	Percent total benefits
PDO	2,556	3.1
MAIS 1	1,372	5.6
MAIS 2	257	7.3
MAIS 3	111	11.1
MAIS 4	17	4.2
MAIS 5	9	4.7
Fatality	102	64

Benefits are spread unevenly over the 10-year analysis period. Benefits are expected to peak two years after the effective date of the final rule, after which there is a slow decline. Two years after the effective date of the final rule, all trailers covered by the retrofitting requirement will have conspicuity treatments. As the population of pre-1993 trailers decreases, the benefits of the retrofitting rule will decline. This pattern holds for both discounted and non-discounted dollars, as well as for accidents. By the middle of the year 2001, all trailers will be equipped with conspicuity treatments, and nighttime accidents should fall by 15 percent (for retrofitted trailers still in use).

SUMMARY OF COSTS AND BENEFITS OF CONSPICUITY RETROFIT OPTIONS

Options for retrofitting phase-in period	2 years	5 years
Estimated number of trailers that would have to be retrofitted	815,000	502,000

[2] The Abbreviated Injury Scale (AIS) was developed by the American Medical Association and the American Association for Automotive Medicine to measure the threat to life of an accident. The MAIS refers to the maximum (most severe) injury sustained in a crash. The scale ranges from 0 for no injury to 6 for a fatality. A more detailed discussion of MAIS, including examples of the types of injuries that are included in each of the levels, is included in the FHWA's preliminary regulatory evaluation for this rulemaking. A copy of the PRE is contained in FHWA Docket No. MC–94–1; 97–2222.

SUMMARY OF COSTS AND BENEFITS OF CONSPICUITY RETROFIT OPTIONS—Continued

Options for retrofitting phase-in period	2 years	5 years
Estimated benefits ($ millions)	$360	$172
Estimated costs ($ millions)	$228	$82
Estimated Net Benefit ($ millions)	$132	$90
Benefit-to-cost ratio	1.58	2.10
Fatalities prevented (during a 10-year period)	102	51
Injuries prevented (during a 10-year period)	1,766	876

The benefit of this regulation results from an expected 15 percent reduction in nighttime side and rear crashes into trailers, and an expected 19 percent reduction in the severity of certain property damage only accidents. These estimates come from the NHTSA, which performed extensive fleet evaluations in the 1980's. According to the NHTSA, these kinds of accidents result in an average of 536 fatalities annually, and almost 8,800 injuries, most of which are minor. This proposal would prevent approximately 102 fatalities over a 10-year period.

The monetary value of these benefits range from over $360 million for the 2-year phase in to $172 for the 5 year phase in. Under all of the phase-in options considered in this rulemaking, the ratio of the benefits-to-costs exceeds 1.5, with the ratio increasing as the phase-in period is extended. More importantly, all three scenarios yield net benefits (benefits minus costs) in excess of $90 million, with net benefits increasing to more than $132 million as the phase-in period is shortened to two years.

Discussion of the Requirements of the Final Rule

The FHWA is amending the FMCSRs by adding § 393.13, Retroreflective sheeting and reflex reflectors, requirements for semitrailers and trailers manufactured before December 1, 1993. This section is being added to subpart B of part 393, Lighting Devices, Reflectors, and Electrical Equipment. Paragraph (a) provides the applicability for § 393.13. The requirements do not apply to trailers that are manufactured exclusively for use as offices or dwellings because these types of trailers are rarely transported at night. The FHWA is excluding pole trailers (as defined in § 390.5) from the conspicuity requirements because these trailers generally do not have side and rear surfaces to which conspicuity treatments could be applied in a cost-effective manner. The agency notes that § 393.11 does require lamps and reflectors on pole trailers and requests comments on whether retrofitting of conspicuity materials should be required on all pole trailers, including those that are currently manufactured without any type of conspicuity treatment.

In addition, the FHWA is excluding trailers that are being towed in a driveaway-towaway operation (as defined in § 390.5). This is not a blanket exception for certain types of trailers, but an exception that covers certain movements of trailers. Examples of the types of transportation that are covered include movements between a dealership or other entity selling or leasing the trailer and a purchaser or lessee, to a maintenance/repair facility for the repair of disabling damage (as defined in § 390.5).

Paragraph (b) encourages motor carriers to retrofit their trailers with a conspicuity system that meets all of the requirements applicable to trailers manufactured on or after December 1, 1993, but allows the use of alternate color or color combination of retroreflective sheeting or reflex reflectors during a 10-year transition period. At the end of the 10-year period, all trailers are required to have conspicuity treatments identical to the NHTSA requirements. Although the FHWA is allowing motor carriers a certain amount of flexibility with regard to the colors of retroreflective tape or reflex reflectors, the locations for the conspicuity treatments are required to conform to those specified in the NHTSA regulations.

Paragraph (c) covers the locations for retroreflective sheeting, excluding the use of the reflective material on the rear underride device. Paragraph (d) specifies the locations for the arrays of reflex reflectors, excluding the use of reflex reflectors on the rear underride device. The FHWA recognizes the concerns that motor carriers have about conspicuity treatments on the rear impact guards or rear underride devices. Consequently, the agency decided not to require motor carriers to apply conspicuity material to the rear underride device.

With regard to the compliance date for the retrofitting requirements, the FHWA is allowing motor carriers 2 years from the effective date of the final rule to retrofit trailers operated in interstate commerce. Motor carriers are allowed 10 years from the effective date of the final rule to replace non-conforming conspicuity treatments with ones that meet the NHTSA requirements for newly manufactured trailers.

Applicability to Canadian and Mexican Vehicles

The final rule is applicable to trailers operated in the United States by Canada- and Mexico-based motor carriers. Although the Provincial and Territorial governments of Canada are implementing conspicuity retrofitting requirements which would not be enforced until January 1, 2002, and the Federal government of Mexico has not indicated whether it intends to require retrofitting of the trailers operating in their countries, the FHWA believes that it is appropriate to require retrofitting of conspicuity treatments on foreign-based trailers manufactured prior to December 1, 1993, if those vehicles are operated within the United States. This decision is consistent with the applicability of the requirements of parts 393 and 396 of the FMCSRs and ensures that all commercial motor vehicles operating in interstate or foreign commerce within the United States are required to meet the same safety standards.

Rulemaking Analysis and Notices

Executive Order 12866 (Regulatory Planning and Review) and DOT Regulatory Policies and Procedures

The FHWA has determined that this action is a significant regulatory action within the meaning of Executive Order 12866 and significant within the meaning of Department of Transportation regulatory policies and procedures. The FHWA has prepared a final economic assessment of the economic impact the regulatory changes will have on the motor carrier industry. A copy of the final assessment is included in the docket file.

The FHWA estimates that the total costs for motor carriers to comply with the proposed requirements within a 2-year period will be $228 million, with the safety and economic benefits totaling $360 million. The FHWA estimates that this rulemaking will apply to 815,000 trailers. It is estimated that the rule will, over a 10-year period, prevent 102 fatalities and 1,766 injuries associated with passenger cars colliding with trailers. In addition, this rule would prevent approximately 2,556 property damage only accidents.

The costs are considered one-time costs in that the conspicuity treatments will not need to be replaced during the remaining years of the useful service lives of the trailers that would be subject to the retrofitting requirement. The estimates for the benefits are the total

expected benefits over the remaining years of useful service lives of the trailers that will be retrofitted. A copy of the FHWA's final regulatory evaluation has been placed in the docket.

Regulatory Flexibility Act

The FHWA has evaluated the effects of the regulatory changes on small entities. A copy of the analysis on the small entity impact is provided in the docket file. Generally, the costs per trailer for retrofitting is expected to be comparable, but not necessarily identical, for both large motor carriers and small motor carriers. For example, large carriers will be able to obtain discounts when ordering conspicuity materials in bulk. The costs for the retroreflective tape needed to comply with the proposed requirement is $66.18 for 28 foot trailers, $84.48 for 40–42 foot trailers, and $94.33 for 45–53 foot trailers. The FHWA's estimates of labor costs are $60, $70, and $80 for the 28-, 40–42, and 45–53 foot trailers, respectively. The FHWA believes the opportunity cost is approximately $140 per trailer. Therefore, the costs per trailer for small entities is $266 for 28-foot trailers, $294 for 40–42 foot trailers, and $314 for 45–53 foot trailers. The costs only apply to small entities that have trailers that were manufactured before December 1, 1993, and have not already been retrofitted with a conspicuity system that will satisfy the requirements of this rule. Furthermore, the costs will only be applicable if the small entities intend to continue to operate these older trailers after the 2-year phase-in period.

As of September 1996, the FHWA estimates that there were approximately 382,128 interstate motor carriers. Of these carriers, 136,360 own, term-lease or trip-lease 6 or fewer trailers (68,405 have 1 trailer, 45,770 have 2–3 trailers, and 22,185 have 4–6 trailers). The number of motor carriers that own, term-lease or trip-lease more than 6 trailers, but fewer than 21 is 21,793 (6,658 carriers have 7–8 trailers, 6,197 have 9–11 trailers, 3,887 carriers have 12–14 trailers, 2,779 carriers have 15–17 trailers, and 2,272 carriers have 18–20 trailers). If only those motor carriers that own, term-lease, or trip-lease 20 or fewer trailers are considered small entities, this rulemaking could have an economic impact on up to 158,153 small entities.

The economic impact on each of the motor carriers will vary depending on the number of trailers that the carrier would be responsible for retrofitting by the end of the 2-year phase-in period, and the size of those trailers. If, for example, the carrier only operates one 45–53 foot trailer, the total economic impact will be $314. If the carrier operates 20 such trailers that have to be retrofitted, the total economic impact would be $ 6,280.

The Small Business Administration (SBA), which oversees agencies' compliance with the Regulatory Flexibility Act, has published guidelines to classify small business. The SBA has indicated that for entities engaged in motor freight transportation and warehousing, small businesses are those with $18.5 million or fewer dollars in annual receipts. Therefore, if the motor carrier described in the preceding example is a private motor carrier with its principal business being something other than transportation, and operates 20, 45–53 foot trailers and has annual receipts of $18.5 million, the total economic impact would be less than one-tenth of one percent of the private motor carrier's annual receipts ($6,280/$18.5 million). If this carrier operated 100 trailers and had annual receipts of $18.5 million, the economic impact would be approximately two-tenths of one percent of the carrier's annual receipts ($31,400/$18.5 million).

Based on its analysis summarized above, the FHWA believes that this rule will affect a substantial number of small entities, but will not have a significant impact on these entities. The FHWA, in compliance with the Regulatory Flexibility Act (Pub. L. 96–354; 5 U.S.C. 601–612), has considered the economic impacts of these requirements on small entities and certifies that this rule will not have a significant economic impact on a substantial number of small entities.

Executive Order 12612 (Federalism Assessment)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612, and it has been determined that this rulemaking does not have sufficient Federalism implications to warrant the preparation of a Federalism assessment. Nothing in this document directly preempts any State law or regulation.

Executive Order 12372 (Intergovernmental Review)

Catalog of Federal Domestic Assistance Program Number 20.217, Motor Carrier Safety. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this program.

Paperwork Reduction Act

This action does not contain a collection of information requirement for the purposes of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501 *et seq.*

National Environmental Policy Act

The agency has analyzed this rulemaking for the purpose of the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*) and has determined that this action does not have any effect on the quality of the environment.

Unfunded Mandates Reform Act

This rule does not impose any unfunded mandates on State, local, or tribal governments as defined by the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1532–1538). However, this rule will impose a Federal mandate on the private sector requiring expenditure by motor carriers of $100 million or more in any one year. Therefore, the FHWA has prepared a separate written statement incorporating various assessments, estimates, and descriptions that are delineated in the Act. A copy of the FHWA's Regulatory Accountability and Reform Analyses is included in the docket.

The FHWA considered several regulatory alternatives and believes that this rule adopts the least burdensome alternative that achieves the objectives of the rule.

The FHWA estimates that the conspicuity retrofitting rule will cost the public approximately $228 million over two years. The cost applies only to motor carriers subject to the Federal Motor Carrier Safety Regulations. The agency estimates that the 10-year discounted monetary value of the benefits (fatalities and injuries prevented, property damage savings) is $360 million.

The FHWA analyzed and compared the estimated costs and benefits of two-, three-, and five-year phase-in period options for a retrofitting requirement to determine the least costly alternative for improving highway safety. The agency also considered the color-prescriptive requirements to determine the least burdensome alternative for reducing the incidence of passenger vehicles colliding with semitrailers and trailers at nighttime and under other conditions of reduced visibility. The agency proposed a two-year phase-in period for trailers that are not currently equipped with retroreflective sheeting, and a 10-year transition period for trailers that are equipped with alternative colors or

color combinations. The agency is adopting a final rule consistent with the proposal.

The three-, and five-year phase-in periods would have reduced the total costs of the rule but not the burden on individual motor carriers operating pre-1994 trailers at the end of these phase-in periods. Moreover, these alternatives would also reduce the benefits of retrofitting trailers. The agency has determined that it is in the public interest to require motor carriers to retrofit their trailers within two years of the effective date of the final rule to save additional lives, and prevent additional injuries and property-damage only accidents.

The two-year option provides for increased safety benefits over those estimated for the three-, and five-year options. Both the costs and benefits would drop significantly with a three- or five-year phase-in period, as the number of trailers to be retrofit and the number of fatalities, injuries, and property-damage only accidents avoided would be reduced. Generally, the longer the phase-in period, the less benefit there is to completing the rulemaking as the population of pre-1994 trailers decreases every year. Therefore, the agency believes there is good cause for not choosing the least costly option.

With regard to the burden on the motor carrier industry, the final rule includes a 10-year transition period to ensure that most motor carriers are not penalized for voluntarily retrofitting their semitrailers and trailers with alternative colors or patterns. The agency recognizes that some motor carriers will be forced to replace their conspicuity treatments in order to comply with the requirements for the year 2009 and beyond. The FHWA believes the final rule represents a balance between regulatory flexibility and the need for having a standard conspicuity treatment for commercial motor vehicles, and is the least burdensome alternative that achieves the objectives of the rule.

Regulation Identification Number

A regulation identification number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross reference this action with the Unified Agenda.

List of Subjects in 49 CFR Part 393

Highway safety, Motor carriers, Reflectors.

Issued on: March 26, 1999.

Kenneth R. Wykle,

Federal Highway Administrator.

In consideration of the foregoing, the FHWA is amending title 49, Code of Federal Regulations, chapter III, as follows:

PART 393—[AMENDED]

1. The authority citation for part 393 continues to read as follows:

Authority: Section 1041(b) of Pub. L. 102–240, 105 Stat. 1914, 1993 (1991); 49 U.S.C. 31136 and 31502; 49 CFR 1.48.

2. Section 393.13 is added to read as follows:

§ 393.13. Retroreflective sheeting and reflex reflectors, requirements for semitrailers and trailers manufactured before December 1, 1993.

(a) *Applicability.* All trailers and semitrailers manufactured prior to December 1, 1993, which have an overall width of 2,032 mm (80 inches) or more and a gross vehicle weight rating of 4,536 kg (10,001 pounds) or more, except trailers that are manufactured exclusively for use as offices or dwellings, pole trailers (as defined in § 390.5), and trailers transported in a driveaway-towaway operation, must be equipped with retroreflective sheeting or an array of reflex reflectors that meet the requirements of this section. Motor carriers have until June 1, 2001 to comply with the requirements of this section.

(b) *Retroreflective sheeting and reflex reflectors.* Motor carriers are encouraged to retrofit their trailers with a conspicuity system that meets all of the requirements applicable to trailers manufactured on or after December 1, 1993, including the use of retroreflective sheeting or reflex reflectors in a red and white pattern (see Federal Motor Vehicle Safety Standard No. 108 (49 CFR 571.108), S5.7, *Conspicuity systems*). Motor carriers which do not retrofit their trailers to meet the requirements of FMVSS No. 108, for example by using an alternative color pattern, must comply with the remainder of this paragraph and with paragraph (c) or (d) of this section. Retroreflective sheeting or reflex reflectors in colors or color combinations other than red and white may be used on the sides or lower rear area of the semitrailer or trailer until June 1, 2009. The alternate color or color combination must be uniform along the sides and lower rear area of the trailer. The retroreflective sheeting or reflex reflectors on the upper rear area of the trailer must be white and conform to the requirements of FMVSS No. 108 (S5.7). Red retroreflective sheeting or reflex reflectors shall not be used along the sides of the trailer unless it is used as part of a red and white pattern. Retroreflective sheeting shall have a width of at least 50 mm (2 inches).

(c) *Locations for retroreflective sheeting.*

(1) *Sides.* Retroreflective sheeting shall be applied to each side of the trailer or semitrailer. Each strip of retroreflective sheeting shall be positioned as horizontally as practicable, beginning and ending as close to the front and rear as practicable. The strip need not be continuous but the sum of the length of all of the segments shall be at least half of the length of the trailer and the spaces between the segments of the strip shall be distributed as evenly as practicable. The centerline for each strip of retroreflective sheeting shall be between 375 mm (15 inches) and 1,525 mm (60 inches) above the road surface when measured with the trailer empty or unladen, or as close as practicable to this area. If necessary to clear rivet heads or other similar obstructions, 50 mm (2 inches) wide retroreflective sheeting may be separated into two 25 mm (1 inch) wide strips of the same length and color, separated by a space of not more than 25 mm (1 inch).

(2) *Lower rear area.* The rear of each trailer and semitrailer must be equipped with retroreflective sheeting. Each strip of retroreflective sheeting shall be positioned as horizontally as practicable, extending across the full width of the trailer, beginning and ending as close to the extreme edges as practicable. The centerline for each of the strips of retroreflective sheeting shall be between 375 mm (15 inches) and 1,525 mm (60 inches) above the road surface when measured with the trailer empty or unladen, or as close as practicable to this area.

(3) *Upper rear area.* Two pairs of white strips of retroreflective sheeting, each pair consisting of strips 300 mm (12 inches) long, must be positioned horizontally and vertically on the right and left upper corners of the rear of the body of each trailer and semitrailer, as close as practicable to the top of the trailer and as far apart as practicable. If the perimeter of the body, as viewed from the rear, is not square or rectangular, the strips may be applied along the perimeter, as close as practicable to the uppermost and outermost areas of the rear of the body on the left and right sides.

(d) *Locations for reflex reflectors.*

(1) *Sides*. Reflex reflectors shall be applied to each side of the trailer or semitrailer. Each array of reflex reflectors shall be positioned as horizontally as practicable, beginning and ending as close to the front and rear as practicable. The array need not be continuous but the sum of the length of all of the array segments shall be at least half of the length of the trailer and the spaces between the segments of the strip shall be distributed as evenly as practicable. The centerline for each array of reflex reflectors shall be between 375 mm (15 inches) and 1,525 mm (60 inches) above the road surface when measured with the trailer empty or unladen, or as close as practicable to this area. The center of each reflector shall not be more than 100 mm (4 inches) from the center of each adjacent reflector in the segment of the array. If reflex reflectors are arranged in an alternating color pattern, the length of reflectors of the first color shall be as close as practicable to the length of the reflectors of the second color.

(2) *Lower rear area*. The rear of each trailer and semitrailer must be equipped with reflex reflectors. Each array of reflex reflectors shall be positioned as horizontally as practicable, extending across the full width of the trailer, beginning and ending as close to the extreme edges as practicable. The centerline for each array of reflex reflectors shall be between 375 mm (15 inches) and 1,525 mm (60 inches) above the road surface when measured with the trailer empty or unladen, or as close as practicable to this area. The center of each reflector shall not be more than 100 mm (4 inches) from the center of each adjacent reflector in the segment of the array.

(3) *Upper rear area*. Two pairs of white reflex reflector arrays, each pair at least 300 mm (12 inches) long, must be positioned horizontally and vertically on the right and left upper corners of the rear of the body of each trailer and semitrailer, as close as practicable to the top of the trailer and as far apart as practicable. If the perimeter of the body, as viewed from the rear, is not square or rectangular, the arrays may be applied along the perimeter, as close as practicable to the uppermost and outermost areas of the rear of the body on the left and right sides. The center of each reflector shall not be more than 100 mm (4 inches) from the center of each adjacent reflector in the segment of the array.

[FR Doc. 99–7827 Filed 3–26–99; 11:50 am]

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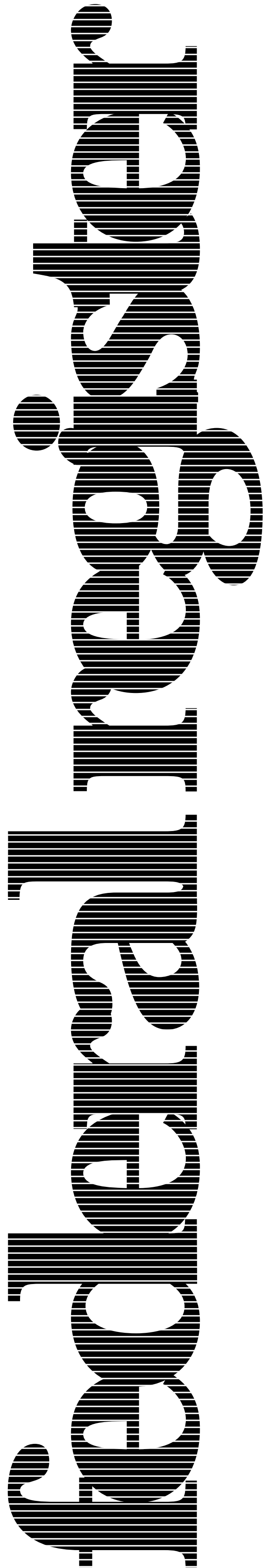


Wednesday
March 31, 1999

Part V

Department of Education

Parental Assistance Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1999

DEPARTMENT OF EDUCATION

[CFDA No.: 84.310A]

Parental Assistance Program; Notice Inviting Applications for New Awards for Fiscal Year (FY) 1999

Note To Applicants: This notice is a complete application package. Together with the statute authorizing the program and the Education Department General Administrative Regulations (EDGAR), the notice contains all of the information, application forms, and instructions needed to apply for a grant under this competition.

Purpose of Program: To assist nonprofit organizations, and nonprofit organizations in consortia with local educational agencies (LEAs), in establishing parental information and resource centers that would (1) increase parents' knowledge of and confidence in child-rearing activities, such as teaching and nurturing their young children; (2) strengthen partnerships between parents and professionals in meeting the educational needs of children aged birth through five years and the working relationship between home and school; and (3) enhance the developmental progress of the children assisted under the program.

Eligible Applicants: Nonprofit organizations, and nonprofit organizations in consortia with LEAs, in the following jurisdictions are eligible to apply for funding: California, Colorado, the District of Columbia, Florida, Georgia, Hawaii, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Dakota, Tennessee, Texas, Vermont, Washington, and Wisconsin.

The statute requires the Secretary to ensure that grants are distributed, to the greatest extent possible, to all geographic regions of the United States. Consistent with this statutory requirement, this competition is for eligible applicants in the District of Columbia and the States identified in the preceding paragraph. Grantees in the other States, the Commonwealth of Puerto Rico, and the outlying areas are eligible for continuation awards.

An LEA, by itself, is not eligible for an award. However, an LEA may be part of a consortium with a nonprofit organization that applies. In those instances, the award would be made to the nonprofit organization, which would serve as the fiscal agent.

For purposes of this competition, nonprofit organizations do not include institutions of higher education, State educational agencies, LEAs, intermediate school districts, government entities, or hospitals.

Deadline for Transmittal of Applications: April 30, 1999.

Deadline for Intergovernmental Review: April 30, 1999.

Available Funds: $18,000,000.

Estimated Range of Awards: $200,000 to $750,000.

(**Note:** Due to anticipated variances in the scope of proposed activities and the number of program beneficiaries, the estimated range is very broad.)

Estimated Number of Awards: 28.

Note: These estimates are projections for the guidance of potential applicants. The Department of Education is not bound by any estimates in this notice.

Project Period: Up to 48 months.

Applicable Regulations: The Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74, 75, 77, 79, 81, 82, and 85.

Note: The regulations in 34 CFR Part 80 (Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments) apply to an LEA that is part of a consortium receiving assistance.

Description of Program: Under the Parental Assistance Program, authorized by Title IV of the Goals 2000: Educate America Act (Pub. L. 103–227) (20 U.S.C. 5801 *et seq.*) (the Act), grants are awarded to nonprofit organizations (and nonprofit organizations in consortia with LEAs) to establish and fund parent information and resource centers that provide training, information, and support to (a) parents of children aged birth through five years; (b) parents of children enrolled in elementary and secondary schools; and (c) individuals who work with these parents.

Organizations seeking funding must have the capacity to deliver services of sufficient size, scope, and quality to reach substantial numbers of children and families from diverse populations throughout the State, with a particular focus on parents who are educationally and economically disadvantaged. In providing these services, the organizations must network with clearinghouses, parent centers served under the Individuals with Disabilities Act, parent groups, other organizations and agencies, and parents of elementary and secondary school children.

Using research-based practices and technological advances, the organizations should provide a mix of direct training services and statewide information and support services to address the needs of the targeted populations. Entities with established statewide organizational structures and proven effectiveness may be more likely to successfully address these needs.

Applicants should be aware that section 1118(g) of the Elementary and Secondary Education Act, as amended by the Improving America's Schools Act of 1994, requires schools and districts receiving Title I funds to assist parents and parent organizations by informing them of the existence and purpose of the parent information and resource center in their State, providing them with a description of the services and programs provided by the center, advising parents on how to use the center, and helping them contact the center. Consequently, applicants should be prepared to address the demand for their services created by this requirement.

Use of Funds: Grant funds received under this program may be used—

(a) For parent training, information, and support programs that assist parents to—

(1) Better understand their children's educational needs;

(2) Provide follow-up support for their children's educational achievement;

(3) Communicate more effectively with teachers, counselors, administrators, and other professional educators and support staff;

(4) Participate in the design and provision of assistance to students who are not making adequate educational progress;

(5) Obtain information about the range of options, programs, services, and resources available at the national, State, and local levels to assist parents of children aged birth through five years and parents of children in elementary and secondary schools;

(6) Seek technical assistance regarding compliance with the requirements of title IV and of other Federal programs relevant to achieving the National Education Goals;

(7) Participate in State and local decisionmaking;

(8) Train other parents; and

(9) Plan, implement, and fund activities that coordinate the education of their children with other Federal programs that serve their children or their families; and

(b) To include State or local educational personnel where such participation will further the activities assisted under the grant.

Program Requirements: Each grantee must—

(a)(1) Be governed by a board of directors the membership of which includes parents; or

(2) Be an organization that represents the interests of parents;

(b) Establish a special advisory committee the membership of which includes—

(1) Parents of children aged birth through five years and parents of children enrolled in elementary and secondary schools; and

(2) Representatives of educational professionals with expertise in improving services for disadvantaged children; and

(3) A broad representation of minority, low-income, and other individuals and groups that have an interest in compensatory education and family literacy;

(c) Use at least one-half the funds provided in the grant in each fiscal year to serve areas with high concentrations of low-income families in order to serve parents who are severely educationally or economically disadvantaged;

(d) Operate a center of sufficient size, scope, and quality to ensure that the center is adequate to serve the parents in the area;

(e) Serve both urban and rural areas;

(f) Design a center that meets the unique training, information, and support needs of parents of children aged birth through five years and of parents of children enrolled in elementary and secondary schools, particularly parents who are economically or educationally disadvantaged;

(g) Demonstrate the capacity and expertise to conduct the effective training information and support activities for which assistance is sought;

(h) Network with—

(1) Clearinghouses;

(2) Parent centers for the parents of infants, toddlers, children, and youth with disabilities served under section 631(e) of the Individuals with Disabilities Act;

(3) Other organizations and agencies;

(4) Established national, State, and local parent groups representing the full range of parents of children aged birth through five years; and

(5) Parents of children enrolled in elementary and secondary schools;

(i) Focus on serving parents of children aged birth through five years and parents of children enrolled in elementary and secondary schools, who are parents of low-income, minority, and limited English proficient children; and

(j) Use part of the funds received under this program to establish, expand, or operate Parents as Teachers (PAT) programs or Home Instruction Programs for Preschool Youngsters (HIPPY) programs, as defined in section 405 of the Act.

The statute does not require a specific amount or percentage of funds to be spent on PAT or HIPPY programs. However, the PAT and HIPPY programs, like the other components of the center, should be integrated with the center's overall activities. On an average, grantees have used approximately one-third of their grant to support PAT and/or HIPPY programs. (A brief description of the PAT and HIPPY programs may be found in the appendix.)

To be eligible for funding, an applicant must meet each of the statutory requirements referenced above. Each application for assistance must include assurances that the grantee will comply with these requirements.

Non-Federal Contribution: To be eligible for a continuation award, in each fiscal year after the first fiscal year a grantee receives assistance under this program, the grantee must demonstrate that a portion of the services provided by the grantee will be supported through non-Federal contributions. Those contributions may be in cash or in kind.

Selection Criteria

The Secretary will use the following selection criteria and factors from 34 CFR 75.210 to evaluate applications under this competition.

The maximum score for all of these criteria is 100 points. The maximum score for each criterion is indicated in parenthesis with the criterion. The criteria and factors are as follows:

(a) *Need for project.* (20 points) (1) The Secretary considers the need for the proposed project.

(2) In determining the need for the proposed project, the Secretary considers the following factors:

(i) The extent to which the proposed project will focus on serving or otherwise addressing the needs of disadvantaged individuals.

(ii) The extent to which specific gaps or weaknesses in services, infrastructure, or opportunities have been identified and will be addressed by the proposed project, including the nature and magnitude of those gaps or weaknesses.

(b) *Quality of the project design.* (22 points) (1) The Secretary considers the quality of the design of the proposed project.

(2) In determining the quality of the design of the proposed project, the Secretary considers the following factors:

(i) The extent to which the goals, objectives, and outcomes to be achieved by the proposed project are clearly specified and measurable.

(ii) The extent to which the design of the proposed project is appropriate to, and will successfully address, the needs of the target population or other identified needs,

(iii) The extent to which the proposed project represents an exceptional approach for meeting statutory purposes and requirements.

(iv) The extent to which the proposed project will be coordinated with similar or related efforts, and with other appropriate community, state, and federal resources.

(c) *Quality of project services.* (20 points) (1) The Secretary considers the quality of the services to be provided by the proposed project.

(2) In determining the quality of the services to be provided by the proposed project, the Secretary considers the quality and sufficiency of strategies for ensuring equal access and treatment for eligible project participants who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The extent to which services to be provided by the proposed project reflect up-to-date knowledge from research and effective practice.

(ii) The likely impact of the services to be provided by the proposed project on the intended recipients of those services.

(iii) The extent to which the services to be provided by the proposed project involve the collaboration of appropriate partners for maximizing the effectiveness of project services.

(iv) The extent to which the technical assistance services to be provided by the proposed project involve the use of efficient strategies, including the use of technology, as appropriate, and the leveraging of non-project resources.

(v) The extent to which the services to be provided by the proposed project are focused on those with greatest needs.

(d) *Quality of project personnel.* (9 points) (1) The Secretary considers the quality of the personnel who will carry out the proposed project.

(2) In determining the quality of the project personnel, the Secretary considers the extent to which the applicant encourages applications for employment from persons who are members of groups that have traditionally been underrepresented based on race, color, national origin, gender, age, or disability.

(3) In addition, the Secretary considers the following factors:

(i) The qualifications, including relevant training and experience, of the project director.

(ii) The qualifications, including relevant training and experience, of key project personnel.

(iii) The qualifications, including relevant training and experience, of project consultants or subcontractors.

(e) *Adequacy of resources.* (7 points) (1) The Secretary considers the adequacy of resources for the proposed project.

(2) In determining the adequacy of resources for the proposed project, the Secretary considers the following factors:

(i) The adequacy of support, including facilities, equipment, supplies, and other resources, from the applicant organization or the lead applicant organization.

(ii) The extent to which the costs are reasonable in relation to the objectives, design, and potential significance of the proposed project.

(iii) The potential for the incorporation of project purposes, activities, or benefits into the ongoing program of the agency or organization at the end of federal funding.

(f) *Quality of the project evaluation.* (22 points) (1) The Secretary considers the quality of the evaluation to be conducted of the proposed project.

(2) In determining the quality of the evaluation, the Secretary considers the following factors:

(i) The extent to which the methods of evaluation are thorough, feasible, and appropriate to the goals, objectives, and outcomes of the proposed project.

(ii) The extent to which the methods of evaluation include the use of objective performance measures that are clearly related to the intended outcomes of the project and will produce quantitative and qualitative data to the extent possible.

(iii) The extent to which the methods of evaluation will provide performance feedback and permit periodic assessment of progress toward achieving intended outcomes.

(**Note:** In designing their evaluation plans, applicants are encouraged to consider the sample performance measures included in the Appendix.)

Intergovernmental Review of Federal Programs

This program is subject to the requirements of Executive Order 12372 (Intergovernmental Review of Federal Programs) and the regulations in 34 CFR Part 79.

The objective of the Executive order is to foster an intergovernmental partnership and to strengthen federalism by relying on State and local processes for State and local government coordination and review of proposed Federal financial assistance.

Applicants must contact the appropriate State Single Point of Contact to find out about, and to comply with, the State's process under Executive Order 12372. If you want to know the name and address of any State Single Point of Contact, see the list published in the **Federal Register** on November 3, 1998 (63 FR 59452 through 54455).

In States that have not established a process or chosen a program for review, State, area-wide, regional, and local entities may submit comments directly to the Department.

Any State Process Recommendation and other comments submitted by a State Single Point of Contact and any comments from State, area-wide, regional, and local entities must be mailed or hand-delivered by the date indicated in this notice to the following address: The Secretary, E.O. 12372—CFDA# 84.310A, U.S. Department of Education, Room 7E200, 400 Maryland Avenue, SW, Washington, D.C. 20202–0125.

Proof of mailing will be determined on the same basis as applications (see 34 CFR 75.102). Recommendations or comments may be hand-delivered until 4:30 p.m. (Washington, D.C. time) on the date indicated in this notice.

Please note that the above address is not the same address as the one to which the applicant submits its completed application. Do not send applications to the above address.

Instructions for Transmittal of Applications

(a) If an applicant wants to apply for a grant, the applicant shall—

(1) Mail the original and two copies of the application on or before the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA # 84.310A), Washington, D.C. 20202–4725, or

(2) Hand deliver the original and two copies of the application by 4:30 p.m. (Washington, D.C. time) on the deadline date to: U.S. Department of Education, Application Control Center, Attention: (CFDA # 84.310A), Room #3633, Regional Office Building #3, 7th and D Streets, SW, Washington, DC.

(b) An applicant must show one of the following as proof of mailing:

(1) A legibly dated U.S. Postal Service postmark.

(2) A legible mail receipt with the date of mailing stamped by the U.S. Postal Service.

(3) A dated shipping label, invoice, or receipt from a commercial carrier.

(4) Any other proof of mailing acceptable to the Secretary.

(c) If an application is mailed through the U.S. Postal Service, the Secretary does not accept either of the following as proof of mailing:

(1) A private metered postmark.

(2) A mail receipt that is not dated by the U.S. Postal Service.

Notes: (1) The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

(2) The Application Control Center will mail a Grant Application Receipt Acknowledgment to each applicant. If an applicant fails to receive the notification of application receipt within 15 days from the date of mailing the application, the applicant should call the U.S. Department of Education Application Control Center at (202) 708–9494.

(3) The applicant must indicate on the envelope and—if not provided by the Department—in Item 3 of the Application for Federal Assistance (Standard Form 424) the CFDA number—and suffix letter, if any—of the competition under which the application is being submitted.

Application Instructions and Forms

The appendix to this application is divided into three parts plus a statement regarding estimated public reporting burden and various assurances and certifications. These parts and additional materials are organized in the same manner that the submitted application should be organized. The parts and additional materials are as follows:

Part I: Application for Federal Assistance (Standard Form 424 (Rev. 12/98)) and instructions.

Part II: Budget Information—Non-Construction Programs (ED Form 524) and instructions.

Part III: Application Narrative.

Additional Materials

Estimated Public Reporting Burden.

Assurances—Non-Construction Programs (Standard Form 424B).

Certifications regarding Lobbying; Debarment, Suspension, and Other Responsibility Matters; and Drug-Free Workplace Requirements (ED 80–0013–6190).

Certification regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion: Lower Tier Covered Transactions (ED 80–0014, 9/90) and instructions.

Note: ED 80–0014 is intended for the use of grantees and should not be transmitted to the Department.

Disclosure of Lobbying Activities (Standard Form LLL) (if applicable) and instructions.

An applicant may submit information on a photostatic copy of the application and budget forms, the assurances, and the certifications. However, the application form, the assurances, and

the certifications must each have an original signature. No grant may be awarded unless a completed application form has been received.

FOR FURTHER INFORMATION CONTACT: Daisy Greenfield, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, D.C. 20202–6400. Telephone: (202) 401–0039.

Individuals who use a telecommunication devise 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., Easter time, Monday through Friday. Individuals with disabilities may obtain this document in an alternate format (*e.g.,* Braille, large print, audiotape, or computer diskette) on request to the contact person listed in the preceding paragraph. Please note, however, that the Department is not able to reproduce in an alternate format the standard forms included in the notice.

Electronic Access to This Document

Anyone may view this document, as well as all other Department of Education documents published in the **Federal Register**, in text or portable document format (pdf) on the World Wide Web at either of the following sites:

http://ocfo.ed.gov/fedreg.htm
htt://www.ed.gov/news.html

To use the pdf you must have the Adobe Acrobat Reader program with Search, which is available free at either of the preceding sites. If you have questions about using the pdf, call the U.S. Government Printing Office toll free at 1–888–293–6498.

Anyone may also view these documents in text copy only on an electronic bulletin board of the Department. Telephone: (202) 219–1511 or, toll free, 1–800–222–4922. The documents are located under Option G—Files/Announcements, Bulletins and Press Releases.

Note: The official version of this document is the document published in the **Federal Register**.

Program Authority: 20 U.S.C. 5911 *et seq.*

Dated: March 25, 1999.

Judith A. Johnson,

Acting Assistant Secretary, Elementary and Secondary Education.

Instructions For Application Narrative

Before preparing the Application Narrative an applicant should read carefully the authorizing statute and the information in this notice, including the selection criteria the Secretary uses to evaluate applications.

The narrative should encompass each function or activity for which funds are being requested and should—

1. Begin with an Abstract; that is, a summary of the proposed project;
2. Describe the proposed project in light of each of the selection criteria in the order in which the criteria are listed in this application package; and
3. Include any other pertinent information that might assist the Secretary in reviewing the application.

The Secretary strongly requests the applicant to limit the Application Narrative to no more than 20 double-spaced, typed pages (on one side only), although the Secretary will consider applications of greater length. The Department has found that successful applications for similar programs generally meet this page limit.

Estimated Public Reporting Burden

The time required to complete this collection of information is estimated to average 48 hours per response, including the time to review instructions, search existing data sources, gather the data needed, and complete and review the collection of information. If you have any comments concerning the accuracy of the time estimate or suggestions for improving this form, please write to: U.S. Department of Education, Washington, D.C. 20202–4651.

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number. The valid OMB control number for this collection of information is 1810–0578. Expiration date: March 31, 2002.

If you have any comments or concerns regarding the status of your individual submission of this form, write directly to: Daisy Greenfield, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202.

Appendix

Descriptions of the Parents as Teachers (PAT) and the Home Instructional Program for Preschool Youngsters (HIPPY)

Parents as Teachers (PAT)

Parents as Teachers (PAT) is an early childhood parent education and family support program designed to empower all parents to give their child the best possible start in life. The program provides parents with information on child development from birth to age 5 and suggests learning opportunities that encourage the development of language, intellect, and physical and social skills. PAT National is located in Missouri and since 1985 has served more than a half million Missouri families. The program has also been replicated in 43 other states, Washington, DC, Australia, England, New Zealand and the West Indies.

Major components of the program include personalized home visits by certified parent educators, group meetings for parents to share information, developmental and health screenings, referrals to other community services not offered by PAT, and administrative and clerical support. Programs may be designed to provide weekly, biweekly or monthly home visits. The parent educator would invest approximately 1073 hours making home visits, planning and keeping records, traveling, conducting group meetings, etc. to provide a year-round (1 month start-up, 11 month service delivery) program for 30 families (including additional visits for selected families).

For additional information call (314) 432–4330, write to Parents as Teachers National Center, Inc., 10176 Corporate Square Drive, Suite 230, St. Louis, Missouri 63132, or visit the web site at www.patn.org.

Home Instruction Program for Preschool Youngsters

The Home Instruction Program for Preschool Youngsters (HIPPY) is a home-based, early intervention program that provides parents with the training and materials to engage in daily learning experiences with their preschoolers, ages three, four and five. HIPPY, USA is located, in New York City and is the national network, technical assistance, and training program that supports the growth and development of new sites, as well as the current 121 local organizations serving over 15,000 families in 28 States, the District of Columbia and Guam.

Major components of the program include paraprofessional home visits, group meetings for parents to share information, training, curriculum, research evaluation and technical assistance. Paraprofessional home visitors train parents to use developmentally appropriate and culturally sensitive HIPPY materials as the basis of these opportunities for learning and time together as a family. Programs may be designed to provide weekly or biweekly home visits, and biweekly or monthly group meetings. A paraprofessional working 20 hours per week could serve 12–15 families, making home visits, conducting group meetings, traveling, completing weekly reports, etc. A program coordinator would be responsible for administering the HIPPY program, supervising and monitoring the paraprofessionals, and record keeping. For additional information, please call (212) 532–7730, write to HIPPY USA, 220 East 23rd Street, Suite 300, New York, New York 10010, or visit the web site at www.c3pg.com.

Performance Measures

Parental Information and Resources Centers (PIRCs)

The Government Performance and Results Act (GPRA) of 1993 places new management expectations and requirements on Federal departments and agencies by creating a framework for more effective planning, budgeting, program evaluation, and fiscal accountability for Federal programs. The intent of the Act is to improve public

confidence by holding departments and agencies accountable for achieving program results. Departments must set program goals and objectives and measure and report on their achievements. One important source of program information on successes and lessons learned is the project evaluation and other information collected under individual grants.

In addition, the U.S. Department of Education is committed to forging a new partnership with grantees that is focused on results. The Department is required to publish performance standards and measures as a part of the program announcement to enable applicants to develop applications that incorporate such standards. After the competition for awards is completed, the Department will work cooperatively with grantees to develop performance agreements that include the performance standards to measure progress toward meeting project objectives. These performance agreements will be developed within 60 days after grants are awarded.

The Department has identified four performance objectives for the Parental Assistance Program: (1) to increase the number and types of partnerships between parents and schools, (2) to increase parents' awareness of education issues, (3) to establish, expand or operate Parents As Teachers (PAT) and/or Home Instruction Programs for Preschool Youngsters (HIPPY), and (4) to develop and sustain partnerships/networks with other organizations, agencies, and parent centers. These performance objectives and others that are directly related to the purposes of the authorizing legislation shall form the basis of the performance agreement that all discretionary grantees will develop in cooperation with the Department.

To assist applicants in understanding how a performance agreement might be developed, we are providing a sample template (see Table 1). The sample identifies the key components of a performance plan (objectives, indicators, baseline data, desired outcomes, and source, periodicity, next update of data) and an example of each component. Applicants may incorporate all or parts of the examples on the sample template along with additional objectives in their application; applicants may also use another similar format. It is important, however, that all applications are not only developed to achieve successful project outcomes, but that they also include a process to measure progress towards attaining those outcomes.

The performance agreements will be used during the life of the grant to ensure that project outcomes are achieved. Progress will be assessed via regularly scheduled communication, which may include telephone calls, letters, and site visits, between Department staff and the project director. Where sufficient progress is not being achieved, the Department and the grantee will work together to identify strategies and resources to overcome challenges and resolve problems. When necessary, the Department and the grantee may modify the performance agreements.

SAMPLE TEMPLATE PERFORMANCE AGREEMENT PARENTAL INFORMATION AND RESOURCE ASSISTANCE CENTERS (PIRCS)

Program Purpose: To assist nonprofit organizations and nonprofit organizations in consortia with local education agencies in establishing parental information and resource assistance centers to increase knowledge of and confidence in child-rearing activities, and strengthen partnerships between parents and professionals in meeting the educational needs of children, the working relationship between home and school; and enhancing the developmental progress of the children assisted under the program.

Objective (examples:)	Performance indicators (examples:)	Baseline data (examples:)	Desired outcome (examples:)	Data source, periodicity, next update (examples:)
1. To increase the number and types of partnerships between parents and schools.	1.1 Parents and school personnel, particularly those in Title I schools, will report greater levels of parent involvement in their child's school and learning after receiving services through the PIRC.	1.1 In year 1999, 50% of parents and school personnel, particularly those in Title I schools reported greater levels of parental involvement in their child's school and learning after receiving services through the PIRC.	1.1 In year 2000, 80% of parents and school personnel, particularly those in Title I schools, reported greater levels of parental involvement in their child's school and learning after receiving services through the PIRC.	1.1 Survey of Parents and School Personnel, 1999, 2000.
	1.2 PIRCs will provide information and support to schools to develop strategies to encourage ongoing parental involvement in school activities (e.g. working with children at home on homework and reading, making parent aware of chances to volunteer at school).	1.2 Descriptive information of parental involvement strategies used in a sampling of schools.	1.2 Descriptive information of changes in parental involvement in a sampling of schools.	1.2 Anecdotal information, informal case studies of a sampling of schools.
	1.3 Other.			
2. To increase parents' awareness of education issues.	2.1 Parents that the PIRC serve will report that they are more knowledgeable about education issues after receiving information and services through the PIRC.	2.1 In 1999, 50% of parents served reported that they are knowledgeable about education issues.	2.1 In 2000, 85% of parents served will report that they are knowledgeable about education issues after receiving information and services through the PIRC.	2.1 Customer survey, 1999, Workshop pre and post test measures of parents' knowledge.
	2.2 There will be an increase in the number of parents receiving information about how to help their child succeed in school.	2.2 In 1998, 50,000 parents received materials and information that informed them of education issues via the PIRC.	2.2 In 1999, 75,000 parents will receive materials and information regarding education via the PIRC.	2.2 Web site hits, toll free number, mailing lists.
	2.3 Other.			

SAMPLE TEMPLATE PERFORMANCE AGREEMENT PARENTAL INFORMATION AND RESOURCE ASSISTANCE CENTERS (PIRCS)—Continued

Program Purpose: To assist nonprofit organizations and nonprofit organizations in consortia with local education agencies in establishing parental information and resource assistance centers to increase knowledge of and confidence in child-rearing activities, and strengthen partnerships between parents and professionals in meeting the educational needs of children, the working relationship between home and school; and enhancing the developmental progress of the children assisted under the program.

Objective (examples:)	Performance indicators (examples:)	Baseline data (examples:)	Desired outcome (examples:)	Data source, periodicity, next update (examples:)
3. To establish, expand or operate Parents As Teachers (PAT) and Home Instructional Programs for Preschool Youngsters (HIPPY) services.	3.1 The number of families participating in PAT/HIPPY will increase.	3.1 In 1998, 150 families in the states participated in PAT/HIPPY programs.	3.1 In 2000, 200 families in the state participated in PAT/HIPPY programs.	3.1 Parent educator logs PAT/HIPPY.
	3.2 The number of parents that can demonstrate developmentally appropriate parenting behavior as defined by PAT/HIPPY will increase.	3.2 In 1999, PAT/HIPPY parent educators will observe and document 150 parents demonstrating developmentally appropriate parenting behavior.	3.2 In 2000, PAT/HIPPY parent educators will observe and document 200 parents demonstrating developmentally appropriate parenting behavior.	3.2 Observation records of PAT/ HIPPY parent educators.
	3.3 Other.			
4. To develop and sustain partnerships/networks with other organizations, agencies, and parent centers (e.g. schools, school districts, PTAs national coalition of Title I schools etc.).	4.1 There will be an increase in the number and types of partnerships/networks that the PIRC identifies, develops and sustains with other organizations, agencies and parent centers.	4.1 In 1999, the PIRC will identify the number and types of partnerships/networks with other organizations, agencies and parent centers.	4.1 In 2000, the PIRC will identify, develop and sustain an increased number and various types of partnerships/networks with other organizations, agencies and parent centers.	4.1 List of organizations participating in partnerships and networks.
	4.2 The number of collaborative efforts jointly undertaken by the PIRC and partners will increase.	4.2 In 1999, 50 collaborative efforts will be undertaken by the PIRC and partners.	4.2 In 2000, 60 collaborative efforts will be jointly undertaken by the PIRC and partners.	4.2 List of partners and the type of parenting activities jointly developed and implemented.
	4.3 ther.			

BILLING CODE 4000–01–U

Application for Federal Education Assistance

Note: If available, please provide application package on diskette and specify the file format.

U.S. Department of Education

Form Approved
OMB No. 1875-0106
Exp. 06/30/2001

Applicant Information

1. Name and Address

Legal Name:______________________

Address:______________________

____

City ______ State ______ County ______ ZIP Code + 4 ______ - ______

Organizational Unit ☐

2. Applicant's D-U-N-S Number ☐☐☐☐☐☐☐☐☐

3. Catalog of Federal Domestic Assistance #: 8 4 . 3 1 0 A → Title: Parental Assistance Program

4. Project Director:______________________

Address:______________________

City ______ State ______ ZIP Code + 4 ______ - ______

Tel. #: ( ) ______-______ Fax #: ( ) ______-______

E-Mail Address:______________________

5. Is the applicant delinquent on any Federal debt? ☐ Yes ☐ No
(If "Yes," attach an explanation.)

6. Type of Applicant *(Enter appropriate letter in the box.)* ☐

A State
B County
C Municipal
D Township
E Interstate
F Intermunicipal
G Special District
H Independent School District
I Public College or University
J Private, Non-Profit College or University
K Indian Tribe
L Individual
M Private, Profit-Making Organization
N Other *(Specify)*:______

7. Novice Applicant ☐ Yes ☐ No

Application Information

8. Type of Submission:

—PreApplication
☐ Construction
☐ Non-Construction

—Application
☐ Construction
☐ Non-Construction

9. Is application subject to review by Executive Order 12372 process?

☐ Yes *(Date made available to the Executive Order 12372 process for review)*: ____/____/________

☐ No *(If "No," check appropriate box below.)*
☐ Program is not covered by E.O. 12372.
☐ Program has not been selected by State for review.

10. Proposed Project Dates: **Start Date:** ____/____/________ **End Date:** ____/____/________

11. Are any research activities involving human subjects planned at any time during the proposed project period? ☐ Yes ☐ No

a. If "Yes," Exemption(s) #: ☐ ***OR*** b. Assurance of Compliance #: ☐

c. IRB approval date: ____________ ☐ Full IRB **or** ☐ Expedited Review

12. Descriptive Title of Applicant's Project:

Estimated Funding

13a. Federal	$	.00
b. Applicant	$	.00
c. State	$	.00
d. Local	$	.00
e. Other	$	.00
f. Program Income	$	.00
g. TOTAL	$____________	.00

Authorized Representative Information

14. To the best of my knowledge and belief, all data in this preapplication/application are true and correct. The document has been duly authorized by the governing body of the applicant and the applicant will comply with the attached assurances if the assistance is awarded.

a. Typed Name of Authorized Representative

b. Title

c. Tel. #: ( ) ______-________ Fax #: ( ) ______-________

d. E-Mail Address:

e. Signature of Authorized Representative Date:___/___/_____

Instructions for ED 424

1. **Legal Name and Address.** Enter the legal name of applicant and the name of the primary organizational unit which will undertake the assistance activity.

2. **D-U-N-S Number.** Enter the applicant's D-U-N-S Number. If your organization does not have a D-U-N-S Number, you can obtain the number by calling 1-800-333-0505 or by completing a D-U-N-S Number Request Form. The form can be obtained via the Internet at the following URL: **http://www.dnb.com/dbis/aboutdb/intlduns.htm.**

3. **Catalog of Federal Domestic Assistance (CFDA) Number.** Enter the CFDA number and title of the program under which assistance is requested.

4. **Project Director.** Name, address, telephone and fax numbers, and e-mail address of the person to be contacted on matters involving this application.

5. **Federal Debt Delinquency.** Check **"Yes"** if the applicant's organization is delinquent on any Federal debt. (This question refers to the applicant's organization and not to the person who signs as the authorized representative. Categories of debt include delinquent audit disallowances, loans and taxes.) Otherwise, check **"No."**

6. **Type of Applicant.** Enter the appropriate letter in the box provided.

7. **Novice Applicant.** Check **"Yes"** only if assistance is being requested under a program that gives special consideration to novice applicants and you meet the program requirements for novice applicants. By checking "Yes" the applicant certifies that it meets the novice applicant requirements specified by ED. Otherwise, check **"No."**

8. **Type of Submission.** Self-explanatory.

9. **Executive Order 12372.** Check **"Yes"** if the application is subject to review by Executive Order 12372. Also, please enter the month, date, and four (4) digit year (e.g., 12/12/2000). Applicants should contact the State Single Point of Contact (SPOC) for Federal Executive Order 12372 to determine whether the application is subject to the State intergovernmental review process. Otherwise, check **"No."**

10. **Proposed Project Dates.** Please enter the month, date, and four (4) digit year (e.g., 12/12/2000).

11. **Human Subjects.** Check "Yes" or "No". If research activities involving human subjects are not planned at any time during the proposed project period, check **"No."** **The remaining parts of item 11 are then not applicable.**

    If research activities involving human subjects, whether or not exempt from Federal regulations for the protection of human subjects, are planned at any time during the proposed project period, either at the applicant organization or at any other performance site or collaborating institution, check **"Yes."** If all the research activities are designated to be exempt under the regulations, enter, in item 11a, the exemption number(s) corresponding to one or more of the six exemption categories listed in **"Protection of Human Subjects in Research"** attached to this form. Provide sufficient information in the application to allow a determination that the designated exemptions in item 11a, are appropriate. **Provide this narrative information in an "Item 11/Protection of Human Subjects Attachment" and insert this attachment immediately following the ED 424 face page. Skip the remaining parts of item 11.**

    If some or all of the planned research activities involving human subjects are covered (nonexempt), skip item 11a and continue with the remaining parts of item 11, as noted below. In addition, follow the instructions in **"Protection of Human Subjects in Research"** attached to this form to prepare the six-point narrative about the nonexempt activities. **Provide this six-point narrative in an "Item 11/Protection of Human Subjects Attachment" and insert this attachment immediately following the ED 424 face page.**

    If the applicant organization has an approved Multiple Project Assurance of Compliance on file with the Grants Policy and Oversight Staff (GPOS), U.S. Department of Education, or with the Office for Protection from Research Risks (OPRR), National Institutes of Health, U.S. Department of Health and Human Services, that covers the specific activity, enter the Assurance number in item 11b and the date of approval by the Institutional Review Board (IRB) of the proposed activities in item 11c. This date must be no earlier than one year before the receipt date for which the application is submitted and must include the four (4) digit year (e.g., 2000). Check the type of IRB review in the appropriate box. An IRB may use the expedited review procedure if it complies with the requirements of 34 CFR 97.110. If the IRB review is delayed beyond the submission of the application, enter **"Pending"** in item 11c. If your application is recommended/selected for funding, a follow-up certification of IRB approval from an official signing for the applicant organization must be sent to and received by the designated ED official within 30 days after a specific formal request from the designated ED official. **If the applicant organization does not have** on file with GPOS or OPRR **an approved Assurance of Compliance** that covers the proposed research activity, enter **"None"** in item 11b and skip 11c. In this case, the applicant organization, by the signature on the application, is declaring that it will comply with 34 CFR 97 within 30 days after a specific formal request from the designated ED official for the Assurance(s) and IRB certifications.

12. **Project Title.** Enter a brief descriptive title of the project. If more than one program is involved, you should append an explanation on a separate sheet. If appropriate (e.g., construction or real property projects), attach a map showing project location. For preapplications, use a separate sheet to provide a summary description of this project.

13. **Estimated Funding.** Amount requested or to be contributed during the first funding/budget period by each contributor. Value of in-kind contributions should be included on appropriate lines as applicable. If the action will result in a dollar change to an existing award, indicate only the amount of the change. For decreases, enclose the amounts in parentheses. If both basic and supplemental amounts are included, show breakdown on an attached sheet. For multiple program funding, use totals and show breakdown using same categories as item 13.

14. **Certification.** To be signed by the authorized representative of the applicant. A copy of the governing body's authorization for you to sign this application as official representative must be on file in the applicant's office.

    Be sure to enter the telephone and fax number and e-mail address of the authorized representative. Also, in item 14e, please enter the month, date, and four (4) digit year (e.g., 12/12/2000) in the date signed field.

Paperwork Burden Statement

According to the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless such collection displays a valid OMB control number. The valid OMB control number for this information collection is **1875-0106**. The time required to complete this information collection is estimated to average between 15 and 45 minutes per response, including the time to review instructions, search existing data resources, gather the data needed, and complete and review the information collection. **If you have any comments concerning the accuracy of the estimate(s) or suggestions for improving this form, please write to:** U.S. Department of Education, Washington, D.C. 20202-4651. **If you have comments or concerns regarding the status of your individual submission of this form write directly to:** Joyce I. Mays, Application Control Center, U.S. Department of Education, 7th and D Streets, S.W. ROB-3, Room 3633, Washington, D.C. 20202-4725.

PROTECTION OF HUMAN SUBJECTS IN RESEARCH
(Attachment to ED 424)

I. Instructions to Applicants about the Narrative Information that Must be Provided if Research Activities Involving Human Subjects are Planned

If you marked item 11 on the application "Yes" and designated exemptions in 11a, **(all research activities are exempt),** provide sufficient information in the application to allow a determination that the designated exemptions are appropriate. Research involving human subjects that is exempt from the regulations is discussed under **II.B. "Exemptions,"** below. The Narrative must be succinct. **Provide this information in an "Item 11/Protection of Human Subjects Attachment" and insert this attachment immediately following the ED 424 face page.**

If you marked "Yes" to item 11 on the face page, and designated no exemptions from the regulations **(some or all of the research activities are nonexempt),** address the following six points for each nonexempt activity. In addition, if research involving human subjects will take place at collaborating site(s) or other performance site(s), provide this information before discussing the six points. Although no specific page limitation applies to this section of the application, be succinct. Provide the six-point narrative and discussion of other performance sites in an **"Item 11/Protection of Human Subjects Attachment" and insert this attachment immediately following the ED 424 face page.**

(1) Provide a detailed description of the proposed involvement of human subjects. Describe the characteristics of the subject population, including their anticipated number, age range, and health status. Identify the criteria for inclusion or exclusion of any subpopulation. Explain the rationale for the involvement of special classes of subjects, such as children, children with disabilities, adults with disabilities, persons with mental disabilities, pregnant women, prisoners, institutionalized individuals, or others who are likely to be vulnerable.

(2) Identify the sources of research material obtained from individually identifiable living human subjects in the form of specimens, records, or data. Indicate whether the material or data will be obtained specifically for research purposes or whether use will be made of existing specimens, records, or data.

(3) Describe plans for the recruitment of subjects and the consent procedures to be followed. Include the circumstances under which consent will be sought and obtained, who will seek it, the nature of the information to be provided to prospective subjects, and the method of documenting consent. State if the Institutional Review Board (IRB) has authorized a modification or waiver of the elements of consent or the requirement for documentation of consent.

(4) Describe potential risks (physical, psychological, social, legal, or other) and assess their likelihood and seriousness. Where appropriate, describe alternative treatments and procedures that might be advantageous to the subjects.

(5) Describe the procedures for protecting against or minimizing potential risks, including risks to confidentiality, and assess their likely effectiveness. Where appropriate, discuss provisions for ensuring necessary medical or professional intervention in the event of adverse effects to the subjects. Also, where appropriate, describe the provisions for monitoring the data collected to ensure the safety of the subjects.

(6) Discuss why the risks to subjects are reasonable in relation to the anticipated benefits to subjects and in relation to the importance of the knowledge that may reasonably be expected to result.

II. Information on Research Activities Involving Human Subjects

A. Definitions.

A research activity involves human subjects if the activity is research, as defined in the Department's regulations, and the research activity will involve use of human subjects, as defined in the regulations.

—Is it a research activity?

The ED Regulations for the Protection of Human Subjects, Title 34, Code of Federal Regulations, Part 97, define research as "a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge." *If an activity follows a deliberate plan whose purpose is to develop or contribute to generalizable knowledge, such as an exploratory study or the collection of data to test a hypothesis, it is research.* Activities which meet this definition constitute research whether or not they are conducted or supported under a program which is considered research for other purposes. For example, some demonstration and service programs may include research activities.

—Is it a human subject?

The regulations define human subject as "a living individual about whom an investigator (whether professional or student) conducting research obtains (1) data through intervention or interaction with the individual, or (2) identifiable private information." *(1) If an activity involves obtaining information about a living person by manipulating that person or that person's environment, as might occur when a new instructional technique is tested, or by communicating or interacting with the individual, as occurs with surveys and interviews, the definition of human subject is met. (2) If an activity involves obtaining private information about a living person in such a way that the information can be linked to that individual (the identity of the subject is or may be readily determined by the investigator or associated with the information), the definition of human subject is met.* [Private information includes information about behavior that occurs in a context in which an individual can reasonably expect that no observation or recording is taking place, and information which has been provided for specific purposes by an individual and which the individual can reasonably expect will not be made public (for example, a school health record).]

B. Exemptions.

Research activities in which the only involvement of human subjects will be in one or more of the following six categories of ***exemptions*** are not covered by the regulations:

(1) Research conducted in established or commonly accepted educational settings, involving normal educational practices, such as (a) research on regular and special education instructional strategies, or (b) research on the effectiveness of or the comparison among instructional techniques, curricula, or classroom management methods.

(2) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior, unless: (a) information obtained is recorded in such a manner that human subjects can be identified, directly or through identifiers linked to the subjects; and (b) any disclosure of the human subjects' responses outside the research could reasonably place the subjects at risk of criminal or civil liability or be damaging to the subjects' financial standing, employability, or reputation. ***If the subjects are children, this exemption applies only to research involving educational tests or observations of public behavior when the investigator(s) do not participate in the activities being observed.*** [Children are defined as persons who have not attained the legal age for consent to treatments or procedures involved in the research, under the applicable law or jurisdiction in which the research will be conducted.]

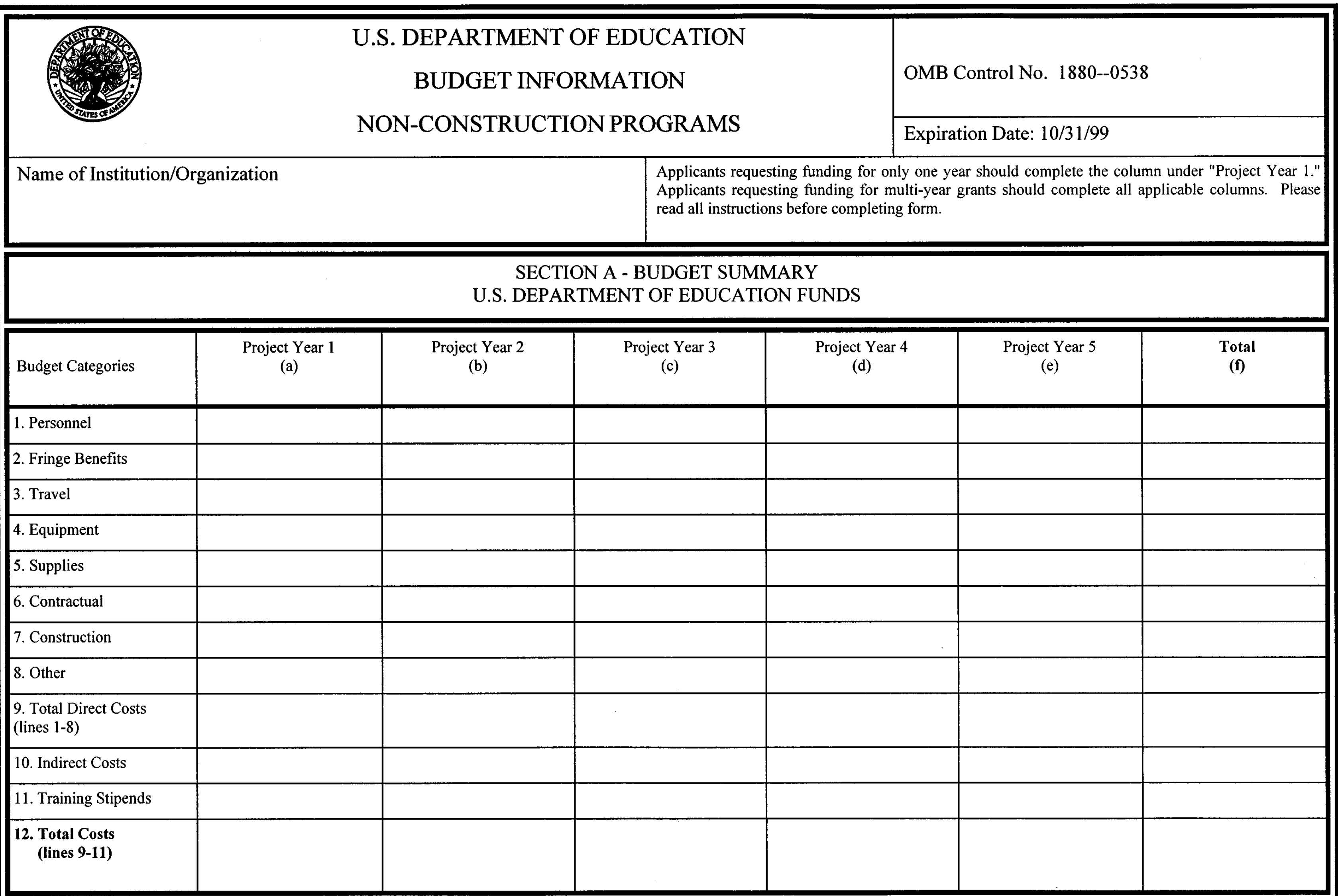
(3) Research involving the use of educational tests (cognitive, diagnostic, aptitude, achievement), survey procedures, interview procedures or observation of public behavior that is not exempt under section (2) above, if the human subjects are elected or appointed public officials or candidates for public office; or federal statute(s) require(s) without exception that the confidentiality of the personally identifiable information will be maintained throughout the research and thereafter.

(4) Research involving the collection or study of existing data, documents, records, pathological specimens, or diagnostic specimens, if these sources are publicly available or if the information is recorded by the investigator in a manner that subjects cannot be identified, directly or through identifiers linked to the subjects.

(5) Research and demonstration projects which are conducted by or subject to the approval of department or agency heads, and which are designed to study, evaluate, or otherwise examine: (a) public benefit or service programs; (b) procedures for obtaining benefits or services under those programs; (c) possible changes in or alternatives to those programs or procedures; or (d) possible changes in methods or levels of payment for benefits or services under those programs.

(6) Taste and food quality evaluation and consumer acceptance studies, (a) if wholesome foods without additives are consumed or (b) if a food is consumed that contains a food ingredient at or below the level and for a use found to be safe, or agricultural chemical or environmental contaminant at or below the level found to be safe, by the Food and Drug Administration or approved by the Environmental Protection Agency or the Food Safety and Inspection Service of the U.S Department of Agriculture.

Copies of the Department of Education's Regulations for the Protection of Human Subjects, 34 CFR Part 97 and other pertinent materials on the protection of human subjects in research are available from the Grants Policy and Oversight Staff (GPOS) Office of the Chief Financial and Chief Information Officer, U.S. Department of Education, Washington, D.C., telephone: (202) 708-8263, and on the U.S. Department of Education's Protection of Human Subjects in Research Web Site at http://ocfo.ed.gov/humansub.htm.



U.S. DEPARTMENT OF EDUCATION

BUDGET INFORMATION

NON-CONSTRUCTION PROGRAMS

OMB Control No. 1880--0538

Expiration Date: 10/31/99

Name of Institution/Organization

Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.

SECTION A - BUDGET SUMMARY
U.S. DEPARTMENT OF EDUCATION FUNDS

Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	**Total (f)**
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						

ED FORM NO. 524

Name of Institution/Organization	Applicants requesting funding for only one year should complete the column under "Project Year 1." Applicants requesting funding for multi-year grants should complete all applicable columns. Please read all instructions before completing form.

SECTION B - BUDGET SUMMARY NON-FEDERAL FUNDS

Budget Categories	Project Year 1 (a)	Project Year 2 (b)	Project Year 3 (c)	Project Year 4 (d)	Project Year 5 (e)	**Total (f)**
1. Personnel						
2. Fringe Benefits						
3. Travel						
4. Equipment						
5. Supplies						
6. Contractual						
7. Construction						
8. Other						
9. Total Direct Costs (lines 1-8)						
10. Indirect Costs						
11. Training Stipends						
12. Total Costs (lines 9-11)						

SECTION C - OTHER BUDGET INFORMATION (see instructions)

ED FORM NO. 524

Public reporting burden for this collection of information is estimated to vary from 13 to 22 hours per response, with an average of 17.5 hours per response, including the time reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the U.S. Department of Education, Information Management and Compliance Division, Washington, D.C. 20202-4651; and the Office of Management and Budget, Paperwork Reduction Project 1875-0102, Washington DC 20503.

INSTRUCTIONS FOR ED FORM 524

General Instructions

This form is used to apply to individual U.S. Department of Education discretionary grant programs. Unless directed otherwise, provide the same budget information for each year of the multi-year funding request. Pay attention to applicable program specific instructions, if attached.

Section A - Budget Summary U.S. Department of Education Funds

All applicants must complete Section A and provide a breakdown by the applicable budget categories shown in lines 1-11.

Lines 1-11, columns (a)-(e): For each project year for which funding is requested, show the total amount requested for each applicable budget category.

Lines 1-11, column (f): Show the multi-year total for each budget category. If funding is requested for only one project year, leave this column blank.

Line 12, columns (a)-(e): Show the total budget request for each project year for which funding is requested.

Line 12, column (f): Show the total amount requested for all project years. If funding is requested for only one year, leave this space blank.

Section B - Budget Summary Non-Federal Funds

If you are required to provide or volunteer to provide matching funds or other non-Federal resources to the project, these should be shown for each applicable budget category on lines 1-11 of Section B.

Lines 1-11, columns (a)-(e): For each project year for which matching funds or other contributions are provided, show the total contribution for each applicable budget category.

Lines 1-11, column (f): Show the multi-year total for each budget category. If non-Federal contributions are provided for only one year, leave this column blank.

Line 12, columns (a)-(e): Show the total matching or other contribution for each project year.

Line 12, column (f): Show the total amount to be contributed for all years of the multi-year project. If non-Federal contributions are provided for only one year, leave this space blank.

Section C - Other Budget Information Pay attention to applicable program specific instructions, if attached.

1. Provide an itemized budget breakdown, by project year, for each budget category listed in Sections A and B.
2. If applicable to this program, enter the type of indirect rate (provisional, predetermined, final or fixed) that will be in effect during the funding period. In addition, enter the estimated amount of the base to which the rate is applied, and the total indirect expense.
3. If applicable to this program, provide the rate and base on which fringe benefits are calculated.
4. Provide other explanations or comments you deem necessary.

OMB Approval No. 0348-0040

ASSURANCES - NON-CONSTRUCTION PROGRAMS

Public reporting burden for this collection of information is estimated to average 15 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0040), Washington, DC 20503

PLEASE DO NOT RETURN YOUR COMPLETED FORM TO THE OFFICE OF MANAGEMENT AND BUDGET. SEND IT TO THE ADDRESS PROVIDED BY THE SPONSORING AGENCY.

Note: Certain of these assurances may not be applicable to your project or program. If you have questions, please contact the awarding agency. Further, certain Federal awarding agencies may require applicants to certify to additional assurances. If such is the case, you will be notified.

As the duly authorized representative of the applicant I certify that the applicant:

1. Has the legal authority to apply for Federal assistance, and the institutional, managerial and financial capability (including funds sufficient to pay the non-Federal share of project cost) to ensure proper planning, management, and completion of the project described in this application.

2. Will give the awarding agency, the Comptroller General of the United States, and if appropriate, the State, through any authorized representative, access to and the right to examine all records, books, papers, or documents related to the award; and will establish a proper accounting system in accordance with generally accepted accounting standards or agency directives.

3. Will establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain.

4. Will initiate and complete the work within the applicable time frame after receipt of approval of the awarding agency.

5. Will comply with the Intergovernmental Personnel Act of 1970 (42 U.S.C. §§4728-4763) relating to prescribed standards for merit systems for programs funded under one of the 19 statutes or regulations specified in Appendix A of OPM's Standards for a Merit System of Personnel Administration (5 C.F.R. 900, Subpart F).

6. Will comply with all Federal statutes relating to nondiscrimination. These include but are not limited to: (a) Title VI of the Civil Rights Act of 1964 (P.L. 88-352) which prohibits discrimination on the basis of race, color or national origin; (b) Title IX of the Education Amendments of 1972, as amended (20 U.S.C. §§1681-1683, and 1685-1686), which prohibits discrimination on the basis of sex; (c) Section 504 of the Rehabilitation Act of 1973, as amended (29 U.S.C. §794), which prohibits discrimination on the basis of handicaps; (d) the Age Discrimination Act of 1975, as amended (42 U.S.C. §§ 6101-6107), which prohibits discrimination on the basis of age; (e) the Drug Abuse Office and Treatment Act of 1972 (P.L. 92-255), as amended, relating to nondiscrimination on the basis of drug abuse; (f) the Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970 (P.L. 91-616), as amended, relating to nondiscrimination on the basis of alcohol abuse or alcoholism; (g) §§ 523 and 527 of the Public Health Service Act of 1912 (42 U.S.C. §§ 290 dd-3 and 290 ee 3), as amended, relating to confidentiality of alcohol and drug abuse patient records; (h) Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq.), as amended, relating to nondiscrimination in the sale, rental or financing of housing; (i) any other nondiscrimination provisions in the specific statute(s) under which application for Federal assistance is being made; and (j) the requirements of any other nondiscrimination statute(s) which may apply to the application.

7. Will comply, or has already complied, with the requirements of Titles II and III of the uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (P.L. 91-646) which provide for fair and equitable treatment of persons displaced or whose property is acquired as a result of Federal or federally assisted programs. These requirements apply to all interests in real property acquired for project purposes regardless of Federal participation in purchases.

8. Will comply, as applicable, with the provisions of the Hatch Act (5 U.S.C. §§1501-1508 and 7324-7328) which limit the political activities of employees whose principal employment activities are funded in whole or in part with Federal funds.

9. Will comply, as applicable, with the provisions of the Davis-Bacon Act (40 U.S.C. §§276a to 276a-7), the Copeland Act (40 U.S.C. §276c and 18 U.S.C. §§874) and the Contract Work Hours and Safety Standards Act (40 U.S.C. §§ 327-333), regarding labor standards for federally assisted construction subagreements.

10. Will comply, if applicable, with flood insurance purchase requirements of Section 102(a) of the Flood Disaster Protection Act of 1973 (P.L. 93-234) which requires recipients in a special flood hazard area to participate in the program and to purchase flood insurance if the total cost of insurable construction and acquisition is $10,000 or more.

11. Will comply with environmental standards which may be prescribed pursuant to the following: (a) institution of environmental quality control measures under the National Environmental Policy Act of 1969 (P.L. 91-190) and Executive Order (EO) 11514; (b) notification of violating facilities pursuant to EO 11738; (c) protection of wetlands pursuant to EO 11990; (d) evaluation of flood hazards in floodplains in accordance with EO 11988; (e) assurance of project consistency with the approved State management program developed under the Coastal Zone Management Act of 1972 (16 U.S.C. §§1451 et seq.); (f) conformity of Federal actions to State (Clear Air) Implementation Plans under Section 176(c) of the Clear Air Act of 1955, as amended (42 U.S.C. §§7401 et seq.); (g) protection of underground sources of drinking water under the Safe Drinking Water Act of 1974, as amended, (P.L. 93-523); and (h) protection of endangered species under the Endangered Species Act of 1973, as amended, (P.L. 93-205).

12 Will comply with the Wild and Scenic Rivers Act of 1968 (16 U.S.C. §§1721 et seq.) related to protecting components or potential components of the national wild and scenic rivers system.

13. Will assist the awarding agency in assuring compliance with Section 106 of the National Historic Preservation Act of 1966, as amended (16 U.S.C. §470), EO 11593 (identification and protection of historic properties), and the Archaeological and Historic Preservation Act of 1974 (16 U.S.C. §§469a-1 et seq.).

14. Will comply with P.L. 93-348 regarding the protection of human subjects involved in research, development, and related activities supported by this award of assistance.

15. Will comply with the Laboratory Animal Welfare Act of 1966 (P.L. 89-544, as amended, 7 U.S.C. §§2131 et seq.) pertaining to the care, handling, and treatment of warm blooded animals held for research, teaching, or other activities supported by this award of assistance.

16. Will comply with the Lead-Based Paint Poisoning Prevention Act (42 U.S.C. §§4801 et seq.) which prohibits the use of lead-based paint in construction or rehabilitation of residence structures.

17. Will cause to be performed the required financial and compliance audits in accordance with the Single Audit Act Amendments of 1996 and OMB Circular No. A-133, "Audits of States, Local Governments, and Non-Profit Organizations."

18. Will comply with all applicable requirements of all other Federal laws, executive orders, regulations and policies governing this program.

SIGNATURE OF AUTHORIZED CERTIFYING OFFICIAL	TITLE
APPLICANT ORGANIZATION	DATE SUBMITTED

Standard Form 424B (Rev. 7-97) Back

CERTIFICATIONS REGARDING LOBBYING; DEBARMENT, SUSPENSION AND OTHER RESPONSIBILITY MATTERS; AND DRUG-FREE WORKPLACE REQUIREMENTS

Applicants should refer to the regulations cited below to determine the certification to which they are required to attest. Applicants should also review the instructions for certification included in the regulations before completing this form. Signature of this form provides for compliance with certification requirements under 34 CFR Part 82, "New Restrictions on Lobbying," and 34 CFR Part 85, "Government-wide Debarment and Suspension (Nonprocurement) and Government-wide Requirements for Drug-Free Workplace (Grants)." The certifications shall be treated as a material representation of fact upon which reliance will be placed when the Department of Education determines to award the covered transaction, grant, or cooperative agreement.

1. LOBBYING

As required by Section 1352, Title 31 of the U.S. Code, and implemented at 34 CFR Part 82, for persons entering into a grant or cooperative agreement over $100,000, as defined at 34 CFR Part 82, Sections 82.105 and 82.110, the applicant certifies that:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the making of any Federal grant, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal grant or cooperative agreement;

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal grant or cooperative agreement, the undersigned shall complete and submit Standard Form - LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions;

(c) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subgrants, contracts under grants and cooperative agreements, and subcontracts) and that all subrecipients shall certify and disclose accordingly.

2. DEBARMENT, SUSPENSION, AND OTHER RESPONSIBILITY MATTERS

As required by Executive Order 12549, Debarment and Suspension, and implemented at 34 CFR Part 85, for prospective participants in primary covered transactions, as defined at 34 CFR Part 85, Sections 85.105 and 85.110--

A. The applicant certifies that it and its principals:

(a) Are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency;

(b) Have not within a three-year period preceding this application been convicted of or had a civil judgement rendered against them for commission of fraud or a criminal offense in connection with obtaining, attempting to obtain, or performing a public (Federal, State, or local) transaction or contract under a public transaction; violation of Federal or State antitrust statutes or commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property;

(c) Are not presently indicted for or otherwise criminally or civilly charged by a governmental entity (Federal, State, or local) with commission of any of the offenses enumerated in paragraph (1)(b) of this certification; and

(d) Have not within a three-year period preceding this application had one or more public transaction (Federal, State, or local) terminated for cause or default; and

B. Where the applicant is unable to certify to any of the statements in this certification, he or she shall attach an explanation to this application.

3. DRUG-FREE WORKPLACE (GRANTEES OTHER THAN INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610 -

A. The applicant certifies that it will or will continue to provide a drug-free workplace by:

(a) Publishing a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the grantee's workplace and specifying the actions that will be taken against employees for violation of such prohibition;

(b) Establishing an on-going drug-free awareness program to inform employees about-

(1) The dangers of drug abuse in the workplace;

(2) The grantee's policy of maintaining a drug-free workplace;

(3) Any available drug counseling, rehabilitation, and employee assistance programs; and

(4) The penalties that may be imposed upon employees for drug abuse violations occurring in the workplace;

(c) Making it a requirement that each employee to be engaged in the performance of the grant be given a copy of the statement required by paragraph (a);

(d) Notifying the employee in the statement required by paragraph (a) that, as a condition of employment under the grant, the employee will-

(1) Abide by the terms of the statement; and

(2) Notify the employer in writing of his or her conviction for a violation of a criminal drug statute occurring in the workplace no later than five calendar days after such conviction;

(e) Notifying the agency, in writing, within 10 calendar days after receiving notice under subparagraph (d)(2) from an employee or otherwise receiving actual notice of such conviction. Employers of convicted employees must provide notice, including position title, to: Director, Grants Policy and Oversight Staff, U.S. Department of Education, 400 Maryland Avenue, S.W. (Room 3652, GSA Regional Office Building No. 3), Washington, DC 20202-4248. Notice shall include the identification number(s) of each affected grant;

(f) Taking one of the following actions, within 30 calendar days of receiving notice under subparagraph (d)(2), with respect to any employee who is so convicted-

(1) Taking appropriate personnel action against such an employee, up to and including termination, consistent with the requirements of the Rehabilitation Act of 1973, as amended; or

(2) Requiring such employee to participate satisfactorily in a drug abuse assistance or rehabilitation program approved for such purposes by a Federal, State, or local health, law enforcement, or other appropriate agency;

(g) Making a good faith effort to continue to maintain a drug-free workplace through implementation of paragraphs (a), (b), (c), (d), (e), and (f).

B. The grantee may insert in the space provided below the site(s) for the performance of work done in connection with the specific grant:

Place of Performance (Street address. city, county, state, zip code)

____

____

____

Check [ ] if there are workplaces on file that are not identified here.

DRUG-FREE WORKPLACE (GRANTEES WHO ARE INDIVIDUALS)

As required by the Drug-Free Workplace Act of 1988, and implemented at 34 CFR Part 85, Subpart F, for grantees, as defined at 34 CFR Part 85, Sections 85.605 and 85.610-

A. As a condition of the grant, I certify that I will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity with the grant; and

B. If convicted of a criminal drug offense resulting from a violation occurring during the conduct of any grant activity, I will report the conviction, in writing, within 10 calendar days of the conviction, to: Director, Grants Policy and Oversight Staff, Department of Education, 400 Maryland Avenue, S.W. (Room 3652, GSA Regional Office Building No. 3), Washington, DC 20202-4248. Notice shall include the identification number(s) of each affected grant.

As the duly authorized representative of the applicant, I hereby certify that the applicant will comply with the above certifications.

NAME OF APPLICANT	PR/AWARD NUMBER AND / OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0013

Certification Regarding Debarment, Suspension, Ineligibility and Voluntary Exclusion -- Lower Tier Covered Transactions

This certification is required by the Department of Education regulations implementing Executive Order 12549, Debarment and Suspension, 34 CFR Part 85, for all lower tier transactions meeting the threshold and tier requirements stated at Section 85.110.

Instructions for Certification

1. By signing and submitting this proposal, the prospective lower tier participant is providing the certification set out below.

2. The certification in this clause is a material representation of fact upon which reliance was placed when this transaction was entered into. If it is later determined that the prospective lower tier participant knowingly rendered an erroneous certification, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

3. The prospective lower tier participant shall provide immediate written notice to the person to which this proposal is submitted if at any time the prospective lower tier participant learns that its certification was erroneous when submitted or has become erroneous by reason of changed circumstances.

4. The terms "covered transaction," "debarred," "suspended," "ineligible," "lower tier covered transaction," "participant," " person," "primary covered transaction," " principal," "proposal," and "voluntarily excluded," as used in this clause, have the meanings set out in the Definitions and Coverage sections of rules implementing Executive Order 12549. You may contact the person to which this proposal is submitted for assistance in obtaining a copy of those regulations.

5. The prospective lower tier participant agrees by submitting this proposal that, should the proposed covered transaction be entered into, it shall not knowingly enter into any lower tier covered transaction with a person who is debarred, suspended, declared ineligible, or voluntarily excluded from participation in this covered transaction, unless authorized by the department or agency with which this transaction originated.

6. The prospective lower tier participant further agrees by submitting this proposal that it will include the clause titled "Certification Regarding Debarment, Suspension, Ineligibility, and Voluntary Exclusion-Lower Tier Covered Transactions," without modification, in all lower tier covered transactions and in all solicitations for lower tier covered transactions.

7. A participant in a covered transaction may rely upon a certification of a prospective participant in a lower tier covered transaction that it is not debarred, suspended, ineligible, or voluntarily excluded from the covered transaction, unless it knows that the certification is erroneous. A participant may decide the method and frequency by which it determines the eligibility of its principals. Each participant may but is not required to, check the Nonprocurement List.

8. Nothing contained in the foregoing shall be construed to require establishment of a system of records in order to render in good faith the certification required by this clause. The knowledge and information of a participant is not required to exceed that which is normally possessed by a prudent person in the ordinary course of business dealings.

9. Except for transactions authorized under paragraph 5 of these instructions, if a participant in a covered transaction knowingly enters into a lower tier covered transaction with a person who is suspended, debarred, ineligible, or voluntarily excluded from participation in this transaction, in addition to other remedies available to the Federal Government, the department or agency with which this transaction originated may pursue available remedies, including suspension and/or debarment.

Certification

(1) The prospective lower tier participant certifies, by submission of this proposal, that neither it nor its principals are presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from participation in this transaction by any Federal department or agency.

(2) Where the prospective lower tier participant is unable to certify to any of the statements in this certification, such prospective participant shall attach an explanation to this proposal.

NAME OF APPLICANT	PR/AWARD NUMBER AND/OR PROJECT NAME
PRINTED NAME AND TITLE OF AUTHORIZED REPRESENTATIVE	
SIGNATURE	DATE

ED 80-0014, 9/90 (Replaces GCS-009 (REV.12/88), which is obsolete)

Approved by OMB
0348-0046

Disclosure of Lobbying Activities

Complete this form to disclose lobbying activities pursuant to 31 U.S.C. 1352
(See reverse for public burden disclosure)

1. Type of Federal Action: a. contract ____ b. grant c. cooperative agreement d. loan e. loan guarantee f. loan insurance	**2. Status of Federal Action:** a. bid/offer/application _____ b. initial award c. post-award
3. Report Type: a. initial filing _____ b. material change **For material change only:** Year _______ quarter _______ Date of last report___________	
4. Name and Address of Reporting Entity: ____ Prime _____ Subawardee Tier______, if Known: **Congressional District, if known:**	**5. If Reporting Entity in No. 4 is Subawardee,** Enter Name and Address of Prime: **Congressional District, if known:**
6. Federal Department/Agency:	**7. Federal Program Name/Description:** CFDA Number, *if applicable*: _________________
8. Federal Action Number, *if known:*	**9. Award Amount,** *if known:* **$**
10. a. Name and Address of Lobbying Registrant *(if individual, last name, first name, MI):*	**b. Individuals Performing Services** *(including address if different from No. 10a) (last name, first name, MI):*
11. Information requested through this form is authorized by title 31 U.S.C. section 1352. This disclosure of lobbying activities is a material representation of fact upon which reliance was placed by the tier above when this transaction was made or entered into. This disclosure is required pursuant to 31 U.S.C. 1352. This information will be reported to the Congress semi-annually and will be available for public inspection. Any person who fails to file the required disclosure shall be subject to a civil penalty of not less than $10,000 and not more than $100,000 for each such failure.	**Signature:** ________________________________ **Print Name:**________________________________ **Title:**____________________________________ **Telephone No.:** _______________ **Date:** _______
Federal Use Only	**Authorized for Local Reproduction** **Standard Form - LLL (Rev. 7-97)**

INSTRUCTIONS FOR COMPLETION OF SF-LLL, DISCLOSURE OF LOBBYING ACTIVITIES

This disclosure form shall be completed by the reporting entity, whether subawardee or prime Federal recipient, at the initiation or receipt of a covered Federal action, or a material change to a previous filing, pursuant to title 31 U.S.C. section 1352. The filing of a form is required for each payment or agreement to make payment to any lobbying entity for influencing or attempting to influence an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with a covered Federal action. Complete all items that apply for both the initial filing and material change report. Refer to the implementing guidance published by the Office of Management and Budget for additional information.

1. Identify the type of covered Federal action for which lobbying activity is and/or has been secured to influence the outcome of a covered Federal action.

2. Identify the status of the covered Federal action.

3. Identify the appropriate classification of this report. If this is a followup report caused by a material change to the information previously reported, enter the year and quarter in which the change occurred. Enter the date of the last previously submitted report by this reporting entity for this covered Federal action.

4. Enter the full name, address, city, State and zip code of the reporting entity. Include Congressional District, if known. Check the appropriate classification of the reporting entity that designates if it is, or expects to be, a prime or subaward recipient. Identify the tier of the subawardee, e.g., the first subawardee of the prime is the 1st tier. Subawards include but are not limited to subcontracts, subgrants and contract awards under grants.

5. If the organization filing the report in item 4 checks "Subawardee," then enter the full name, address, city, State and zip code of the prime Federal recipient. Include Congressional District, if known.

6. Enter the name of the federal agency making the award or loan commitment. Include at least one organizational level below agency name, if known. For example, Department of Transportation, United States Coast Guard.

7. Enter the Federal program name or description for the covered Federal action (item 1). If known, enter the full Catalog of Federal Domestic Assistance (CFDA) number for grants, cooperative agreements, loans, and loan commitments.

8. Enter the most appropriate Federal identifying number available for the Federal action identified in item 1 (e.g., Request for Proposal (RFP) number; Invitations for Bid (IFB) number; grant announcement number; the contract, grant, or loan award number; the application/proposal control number assigned by the Federal agency). Included prefixes, e.g., "RFP-DE-90-001."

9. For a covered Federal action where there has been an award or loan commitment by the Federal agency, enter the Federal amount of the award/loan commitment for the prime entity identified in item 4 or 5.

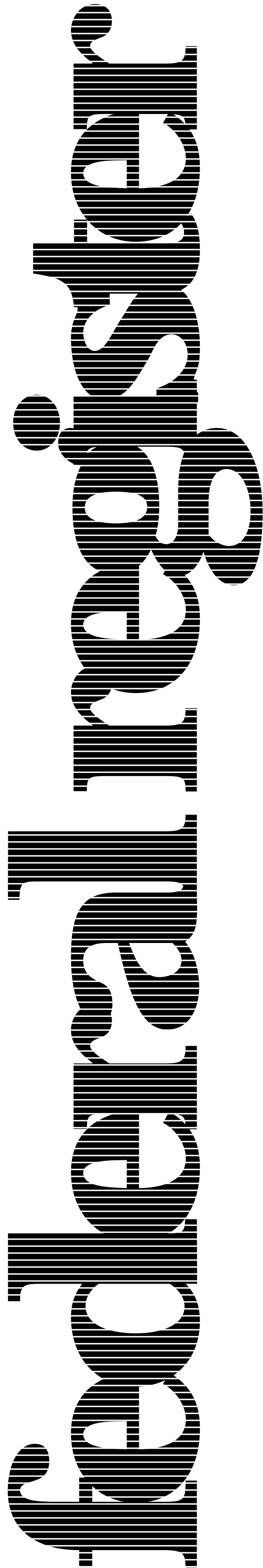
10. (a) Enter the full name, address, city, State and zip code of the lobbying registrant under the Lobbying Disclosure Act of 1995 engaged by the reporting entity identified in item 4 to influence the covered Federal action.

    (b) Enter the full names of the individual(s) performing services, and include full address if different from 10(a). Enter Last Name, First Name, and Middle Initial (MI).

11. The certifying official shall sign and date the form, print his/her name, title, and telephone number.

According to the Paperwork Reduction Act, as amended, no persons are required to respond to a collection of information unless it displays a valid OMB control Number. The valid OMB control number for this information collection is OMB No. 0348-0046. Public reporting burden for this collection of information is estimated to average 10 minutes per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Management and Budget, Paperwork Reduction Project (0348-0046), Washington, DC 20503

[FR Doc. 99–7785 Filed 3–30–99; 8:45 am]
BILLING CODE 4000–01–C



Wednesday
March 31, 1999

Part VI

General Services Administration

41 CFR Part 301–10

Federal Travel Regulation; Privately Owned Automobile Mileage Reimbursement; Final Rule

GENERAL SERVICES ADMINISTRATION

41 CFR Part 301–10

[FTR Amendment 78—1998 Edition]

RIN 3090–AG89

Federal Travel Regulation; Privately Owned Automobile Mileage Reimbursement

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Final rule.

SUMMARY: This final rule decreases the mileage reimbursement rate for use of a privately owned automobile (POA) on official business to reflect current costs of operation as determined in a cost study conducted by the General Services Administration (GSA). The governing regulation is revised to decrease the mileage allowance for use of a POA from 32.5 to 31 cents per mile.

DATES: This final rule is effective April 1, 1999, and applies to official travel performed on or after April 1, 1999.

FOR FURTHER INFORMATION CONTACT: Devoanna R. Reels at 202–501–3781.

SUPPLEMENTARY INFORMATION:

A. Background

Pursuant to 5 U.S.C. 5707(b), the Administrator of General Services has the responsibility to establish the privately owned vehicle (POV) mileage reimbursement rates. Separate rates are set for automobiles (including trucks), motorcycles, and airplanes. In order to set these rates, GSA is required to conduct periodic investigations, in consultation with the Secretaries of Defense and Transportation, and representatives of Government employee organizations, of the cost of travel and the operation of POVs to employees while engaged on official business. As required, GSA conducted an investigation of the costs of operating a POA and is reporting the cost per mile determination. The results of the investigation have been reported to Congress and a copy of the report appears as an attachment to this document. GSA's cost study shows the per-mile operating costs of a POA to be 31 cents. Additionally, as provided in 5 U.S.C. 5704(a)(1), the automobile reimbursement rate cannot exceed the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS has announced a new single standard mileage rate for automobiles of 31 cents effective April 1, 1999. With regard to motorcycles and airplanes, the mileage rates established by GSA will remain the same.

B. Regulatory Flexibility Act

This final rule is not required to be published in the **Federal Register** for notice and comment; therefore, the Regulatory Flexibility Act does not apply.

C. Executive Order 12866

GSA has determined that this rule is not a significant regulatory action for the purposes of Executive Order 12866 of September 30, 1993.

D. Paperwork Reduction Act

The Paperwork Reduction Act does not apply, because the revisions do not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 501 *et seq.*

E. Small Business Regulatory Enforcement Reform Act

This rule is also exempt from congressional review prescribed under 5 U.S.C. 801 since it relates solely to agency management and personnel.

List of Subjects in 41 CFR Part 301–10

Government employees, Travel and transportation expenses.

For the reasons set forth in the preamble, 41 CFR part 301–10 is amended to read as follows:

PART 301–10—TRANSPORTATION EXPENSES

1. The authority citation for 41 CFR part 301–10 continues to read as follows:

Authority: 5 U.S.C. 5707; 40 U.S.C. 486(c); 49 U.S.C. 40118.

2. Section 301–10.303 is amended by revising the entry ''Privately owned automobile'' in the table to read as follows:

§ 301–10.303 What am I reimbursed when use of a POV is determined by my agency to be advantageous to the Government?

For use of a	Your reimbursement is
* * * * *	
Privately owned automobile	[1] 31
* * * * *	

[1] Cents per mile.

Dated: March 24, 1999.

David J. Barram,

Administrator of General Services.

Attachment to Preamble—Report to Congress on the Costs of Operating Privately Owned Vehicles

Subparagraph (b)(1)(A) of section 5707 of Title 5, United States Code, requires the Administrator of General Services, in consultation with the Secretaries of Defense and Transportation and representatives of Government employee organizations, to conduct periodic investigations of the cost of travel and the operation of privately owned vehicles (airplanes, automobiles, and motorcycles) to Government employees while on official business, to report the results of the investigations to Congress at least once a year, and to publish the report in the **Federal Register**. This report is being published to comply with the requirements of the law.

Dated: March 24, 1999.

David J. Barram,

Administrator of General Services.

Report To Congress

Subparagraph (b)(1)(A) of section 5707 of Title 5, United States Code, requires that the Administrator of General Services, in consultation with the Secretaries of Defense and Transportation and representatives of Government employee organizations, conduct periodic investigations of the cost of travel and the operation of privately owned vehicles (POVs) (airplanes, automobiles, and motorcycles) to Government employees while on official business and report the results to Congress at least once a year. Subparagraph (b)(2)(B) of section 5707 of Title 5, United States Code, further requires that the Administrator of General Services determine the average, actual cost per mile for the use of each type of POV based on the results of the cost investigation. Such figures must be reported to Congress within 5 working days after the cost determination has been made in accordance with 5 U.S.C. 5707(b)(2)(C).

Pursuant to the requirements of subparagraph (b)(1)(A) of Section 5707 of Title 5, United States Code, the General Services Administration (GSA), in consultation with the Secretaries of Defense and Transportation and representatives of Government employee organizations, conducted an investigation of the cost of operating a privately owned automobile (POA). GSA's cost study shows the per-mile operating costs of a PAO to be 31 cents. Additionally, as provided in 5 U.S.C. 5704(a)(1), the automobile reimbursement rate cannot exceed the single standard mileage rate established by the Internal Revenue Service (IRS). The IRS has announced a new single standard mileage rate for automobiles of 31 cents effective April 1, 1999.

As required, GSA is reporting the results of the investigation and the cost per mile determination. Based on the cost study conducted by GSA, I have determined the per-mile operating costs of a PAO to be 31 cents. With regard to motorcycles and

airplanes, the mileage rates established by GSA will remain the same.

I will issue a regulation to decrease the current 32.5 cents to 31 cents per mile for POAs. This report to Congress on the cost of operating POAs will be published in the **Federal Register**.

[FR Doc. 99–7830 Filed 3–30–99; 8:45 am]

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The items in this list were editorially compiled as an aid to Federal Register users. Inclusion or exclusion from this list has no legal significance.

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